TEXAS REGISTER

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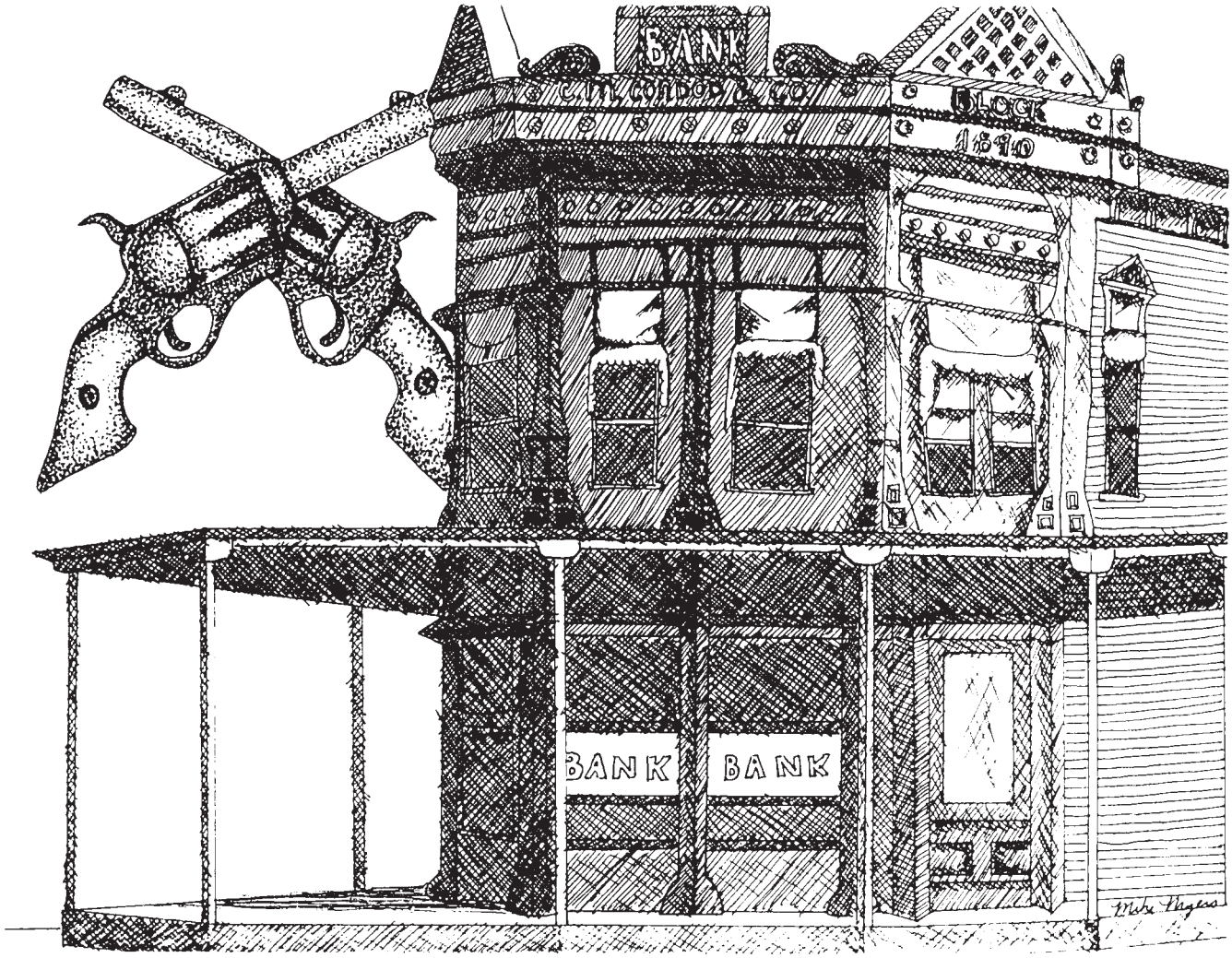

This month's front cover artwork:

Artist: *Mike Myers*

12th Grade

Rockwall High School

School children's artwork has decorated the blank filler pages of the *Texas Register* since 1987. 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.

We will display artwork on the cover of each *Texas Register.* The artwork featured on the front cover is chosen at random.

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.* The artwork does not add additional pages to each issue and does not increase the cost of the *Texas Register.*

For more information about the student art project, please call (800) 226-7199.

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THE GOVERNOR

As required by Texas Civil Statutes, Article 6252-13a, §6, 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 Made March 19, 1999

To be members of the Texas Tech University Board of Regents for terms to expire January 31, 2005: Carin Marcy Barth, 4001 Inverness, Houston, Texas 77019, whose replacing Dr. Bernard A. Harris, Jr., of Houston whose term expired; E. R. (Dick) Brooks, 12101 Madeleine Circle, Dallas, Texas 75230, whose replacing Dr. Carl Edward Noe of Dallas whose term expired; Brian C. Newby, 4017 Gaines Court, Austin, Texas 78735, whose replacing Edward E. Whitacre, Jr. of San Antonio whose term expired.

To be members of the General Services Commission for terms to expire January 31, 2005: James A. Cox, Jr., 2805 Pecos Street, Austin, Texas 78703 whose replacing Ofelia de los Santos of McAllen whose term expired; Thomas Cardenas, Jr., 5901 Pomona, El Paso, Texas 79912, whose replacing Ramiro Guzman of El Paso whose term expired.

To be a member of the Texas State Board Plumbing Examiners for a term to expire September 5, 2003: Terry Wayne Moore, 1507 Eastland Circle, Sachse, Texas 75048, whose replacing Phillip Allen Lord of Houston whose term expired.

George W. Bush, Governor of Texas
Filed: March 25, 1999

OFFICE OF THE ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code. Title 4, §402.042, and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open records decisions are summarized for publication in the ***Texas Register***. The attorney general responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the attorney general unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. You may view copies of opinions at http://www.oag.state.tx.us. To request copies of opinions, please fax your request to (512) 462-0548 or call (512) 936-1730. To inquire about pending requests for opinions, phone (512) 463-2110.

Opinions

Opinion #JC-0023. (RQ-1182). Request from Mr. John Branson, Fisher County Auditor, P. O. Box 126, Roby, Texas 79543 regarding authority of a commissioners court to order an independent audit.

Summary. Under section 115.031(i) of the Local Government Code, a commissioners court may provide for an independent audit of accounts and officials if the court, by an order entered at any regular term, determines that the audit would best serve the public interest. Whether an independent audit would "best serve the public interest" is a factual determination committed to the discretion of the commissioners court. A county auditor may not prevent a properly ordered independent audit absent an abuse of discretion by the commissioners court.

Opinion #JC-0024. (RQ-1190). Request from the Honorable Michael P. Fleming, Harris County Attorney, 1019 Congress, 15th Floor Houston, Texas 77002-1700, regarding procedure for receiving and refunding a cash bail bond posted pursuant to article 17.02 of the Code of Criminal Procedure.

Summary. A person other than the defendant may make a cash bail bond deposit with the court officer to secure the defendant's release from custody pursuant to article 17.02 of the Code of Criminal Procedure. The receipt for a cash deposit should be issued in the name of the defendant. While the court officer is not required to notify the third party depositor that the funds will be returned to the defendant, no statutory prohibition precludes such notification. If the defendant complies with the conditions of the bond, and upon court order, the bond funds must be returned to the defendant. The court officer may not withhold a cash bail bond refund until fines assessed against the defendant are paid.

Opinion #JC-0025. (RQ-1212). Request from the Honorable William T. Hill, Jr., Dallas County Criminal District Attorney, 411 Elm Street, Dallas, Texas 75202, regarding whether municipal court has jurisdiction over cases arising under nuisance ordinance prohibiting outdoor burning within 5,000 feet outside city limits.

Summary. Where a municipality is authorized to adopt a nuisance ordinance applicable to conduct occurring outside city limits and where the municipality has adopted such an ordinance, a municipal court has implied jurisdiction over cases arising from violations of the ordinance that occur outside city limits.

Opinion #JC-0026. (RQ-1216). Request from the Honorable David Aken, San Patricio County Attorney, County Courthouse, Room 102, Sinton, Texas 78387, request whether the commissioners court may pay the sheriff the same amount of longevity pay he received as a deputy.

Summary. The commissioners court of San Patricio County may, at its discretion, adjust its rate of longevity pay for the sheriff of the county prospectively. Article III, section 53 of the Texas Constitution, however, forbids it from making such an adjustment retroactively.

TRD-9901740
Elizabeth Robinson
Assistant Attorney General
Office of the Attorney General
Filed: March 23, 1999

♦ ♦ ♦

Request for Opinion

RQ-0040. Request from the Honorable Michael P. Fleming, Harris County Attorney, 1001 Preston Houston, TX 77002-1891, regarding whether a commissioners court may or must pay the fee of an attorney who defended a district judge in a mandamus action.

TRD-9901741
Elizabeth Robinson
Assistant Attorney General
Office of the Attorney General
Filed: March 23, 1999

♦ ♦ ♦

PROPOSED RULES

Before an agency may permanently adopt a new or amended section or repeal an existing section, a proposal detailing the action must be published in the ***Texas Register*** at least 30 days before action is taken. The 30-day time period gives interested persons an opportunity to review and make oral or written comments on the section. Also, in the case of substantive action, a public hearing must be granted if requested by at least 25 persons, a governmental subdivision or agency, or an association having at least 25 members.

Symbology in proposed amendments. New language added to an existing section is indicated by the text being underlined. [Brackets] and ~~strike-through~~ of text indicates deletion of existing material within a section.

TITLE 1. ADMINISTRATION

Part XII. Advisory Commission on State Emergency Communications

Chapter 251. Regional Plans-Standards

1 TAC §251.3

The Advisory Commission on State Emergency Communications (ACSEC) proposes an amendment to §251.3, concerning guidelines for addressing funds and reporting requirements that call for more timely, structured, and quantitiative reports from the Councils of Governments to the ACSEC. The amendment would specifically require the councils of governments to submit 9-1-1 program and addressing performance reports at least quarterly to ACSEC.

The Advisory Commission on State Emergency Communications is contemporaneously proposing the rule review of Chapter 251, concerning Regional Plans-Standards, elsewhere in this issue of the *Texas Register*. The rule review of Chapter 251 is in accordance with the Appropriations Act, Article IX, Section 167.

James D. Goerke, executive director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Goerke also has determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be improved record keeping for accountability of 9-1-1 funds. No historical data is available, however, there appears to be no direct impact on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. There is no anticipated local employment impact as a result of enforcing the section.

Comments on the proposed amendment must be submitted in writing within 30 days after publication of the proposal in the *Texas Register* to: James D. Goerke, Executive Director, Advisory Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942.

The amendment is proposed pursuant to the Texas Health and Safety Code, Chapter 771, §§771.051, 771.056, and 771.075, which authorize the Commission to adopt policies and procedures prescribing the distribution and use of 9-1-1 funds for providing 9-1-1 service.

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

§251.3. Guidelines for Addressing Funds.

(a)-(d) (No change.)

(e) Reporting. Addressing funds will be allocated to COGs and emergency communication districts on a reimbursement basis. A performance and financial report is to be submitted to the Commission , at least quarterly, in accordance with established Commission policy. The performance report shall include phases of addressing activities for progress and shall be submitted along with each financial report requesting addressing funds. [and ~~reimbursement~~ ~~reporting~~ ~~purposes.~~] Where a COG or an emergency communication district is the primary contractor but a county is providing services under this program, said reports shall be provided to the Commission prior to COG or emergency communications district reimbursement of related county expenses. Counties, emergency communications districts, and COGs are required to follow local government statutes as they apply to competitive proposals for purchases of services and equipment.

This 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 March 22, 1999.

TRD-9901693
James D. Goerke
Executive Director
Advisory Commission on State Emergency Communications
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 305–6933

♦ ♦ ♦

1 TAC §251.5

The Advisory Commission on State Emergency Communications (ACSEC) proposes an amendment to §251.5, concerning the use of 9-1-1 funds for capital recovery and equipment maintenance by providing uniform guidelines and expectations.

The Advisory Commission on State Emergency Communications is contemporaneously proposing the rule review of Chapter 251, concerning Regional Plans-Standards, elsewhere in this issue of the *Texas Register*. The rule review of Chapter 251 is in accordance with the Appropriations Act, Article IX, Section 167.

James D. Goerke, executive director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule, however, it will serve to monitor financial resources ensuring fiscal accountability related to capital assets.

Mr. Goerke also has determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be an improved mechanism for assuring equipment is well maintained or replaced to provide maximum performance and that adequate resources are available and accounted for. No historical data is available, however, there appears to be no direct impact on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. There is no anticipated local employment impact as a result of enforcing the section.

Comments on the proposed amendment must be submitted in writing within 30 days after publication of the proposal in the *Texas Register* to: James D. Goerke, Executive Director, Advisory Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942.

The amendment is proposed pursuant to the Health and Safety Code, Chapter 771, §§771.051, 771.071, 771.0711, 771.072, and 771.075, which authorize the Commission to adopt policies and procedures prescribing the distribution and use of 9-1-1 funds for providing 9-1-1 service.

No other statute, article or code is affected by the proposed amendment.

§251.5. Guidelines for [~~the Maintenance and Replacement of~~] 9-1-1 Equipment Maintenance and Capital Asset Recovery.

(a) As authorized by the Texas Health and Safety Code, Chapter 771, the Advisory Commission on State Emergency Communications (ACSEC) may impose 9-1-1 emergency service fees and equalization surcharges to support the planning, development, and provision of 9-1-1 service throughout the State of Texas. In accordance with §771.055 of the Texas Health and Safety Code, such service implementation shall be consistent with regional plans developed by regional planning commissions. Each regional planning commission shall develop a plan for the establishment and operation of 9-1-1 service throughout the region that the regional planning commission serves. The service must meet the standards established by the Advisory Commission.

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

(1) 9-1-1 Funds. Funds assessed and disbursed in accordance with the Texas Health and Safety Code, Chapter 771.

[~~(2) 9-1-1 Equipment. Capital Equipment acquired partially or in whole with 9-1-1 funds and designed to support and/or facilitate the delivery of an emergency 9-1-1 call to an appropriate emergency response agency.~~]

(2) Addressing Activities. The work associated with the rural addressing of a county as defined in ACSEC §251.3 of this title (relating to Guidelines for Addressing Funds).

(3) Capital Equipment. Items and components that comprise the technology used to answer and deliver 9-1-1 calls whose cost is over $1,000 and have a useful life of at least one year.

[~~(3) Capital Reinvestment Cost. The non-recurring cost of replacing 9-1-1 equipment amortized over a selected period of time.~~]

(4) Capital Replacement Cost. The cost of a piece of equipment that was originally identified to be amortized (i.e. the original cost for equipment.)

(5) Controlled Equipment. Items and components that comprise the technology used to answer and deliver 9-1-1 calls whose cost is less than $1,000 and have a useful life of at least one year. Used at the discretion of the RPC for items that tracking is deemed necessary.

(6) [~~(4)~~] Emergency Communications District. A public agency or group of public agencies acting jointly that provided 9-1-1 service before September 1, 1987, or that had voted or contracted before that date to provide that service; or a district created under Texas Health and Safety Code, Chapter 772, Subchapter B, C, or D.

(7) Intangible Assets. Includes items such as labor for PSAP room prep, electrical wiring costs, labor for the assembly of equipment, or any costs for the delay or transfer of equipment.

(8) [~~(5)~~] Maintenance. The preservation and upkeep of 9-1-1 equipment in order to insure that it continues to operate and perform at a level comparable to that exhibited at its initial acquisition.

(9) [~~(6)~~] Maintenance Plan. A plan that identifies a cost effective program for the maintenance of 9-1-1 equipment. For regional planning commissions this plan is part of a regional plan as described by the Texas Health and Safety Code, Chapter 771.

(10) Non-Recurring Charge. The amount of cost usually identified as the entire cost for PSAP equipment replacement. The charge may be inclusive of an out right purchase of equipment or the primary cost for the implementation of leased equipment through a major telephone provider.

(11) Power Backup. Power provided by a generator or UPS in the event regular utility services are interrupted.

(12) Recorders. Devices that capture and retain sound, including but not limited to the following:

(A) Voice Loggers. A device that records sound on a permanent source for later review.

(B) Instant Recall Recorders. A device that records and temporarily stores calls for immediate review.

(13) [~~(7)~~] Regional Planning Commission. A commission established under Local Government Code, Chapter 391, also referred to as a regional council of governments (COG).

[~~(8) Replacement. The timely replacement of old 9-1-1 equipment for new 9-1-1 equipment in order to insure the appropriate and acceptable continued operation of 9-1-1 service.~~]

[(9) Replacement Plan. A plan that identified a cost effective program for the replacement of 9-1-1 equipment. For regional planning commissions, this plan is part of a regional plan as described by the Texas Health and Safety Code, Chapter 771.]

(14) Strategic Plan. As part of a regional plan, a document identifying 9-1-1 equipment and related activity, by strategic plan component, required to support plan levels of 9-1-1 service within a defined area of the state. The strategic plan normally covers at least a three year planning period, and specifically projects 9-1-1 implementation costs and revenues associated with the above including equalization surcharge requirements.

(15) Tangible Assets. Only those items that are tangible may be considered for capital recovery costs. Tangible assets items include any "Back room" capital equipment such as the ANI/ALI Controllers, answering position units, integrated workstations, or any other technical piece of equipment.

(16) Uninterrupted Power Source. Equipment that is designed to provide a constant power source for electronic systems. Capable of operating independently, for a designated period of time, should public or emergency power sources fail.

(17) [(10)] Useful Life. The period of time that a piece of capital equipment can consistently and acceptably fulfill its' service or functional assignment.

[(b) Policy and procedures. As authorized by the Texas Health and Safety Code, Chapter 771, the Advisory Commission on State Emergency Communications (ACSEC) may impose 9-1-1 emergency service fees and equalization surcharges to support the planning, development, and provision of 9-1-1 service throughout the state of Texas. The implementation of such service involves the procurement, installation, and operation of equipment designed to either support or facilitate the delivery of an emergency call to an appropriate emergency response agency. It is the policy of the ACSEC that this equipment be well maintained and provide the maximum performance possible within the environment in which it operates.]

(c) Maintenance.

(1) Regional planning commissions funding the purchase and/or lease of 9-1-1 equipment shall develop and adopt maintenance plans covering the equipment involved as part of the regional plan.

(2) Emergency communication districts requesting 9-1-1 funds in accordance with established rules and procedures for the maintenance of 9-1-1 equipment shall provide a maintenance plan for the equipment involved.

(3) Maintenance plans shall be provided to the ACSEC in conjunction with equipment plan amendments or district requests submitted to the commission following the adoption of this rule in accordance with established commission policy. For equipment purchased and/or leased prior to the adoption of this rule, maintenance plans for regional planning commissions shall be submitted to the ACSEC for consideration no later than the beginning of the next budget cycle from the date of adoption of this rule.

(4) Annual budgeted costs associated with the maintenance of 9-1-1 equipment shall be monitored by the ACSEC staff for consistency with approved maintenance plans. Such costs that are determined by the ACSEC staff to not be consistent with approved maintenance plans shall be reviewed and approved by the commission.

[(d) Replacement]

[(1) Regional planning commissions funding the purchase and/or lease of 9-1-1 equipment shall develop and adopt replacement plans designed to insure the availability of adequate financial and other resources required to timely replace equipment that has reached the end of its useful life.]

[(2) The initial useful life of 9-1-1 equipment acquired prior to the adoption of this rule shall be the remaining life of the equipment involved, calculated from the date of the adoption of this rule.]

[(3) Emergency communication districts requesting 9-1-1 funds in accordance with established rules and procedures for the replacement of 9-1-1 equipment shall provide a replacement plan for the equipment involved.]

[(4) Annual capital reinvestment costs associated with the replacement of 9-1-1 equipment shall be monitored by the ACSEC staff for consistency with approved replacement plans. Such costs that are determined by the ACSEC staff to not be consistent with approved replacement plans, shall be reviewed and approved by the Commission.]

(d) Requirements for Capital Recovery Tracking. A Capital Asset Recovery Schedule that lists 9-1-1 related equipment by recoverable item shall be included in each regional planning commission's strategic plan. Strategic plans are required under the Health and Safety Code, Chapter 771 and §251.6 of this title (relating to Guidelines for Strategic Plans, Amendments, and Equalization Surcharge Allocation). A Capital Asset Recovery Schedule shall be maintained by the regional council in a spreadsheet or database that includes the following information for each item listed.

(1) Date Acquired

(2) Description

(3) Identifying Number (Serial, Asset Tag, etc.)

(4) Original Recovery Value

(5) Life Assigned (In Years)

(6) Annual Recovery Amount by Year (The total for all items recovered should be equal to the annual amount that is identified in the strategic plan for all components for one given year. The total amount should also correspond to the budget amount identified in the quarterly FSR).

(7) Responsible Agency (Person in Possession)

(8) Estimated Replacement Date

(9) Addressing Program Asset? (Y/N)

(e) Requirements for Capital Recovery Fund Contributions. Contributions shall be made to the fund at least once a quarter until the full fiscal year contribution budget has been reached. The total deposit to the capital recovery account for a given year shall not exceed the total amount identified in the strategic plan for that same year for all levels. Should funding not be available to fully fund capital recovery in all counties, funds shall be distributed equitably among all counties.

(f) Requirements for Capital Recovery Fund Expenditures. Expenditures from the capital recovery schedule shall be reported on the following Financial Status Report submitted to the ACSEC as required by §251.6 of this title (relating to Guidelines for Strategic Plans, Amendments, and Equalization Surcharge Allocation).

(1) The RPC shall submit with the FSR a "Capital Recovery Asset Disposal Notice" (as promulgated by the ACSEC) for each item that is replaced using Capital Recovery Funds as follows: Figure: 1 TAC §251.5(f)(1)

(2) Should additional funds be needed, the balance of funds needed for costs above original equipment costs must be identified in the strategic plan in the corresponding county narrative and submitted to ACSEC through an amendment.

(3) Capital recovery funds set aside for replacement of an asset and not expended when purchasing a replacement asset shall be returned to the capital recover fund for future use.

(g) Addressing Capital Recovery. Costs for the replacement of addressing equipment purchased with 9-1-1 funds shall be reflected within the regional planning council strategic plan. Computers, printers, plotters, distance measuring devices (DMD), global positioning satellite (GPS) equipment and sign-making machines that meet the definition of Capital Equipment, shall be included in the schedule.

(h) Emergency Communication Districts. Those districts requesting 9-1-1 funds in accordance with established rules and procedures for the replacement of 9-1-1 equipment shall provide a replacement plan for the equipment involved.

(i) Annual Certification. Regional planning commissions shall submit a "Annual Certification of 9-1-1 Assets" (as promulgated by the ACSEC) to the ACSEC at least once each fiscal year as follows. Figure: 1 TAC §251.5(i)

(j) Other Accounting Issues.

(1) The management and disposition of equipment shall follow the Uniform Grant Management Standards (Governor's Office of Budget and Planning, January 1998; phone number (512) 463-1778). Funds acquired from the disposal of assets shall be returned to the 9-1-1 capital recovery fund.

(2) The Texas State Property Accounting Policies and Procedures Manual (Comptroller of Public Accounts, May 1997; phone number (512)305-9954) shall be referenced for guidance when questions arise to particular questions not covered in this rule.

This 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 March 22, 1999.

TRD-9901694
James D. Goerke
Executive Director
Advisory Commission on State Emergency Communications
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 305–6933

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1 TAC §251.6

The Advisory Commission on State Emergency Communications (ACSEC) proposes an amendment to §251.6, concerning guidelines for submission requests from councils of governments on strategic plans, amendments and equalization surcharge funds. The amendment clarifies reporting requirements which are necessary to evaluate the implementation of the various 9-1-1 regional plans throughout the state.

The Advisory Commission on State Emergency Communications is contemporaneously proposing the rule review of Chapter 251, concerning Regional Plans-Standards, elsewhere in this issue of the *Texas Register.* The rule review of Chapter 251 is in accordance with the Appropriations Act, Article IX, Section 167.

James D. Goerke, executive director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Goerke also has determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be an improved system for quantitative reporting and monitoring mechanisms for the 9-1-1 program statewide. No historical data is available, however, there appears to be no direct impact on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. There is no anticipated local employment impact as a result of enforcing the section.

Comments on the proposed amendment must be submitted in writing within 30 days after publication of the proposal in the *Texas Register* to: James D. Goerke, Executive Director, Advisory Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942.

The amendment is proposed pursuant to the Texas Health and Safety Code, Chapter 771, §§771.051, 771.071, 771.0711, 771.072, and 771.075, which authorize the Commission to adopt policies and procedures prescribing the distribution and use of 9-1-1 funds for providing 9-1-1 service.

No other statute, article or code is affected by the proposed amendment.

§251.6. Guidelines for Strategic Plans, Amendments, and Equalization Surcharge Allocation.

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

(c) Strategic Plans. Regional plans developed in compliance with Chapter 771 shall include a strategic plan that projects regional 9-1-1 service costs, and service fee and other non-equalization surcharge revenues at least three years into the future. Within the context of §771.056(d), the ACSEC shall consider any revenue insufficiencies to represent need for equalization surcharge funding support.

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

(5) A regional planning commission shall submit financial and performance reports at least quarterly on a schedule to be established by ACSEC. The financial report shall identify actual implementation costs by county, strategic plan priority level and component. The performance report shall be submitted along with each financial report requesting 9-1-1 funds and shall reflect the progress of implementing the region's strategic plan including the status of equipment, services and program deliverables.

(d)-(h) (No change.)

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

Filed with the Office of the Secretary of State, on March 22, 1999.

TRD-9901695

James D. Goerke
Executive Director
Advisory Commission on State Emergency Communications
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 305–6933

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1 TAC §251.10

The Advisory Commission on State Emergency Communications (ACSEC) proposes new §251.10, concerning proposed guidelines for implementing wireless E9-1-1 services funded with 9-1-1 funds. The proposed rule would assist local governments in the procurement, installation, and implementation of wireless E9-1-1 services to support or facilitate the delivery of a wireless emergency call to an appropriate emergency response agency.

The Advisory Commission on State Emergency Communications is contemporaneously proposing the rule review of Chapter 251, concerning Regional Plans-Standards, elsewhere in this issue of the *Texas Register*. The rule review of Chapter 251 is in accordance with the Appropriations Act, Article IX, Section 167.

James D. Goerke, executive director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Goerke also has determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be improved services in facilitating the delivery of a wireless emergency call through automatic number and location information data. No historical data is available, however, there appears to be no direct impact on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. There is no anticipated local employment impact as a result of enforcing the section.

Comments on the proposed new rule must be submitted in writing within 30 days after publication of the proposal in the *Texas Register* to: James D. Goerke, Executive Director, Advisory Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942.

The new rule is proposed pursuant to the Health and Safety Code, Chapter 771, §§771.051, 771.071, 771.0711, 771.072, and 771.075, which authorize the Commission to adopt policies and procedures prescribing the distribution and use of 9-1-1 funds for providing 9-1-1 service.

No other statute, article or code is affected by the proposed new rule.

§251.10. Guidelines for Implementing Wireless E9-1-1 Service.

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

(1) 9-1-1 Database Record - A physical record, which includes the telephone subscriber information to include the caller's telephone number, related locational information, and class of service, and conforms to NENA adopted database standards.

(2) 9-1-1 Funds - Funds assessed and disbursed in accordance with the Texas Health and Safety Code, Chapter 771.

(3) 9-1-1 Equipment - Capital equipment acquired partially or in whole with 9-1-1 funds and designed to support and/or facilitate the delivery of an emergency 9-1-1 call to an appropriate emergency response agency.

(4) 9-1-1 Governmental Entity - The 9-1-1 provider as defined in Texas Health and Safety Code Chapters 771 and 772.

(5) 9-1-1 Governmental Entity Jurisdiction - As defined in applicable law, Texas Health and Safety Code, Chapters 771 and 772, the geographic coverage area in which a 9-1-1 Governmental Entity provides emergency 9-1-1 service.

(6) 9-1-1 Operator - The PSAP operator receiving 9-1-1 calls.

(7) 9-1-1 Network Provider - The current operator of the selective router/switching that provides the interface to the PSAP for 9-1-1 service.

(8) Automatic Location Identification (ALI) Database - A computer database used to update the Call Back Number information of wireless end users and the Cell Site/Sector information for Phase I call delivery, as well as the X, Y coordinates for longitude and latitude for Phase II call delivery.

(9) Call Associated Signaling (CAS) - A method for delivery of the mobile directory number (MDN) of the calling party plus the emergency service routing digits (ESRD) from the wireless network through the 9-1-1 selective router to the PSAP. The 20 digits of data delivered are sent either over Feature Group D (FG-D) or ISUP from the wireless switch to the 9-1-1 router. From the router to the PSAP, the 20-digit stream is delivered using either Enhanced Multi-Frequency (EMF) or ISDN connections.

(10) Call Back Number - The mobile identification number (MIN) or mobile directory number (MDN), whichever is applicable, of a Wireless End User who has made a 9-1-1 call, which usually can be used by the PSAP to call back the Wireless End User if a 9-1-1 call is disconnected. In certain situations, the MIN or MDN forwarded to the PSAPs may not provide the PSAP with information necessary to call back the Wireless End User making the 9-1-1 call, including, but not limited to, situations affected by illegal use of Service (such as fraud, cloning, and tumbling) and uninitialized calls.

(11) Cell Site - A wireless service provider (WSP) radio base station in the WSP Wireless Network that receives and transmits wireless communications initiated by or terminated to a wireless handset, and links such telecommunications to the WSP's network.

(12) Cell Sector - An area, geographically defined by wireless service provider (WSP) (according to WSP's own radio frequency coverage data), and consisting of a certain portion of all of the total coverage area of a Cell Site.

(13) Cell Site/Sector Information - Information that indicates, to the receiver of the information, the location of the Cell site receiving a 9-1-1 call initiated by a Wireless End User, and which may also include additional information regarding a Cell Sector.

(14) Cell Sector Identifier - The unique numerical designation given to a particular Cell Sector that identifies that Cell Sector.

(15) Class of Service - A standard acronym, code or abbreviation of the classification of telephone service of the wireless end user, such as WRLS (wireless), that is delivered to the PSAP CPE.

(16) Digital Map - A computer generated and stored data set based on a coordinate system, which includes geographical and

attribute information pertaining to a defined location. A digital map includes street name and locational information, data sets related to emergency service provider boundaries, as well as other associated data.

(17) Emergency Communications District (District) - A public agency or group of public agencies acting jointly that provided 9-1-1 service before September 1, 1987, or that had voted or contracted before that date to provide that service; or a district created under Texas Health and Safety Code, Chapter 772, Subchapter B, C, or D.

(18) Emergency Service Routing Digits (ESRD) - A routing number translated from the Cell Sector Identifier that routes the 9-1-1 call to the appropriate PSAP. This number is further used as the search-key for the corresponding Host ALI Record.

(19) FCC - The Federal Communications Commission.

(20) FCC Order - The Federal Communications Commission Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 94-102, released July 26, 1996, and as amended by subsequent decisions.

(21) Host ALI Records - Templates from the ALI Database that identify the Cell Site location and the Call Back Number of the Wireless End User making a 9-1-1 call.

(22) J-Std-034 - A standard, jointly developed by the Telecommunications Industry Association (TIA) and the Alliance for Telecommunications Industry Solutions (ATIS), to provide the delta changes necessary to various existing standards to accommodate the Phase I requirements. This standard identifies that the interconnection between the mobile switching center (MSC) and the 9-1-1 selective router/switch is via 1), and adaptation of the Feature Group-D Multi Frequency (FG-D protocol), or 2), the use of an enhancement to the Integrated Services Digital Network User Part (ISUP) Initial Address Message (IAM) protocol. In this protocol, the caller's location is provided as a ten-digit number referred to as the emergency services routing digits (ESRDs). The protocol NENA-03-002, Recommendation for the Implementation of Enhanced Multi Frequency (MF) Signaling, E9-1-1 Tandem to PSAP, is the corollary of J-Std-034 FG-D protocol.

(23) Mobile Directory Number (MDN) - A 10-digit dialable directory number used to call a Wireless Handset.

(24) Mobile Identification Number (MIN) - A 10-digit number assigned to and stored in a Wireless handset.

(25) Mobile Switching Center (MSC) - A switch that provides stored program control for wireless call processing.

(26) National Emergency Number Association (NENA) - A professional 9-1-1 National Association.

(27) NENA 02-001 - A standard set of protocols for the Automatic Location Identification (ALI) data exchange between service providers and Enhanced 9-1-1 systems, developed by the NENA Data Standards Subcommittee (June 1998 revision).

(28) NENA 03-002 - A standard, or technical reference, developed by the NENA Network Technical Committee, to provide recommendations for the implementation of Enhanced Multi Frequency (MF) Signaling, E9-1-1 Tandem to PSAP. The J-Std-034 FG-D protocol, referenced in definition 22, is the corollary protocol of NENA 03-002.

(29) Non-Callpath Associated Signaling (NCAS) - This method for wireless E9-1-1 call delivery delivers routing digits over existing signaling protocol, including commonly applied CAMA trunking into and out of selective routers. The voice call is set up using the existing interconnection method that the wireline company uses from an end office to the router and from the router to the PSAP. All data, including the mobile directory number (MDN) and cell sector that receives the call, is delivered to the PSAP via the data path within the ALI record. The ANI delivered is an emergency service routing digit (ESRD), not a MDN.

(30) Phase I E9-1-1 Service - The service by which the wireless service provider delivers to the designated PSAP the wireless end user's call back number and cell site/sector information when a wireless end user has made a 9-1-1 call, as contracted by the 9-1-1 Governmental agency.

(31) Phase II E9-1-1 Service - The service by which the wireless service provider delivers to the designated PSAP the wireless end user's call back number, cell site/sector information, as well as X, Y (longitude, latitude) coordinates to the

(32) Phase I E9-1-1 Service Area(s) - Those geographic portions of a 9-1-1 Governmental Entity Jurisdiction in which WSP is licensed to provide Service. Collectively, all such geographic portions of the 9-1-1 Governmental Entity's Jurisdiction subject to this Agreement shall be referred to herein as the "Phase I E9-1-1 Service Areas".

(33) Regional Planning Commission - A commission established under Local Government Code, Chapter 391, also referred to as a council of governments (COG).

(34) Public Safety Answering Point (PSAP) - A 24-hour communications facility established as an answering location for 9-1-1 calls originating within a given service area, as further defined in applicable law Texas Health and Safety Code Chapters 771 and 772.

(35) Service Control Point (SCP) - A centralized database system used for, among other things, wireless Phase I E9-1-1 Service applications. It specifies the routing of 9-1-1 calls from the Cell Site to the PSAP. This hardware device contains special software and data that includes all relevant Cell Site locations and Cell Sector Identifiers.

(36) Selective Router - A switching office placed in front of a set of PSAPs that allows the networking of 9-1-1 calls based on the ESRD assigned to the call.

(37) Strategic Plans - Regional plans developed in compliance with Chapter 771 shall include a strategic plan that projects regional 9-1-1 service costs, and service fee and other non-equalization surcharge revenues at least five years into the future, beginning September 1, 1994. Within the context of §771.056(d), the Advisory Commission on State Emergency Communications (ACSEC) shall consider any revenue insufficiencies to represent need for equalization surcharge funding support.

(38) Uninitialized Call - Any wireless E9-1-1 call from a wireless handset which, for any reason, has not had service initiated with a legitimate WSP.

(39) Vendor - A third party used by either the 9-1-1 Governmental Entity or wireless service provider (WSP) to provided services.

(40) WSP - The named wireless service provider and all its affiliates (collectively referred to as "WSP").

(41) WSP Subscribers - Wireless telephone customers who subscribe to the Service of WSP and have a billing address within a 9-1-1 Governmental Entity Jurisdiction.

(42) Wireless 9-1-1 call - A call made by a wireless end user utilizing a wireless service provider's (WSP) wireless network, initiated by dialing "9-1-1" (and, as necessary, pressing the "Send" or analogous transmitting button) on a Wireless Handset.

(43) Wireless End User - Any person or entity receiving service on a WSP Wireless System.

(44) WSP Wireless System - Those mobile switching facilities, Cell sites, and other facilities that are used to provide wireless Phase I & II E9-1-1 service.

(45) WSP Wireless Network - Those mobile switching facilities, cell sites, and other facilities that are used to provide Phase I & II wireless E9-1-1 service.

(b) Policy and Procedures. As authorized by the Texas Health and Safety Code, Chapter 771.051, the ACSEC shall develop minimum performance standards for equipment and operation of 9-1-1 service to be followed in developing regional plans, and impose 9-1-1 emergency service fees and equalization surcharges to support the planning, development, and provision of 9-1-1 service throughout the State of Texas. The implementation of such service involves the procurement, installation and operation of equipment, database and network services and facilities designed to either support or facilitate the delivery of an emergency call to an appropriate emergency response agency. As mandated by FCC Order, and as authorized by the Texas Health and Safety Code, Chapter 771, §.0711, the ACSEC shall impose on each wireless telecommunications connection a 9-1-1 emergency service fee to provide for the automatic number identification and automatic location identification of wireless E9-1-1 calls. Furthermore, the ACSEC recognizes the rapidly changing telecommunications environment in wireline and wireless services and its impact on 9-1-1 emergency services. Automatic number and location information is crucial data in facilitating the delivery of an emergency call. It is the policy of the ACSEC that all 9-1-1 emergency calls for service be handled at the highest level of service available. In accordance with this policy, the following policies and procedures shall apply to the procurement, installation, and implementation of wireless E9-1-1 services funded in part or in whole by the 9-1-1 funds. Prior to ACSEC considering allocation and expenditure of 9-1-1 funds for implementation of wireless Phase I and/or Phase II wireless E9-1-1 services, a COG and/or District receiving 9-1-1 fees and/or equalization surcharge funds from the ACSEC shall meet the following requirements:

(1) ACSEC Survey and Review - Prior to any wireless E9-1-1 Service implementation in any regional council (COG) area, ACSEC shall solicit in writing from all wireless service providers (WSP) within the State of Texas a detailed description of its technical approach to implementing Phase I and/or Phase II (where applicable); and, the cost associated with that implementation. The ACSEC will review and evaluate this information and consider its appropriateness for implementation. Upon completion of this process, the ACSEC will communicate these WSP evaluations to the regional councils (COGs), and notify the COGs that they may request and implement wireless E9-1-1 service as described below.

(2) Phase I E9-1-1 Service - The provisioning for delivery of a caller's mobile directory number and the location of a cell site receiving a 9-1-1 call to the designated PSAP. Implementation of Phase I service must be accomplished within 6-months of written request according to the FCC Order. Prior to implementing Phase I wireless E9-1-1 service, the following conditions must be satisfied and demonstrated to the Commission as described in paragraph 13 of this section:

(A) sufficient funding mechanism for the recovery of all reasonable costs relating to the provisioning of such service is in place;

(B) the PSAPs administered by the 9-1-1 entity are capable of receiving and using the data associated with such service;

(C) 9-1-1 entity requests such service in writing from the service provider;

(D) an executed contract between 9-1-1 entity and wireless service provider for such service, and which includes a wireless service work plan, fee schedule and standards.

(3) Phase II E9-1-1 Service - provisioning for delivery of a caller's mobile directory number and the caller's location, graphically depicted, within 125 meters RMS level of accuracy, to the designated PSAP. Implementation of Phase II service must be accomplished within 6-months of written request. Prior to implementing Phase II wireless E9-1-1 service, the following conditions, in addition to those listed in paragraph (2) must be satisfied and demonstrated to the Commission as described in Section of this Rule:

(A) provision for digital base map and graphical display, in conjunction with approved Strategic Plan and ACSEC §251.7 of this title (relating to Guidelines for Implementing Integrated Services);

(B) demonstrate, and provide in writing, that the location determination technology and digital base map are capable of identifying the caller's location within 125 meters in at least 67% of calls delivered, or the degree of accuracy as required by FCC Order;

(C) a revised executed contract between 9-1-1 entity and wireless service provider for such service and which includes a wireless service work plan, fee schedule and standards.

(4) Responsibilities - It shall be the responsibility of the 9-1-1 entity, the wireless service provider and any necessary third party (including, but not limited to, 9-1-1 Network Provider/Local Exchange Carrier, Host ALI Provider, SCP software developers and hardware providers, and other suppliers and manufacturers) to fully cooperate for the successful implementation and provision of Phase I and Phase II E9-1-1 service. The Commission acknowledges that the successful and timely provision of such service is dependent upon the timely and effective performance and cooperative efforts of all of the parties listed in this paragraph. All parties shall comply with FCC Order, Texas laws and ACSEC Rules.

(5) Deployment - The 9-1-1 entity and the wireless service provider will agree upon one of the following methods of wireless call delivery:

(A) Call Associated Signaling (CAS)

(B) Non-Callpath Associated Signaling (NCAS)

(C) Exceptions to CAS or NCAS, as in the case of standalone ALI/HP environments - specific solution should be illustrated and demonstrated prior to execution of contract.

(6) Data Delivery - The 9-1-1 entity and the wireless service provider will agree upon one of the following methods for the delivery of data elements necessary for Phase I E9-1-1 service. The 9-1-1 entity and WSP shall provision for redundancy within all methods.

(A) SS7/ISUP - wireless service provider (WSP) will deliver the twenty digits of information necessary for Phase I services by sending SS7 signaling messages in ISUP format to the 9-1-1 selective router;

(B) Feature Group D - wireless service provider will deliver the twenty digits of information necessary for completion of Phase I services to the 9-1-1 selective router in the standard format required;

(C) Single Control Point (SCP) - wireless service provider will, through a third party, route all necessary information directly to the 9-1-1 entity's ALI database through an independent single control point.

(7) Standards - The 9-1-1 entity, the wireless service provider and any third party/vendor, will ensure that all appropriate and applicable industry standards be adhered to in provisioning E9-1-1 wireless service. These standards shall include, but not be limited to:

(A) J-Std 34 and NENA 03-002 for CAS deployments;

(B) NENA 02-001 as benchmark data standards. All parties shall cooperate fully in the development and maintenance of all wireless data, such as cell site locations, Emergency Service Routing Digits, selective routing databases, and timely updates of any such data;

(C) Any and all standards, currently under development by appropriate standards bodies, for NCAS and Phase II/LDT deployments. Any such pending standard should be adhered to upon publication;

(D) ACSEC hereby establishes a standard Class of Service (COS) to be used by the 9-1-1 entity's PSAPs and the wireless service providers to identify calls delivered to the PSAP as WRLS (wireless);

(E) ACSEC §251.4 of this title (relating to Guidelines for the Provisioning of Accessibility Equipment) for provisioning of TTY/TDD equal access;

(F) All applicable standards shall be agreed upon by both parties to the wireless service contract.

(8) Reasonable Cost Elements -The Commission will consider that the reasonable costs incurred by the wireless service provider to be reimbursed by the 9-1-1 entity will include the following:

(A) Trunking - To provide network connectivity between the necessary network elements, the following costs shall be allowed:

(i) From mobile switching center (MSC) to selective router;

(ii) From selective router to PSAP;

(iii) From PSAP to ALI Database;

(iv) From mobile switching center (MSC) to service control point (SCP);

(v) From service control point (SCP) to ALI Database;

(vi) From ALI Database to PSAP.

(B) Network - To provision the transference of necessary digits from the selective router to the PSAP in a CAS deployment, an upgrade or modification to the selective router will be necessary. The Commission will not consider this as an allowable cost.

(C) Database - To provision and deliver the necessary data through the network and to the PSAP for Phase I compliance, the following costs will be allowed:

(i) Non-recurring costs associated with initial emergency service routing digits (ESRD) load into selective router or SCP;

(ii) Monthly recurring costs associated with maintaining ESRD data in the selective router or SCP.

(D) CPE - To provision the 9-1-1 entity's PSAP equipment to have the capability to receive and display information necessary to comply with Phase I call delivery requirements, the Commission has previously funded software upgrades to CPE for 20-digit and two 10-digit capability. These costs should be accommodated within the regional council's currently, or previously, approved strategic plan.

(E) Map Display - The cost to provision the 9-1-1 entity's PSAP equipment to have the capability to receive and graphically display caller's cell site/sector location information, as well as the X, Y (longitude, latitude coordinates)

(F) Training - The cost to train COG and/or PSAP personnel to efficiently and effectively receive and process Phase I & Phase II wireless E9-1-1 calls. This training shall be conducted by the COG, WSP, local service provider, and/or third party, as necessary, upon initial deployment of wireless service and at regularly scheduled intervals. Training plans and any associated costs shall be proposed to COG within WSP written proposal of service, submitted to the ACSEC for approval via the strategic plan amendment review process as outlined in §251.6 of this title (relating to Guidelines for Strategic Plans, Amendments and Equalization Surcharge Allocation) and included in an executed standardized contract for wireless E9-1-1 service.

(9) Testing - The COG, WSP, local service provider and any third party shall conduct initial and regularly scheduled network, database and equipment testing to ensure the integrity of the existent and proposed wireline/wireless 9-1-1 system operated by the COG, for any Phase I and/or Phase II wireless E9-1-1 service deployment. These tests shall include, at a minimum:

(A) network connectivity;

(B) call setup times;

(C) equipment capabilities of receiving and displaying callback number and cell site/sector information;

(D) ability to transfer the wireless E9-1-1 call. The COG shall submit the initial testing documentation and findings to the ACSEC within the strategic plan amendment approval process as referenced in paragraph 8 relating to Reasonable Cost Elements. The COG shall maintain documentation of regularly scheduled testing and notify ACSEC of any on-going, negative outcomes.

(10) Fair and Equitable Provisioning of Wireless E9-1-1 Service - The COG shall establish the level of wireless E9-1-1 service required within its region, and shall ensure that each WSP operating within its region provides comparable levels of wireless E9-1-1 service to all wireless subscribers within the region, within reasonable implementation parameters. No single WSP shall be reimbursed for costs above the average or comparable costs of the other WSP within the COG region.

(11) Uninitialized Calls - Any wireless E9-1-1 call from a wireless handset which, for any reason, has not had service initiated with a legitimate WSP, must be passed through the wireless 9-1-1 network, and uniformly identified to the PSAP.

(12) Third Party Contracts - Any and all subcontracts between WSP and third party vendors, for the deployment of Phase I & II wireless E9-1-1 service deployments, shall adhere to the primary contract as executed between COG and WSP.

(13) Proposals for Wireless E9-1-1 Service - All proposals by WSPs for wireless 9-1-1 service should be presented to the COG in writing and shall include a complete description of network, database, equipment display requirements, training and accessibility elements. Such proposals should include detailed cost information, as well as technical solutions, network diagrams, documented wireless 9-1-1 call set-up times, deployment plans and timelines, specific work plans, WSP network contingency and disaster recovery plans, escalation lists, trouble call response times, as well as any other information required by the COG. All information provided to the COG becomes a matter of public record and is subject to the Texas Public Information Act, unless otherwise covered under confidentiality agreements.

(14) Strategic Plan Amendment Review and Approval Process - Upon demonstration of compliance with subsection (b)(2) and (b)(3), and prior to executing a standardized contract for wireless 9-1-1 service, the COG shall submit such proposals, as described in paragraph 13 of this subsection, to ACSEC for approval, via the strategic plan review and/or amendment process described in §251.6 of this title (relating to Guidelines for Strategic Plans, Amendments and Equalization Surcharge Allocation). Strategic Plan amendment requests should include all of the information provided by WSP to COG, as well as complete information regarding the geographic areas as well as the tandems, exchanges and PSAPs effected by the proposed deployment.

(15) Standardized Contract - Upon review and approval by ACSEC, COG and WSP shall enter into a standardized Wireless E9-1-1 Service Agreement. The standard contract shall be provided by ACSEC, and shall include all of the information contained in the proposal and amendments reviewed and approved by the Commission. ACSEC staff shall review all such contracts before they are executed. COG shall provide ACSEC a copy of all fully executed contracts.

(16) Rights of the State - ACSEC reserves the right to designate a single, centralized wireless E9-1-1 database provider to manage and maintain the wireless E9-1-1 database for the 9-1-1 Governmental entities participating in the state administered program. This designation may take place at such time as the Commission deems prudent and efficient; and as substantiated through proper procurement processes.

This 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 March 22, 1999.

TRD-9901696

James D. Goerke

Executive Director

Advisory Commission on State Emergency Communications

Earliest possible date of adoption: May 2, 1999

For further information, please call: (512) 305–6933

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TITLE 4. AGRICULTURE

Part I. Texas Department of Agriculture

Chapter 17. Marketing and Development Division

Subchapter C. TAP, Taste of Texas, Vintage Texas, Texas Grown, [~~and~~] Naturally Texas, and Go Texan Promotional Marks [~~Mark~~]

4 TAC §§17.51–17.56, 17.60

The Texas Department of Agriculture (the department) proposes amendments to §§17.51-17.56, and 17.60 concerning application and registration to use the TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas and new Go Texan Promotion Mark. The purpose of the amendments is to incorporate new provisions for use of the "Go Texan" Promotion Mark into existing rules. In addition, proposed amendments for registration and use of the Naturally Texas Promotion Mark include changes in natural fiber content for qualified products which will allow more product lines to use the Naturally Texas Promotion Mark. Fees for registration for use of the Naturally Texas Promotion Mark will be reduced to the same fee as the other promotional marks. Section 17.60 is amended to replace the reference to the Texas Grown Nativescape Promotional Mark with the Go Texan Nativescape Promotional Mark.

Brent Wiseman, Director for Horticulture Marketing, has determined that for the first five-year period that the proposed sections are in effect, there will be fiscal implications for state government as a result of enforcing or administering the sections. The effect on state government for the first five-year period the sections are in effect is an estimated loss in revenue of $3,775 per year for a total of $18,875 for the five-year period, as a result of reduced fees for Naturally Texas program members. However, this loss revenue should be offset by new members registering to use the Go Texan promotional mark and by administrative savings from consolidation of programs. This reduction will make Naturally Texas fees consistent with all other programs. There will be no fiscal implications for local government as a result of enforcing or administering the sections.

Mr. Wiseman has also 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 amendments will be having clearer, more workable rules and the addition of another program to be utilized by Texas producers to promote Texas agricultural products. The effect on small and large business for the first five-year period the amendments are in effect will be a reduction of $25 in the annual registration fee for Naturally Texas Program members. The effect on new members to the new Go Texan promotional program will be a registration fee in the amount of $25 per year.

Comments may be submitted to Brent Wiseman, Director for Horticulture Marketing, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas, 78711. Comments must be received no later than 30 days from the date of the publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Agriculture Code §12.106, which provides the department with the authority to adopt rules as necessary for the administration of its powers and duties under the Texas Agriculture Code; §12.017, which authorizes the department to regulate the use of the term "Texas Agricultural Product" by rule; and, §12.0175 which authorizes the department to establish programs to promote products grown in Texas and products made from ingredients grown in Texas and to charge a membership fee for those programs not to exceed $50.

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

§17.51. Definitions.

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

(1)-(12) (No Change.)

(13) Go Texan mark–The following mark being a certification mark registered with the United States Patent and Trademark Office and also being registered with the Secretary of State's office by the department.
Figure: 4 TAC §17.51(13)

§17.52. Application for Registration To Use the TAP, Taste of Texas, Vintage Texas, Texas Grown, [~~or~~]Naturally Texas , or Go Texan Promotional Mark.

(a) No person shall use, employ, adopt, or utilize the TAP, Taste of Texas, Vintage Texas, Texas Grown, [~~or~~] Naturally Texas, or Go Texan promotional mark, unless prior application for registration has been made to the department and permission to make such use, employment, adoption, or utilization has been granted.

(b) Unless permission is otherwise granted by the department:

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

(5) The Naturally Texas promotional mark may only be utilized by Naturally Texas program members. The Naturally Texas program is a program established by the department to promote leather, textile, or apparel products approved by the commissioner as being:

(A) composed of 50% or greater [~~at least 60%~~] natural fibers derived from crops or livestock grown or raised within the State of Texas, the identity of the fibers having been preserved throughout processing so as to be verifiable by satisfactory documentation as having originated in Texas; or

(B) composed of 50% or greater [~~at least 60%~~] natural fibers, regardless of where grown or raised, which have been processed into leather, textile, or apparel products within the State of Texas in a manner which substantially changes their form, and, if composed of natural fibers derived from crops or livestock grown or raised outside the State of Texas, the natural fibers must be of a type commercially produced within the State of Texas.

(6) The Go Texan promotional mark may only be utilized by Taste of Texas, Vintage Texas, Texas Grown and Naturally Texas program members or others meeting requirements as prescribed by this section.

(c)-(f) (No Change.)

(g) Other than the use of the promotional mark, no registrant shall use any statement of affiliation or endorsement by the State of Texas or the department in the selling, advertising, marketing, packaging, or other commercial handling of TAP, Taste of Texas, Vintage Texas, Texas Grown, [~~or~~] Naturally Texas, or Go Texan products.

(h) Registrants shall indemnify and hold harmless the commissioner, the State of Texas, and the department for any claims, losses, or damages arising out of or in connection with that person's advertising, marketing, packaging, manufacture, or other commercial handling of TAP, Taste of Texas, Vintage Texas, Texas Grown, [~~or~~] Naturally Texas , or Go Texan products.

(i)-(m) (No change.)

(n) The department shall have the sole right and discretion to bring infringement or unfair competition proceedings involving the TAP, Taste of Texas, Vintage Texas, [~~or~~] Texas Grown , Naturally Texas, or Go Texan promotional marks.

§17.53. Action on Application.

(a) The assistant commissioner for Marketing and Promotion [~~Agribusiness Development~~], Texas Department of Agriculture, within 30 days of receipt of an application for registration to use the TAP, Taste of Texas, Vintage Texas, Texas Grown, [~~or~~] Naturally Texas , or Go Texan promotional mark, shall make an initial determination of whether such registration permission shall be granted or denied, and forthwith notify the applicant in writing of his decision setting forth in detail the reasons for such grant or denial.

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

§17.54. Denial of Application to use the TAP, Taste of Texas, Vintage Texas, Texas Grown, [~~or~~] Naturally Texas , or Go TexanPromotional Mark.

An application for registration to use the TAP, Taste of Texas, Vintage Texas, Texas Grown, [~~or~~] Naturally Texas , or Go Texanpromotional mark may be denied if:

(1) application is not made in compliance with §17.52 of this title (relating to Application for Permission To Use the TAP, Taste of Texas, Vintage Texas, Texas Grown, [~~or~~] Naturally Texas , or Go Texan Promotional Mark);

(2)-(3) (No change.)

(4) the applicant has misused the TAP, Taste of Texas, Vintage Texas, Texas Grown, [~~or~~] Naturally Texas , or Go Texan promotional mark prior to the date of application; or

(5) (No change.)

§17.55. Registration of Those Entitled To Use the TAP, Taste of Texas, Vintage Texas, Texas Grown, [~~or~~] Naturally Texas , or Go Texan Promotional Mark.

(a) The commissioner shall enroll in a register the names of all persons granted permission under these sections to use the TAP, Taste of Texas, Vintage Texas, Texas Grown, [~~or~~] Naturally Texas, or Go Texan promotional mark. The register shall be available for public inspection during normal business hours in the offices of the Texas Department of Agriculture, 1700 North Congress Avenue, in Austin, Texas.

(b) Procedure for annual renewal of registration of persons authorized to use the TAP, Taste of Texas, Vintage Texas, Texas Grown , [~~or~~] Naturally Texas , or Go Texan promotional mark.

(1) Except for calendar year 1999, between [~~Between~~] January 1 and January 31, annually, the department shall mail to each person previously registered to use the TAP, Taste of Texas, Vintage Texas, Texas Grown , [~~or~~] Naturally Texas , or Go Texan promotional mark a statement setting forth the amount due as an annual registration fee for producers. Nonproducers shall be required to verify that they remain exempt from payment of registration fees.

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

(c) Annual registration fees for use of the TAP, Taste of Texas, Vintage Texas, Texas Grown, [~~or~~] Naturally Texas and Go Texan promotional mark [~~emblem~~] shall be paid to the department in accordance with the following schedule:

(1)-(4) (No Change.)

(5) Naturally Texas promotional mark–$25; [$50.]

(6) Go Texan promotional mark–$25.

(d) Annual registration fees paid to the department for the use of the TAP, Taste of Texas, Vintage Texas, Texas Grown or Naturally Texas promotional marks may include the use of the Go Texan promotional mark.

§17.56. Termination of Registration To Use the TAP, Taste of Texas, Vintage Texas, Texas Grown, [or] Naturally Texas , or Go Texan Promotional Mark.

(a) Registration to use the TAP, Taste of Texas, Vintage Texas, Texas Grown, [or] Naturally Texas , or Go Texan promotional mark may be revoked at any time if the mark is misused.

(b) Misuse of the TAP, Taste of Texas, Vintage Texas, Texas Grown, [or] Naturally Texas, or Go Texan promotional mark includes, but is not limited to:

(1)-(3) (No Change.)

(c) Proceedings for the revocation of registration to use the TAP, Taste of Texas, Vintage Texas, Texas Grown, [or] Naturally Texas , or Go Texan promotional mark shall be conducted in the manner provided for contested cases by the Administrative Procedure Act, Texas Government Code, Chapter 2001, and Chapter 1 of this title (relating to General Practice and Procedure).

(d) A proceeding for revocation of registration to use the TAP, Taste of Texas, Vintage Texas, Texas Grown , [or] Naturally Texas , or Go Texan promotional mark shall not preclude the commissioner from pursuing any other remedies, including, where applicable, the penal and injunctive remedies provided for by law.

§17.60. Go Texan [Texas Grown] NativeScape Certification.

(a) Definitions. In addition to the words and terms provided at §17.51 of this title (relating to Definitions) the following words and terms when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1)-(2) (No Change.)

(3) Go Texan [Texas Grown] NativeScape mark–The copyrighted Texas Department of Agriculture "Go Texan" ["Texas Grown"] mark and the term "NativeScape" centered immediately below the "Go Texan" ["Texas Grown"] mark.
Figure: 4 TAC §17.60 (a)(3)

(b) Application.

(1) Applications submitted under this section shall be made in writing on a form prescribed by the department and submitted to the Director for Horticulture Marketing, Marketing and Promotion [Agribusiness Development] Division, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711, including the prescribed application fee.

(2) Action on an application to use the Go Texan [Texas Grown] NativeScape promotional mark shall be in accordance with §17.53 of this title (relating to Action on Application).

(3) Denial of an application to use the Go Texan [Texas Grown] NativeScape promotional mark shall be in accordance with §17.54 of this title (relating to Termination of Application To Use the TAP, Taste of Texas, Vintage Texas, Texas Grown, [or] Naturally Texas, or Go Texan Promotional Mark).

(c) Certification.

(1) A one-time registration will be required of eligible producers who wish to have a site which has been established with only native plant species as defined under this section designated as a Go Texan [Texas Grown] NativeScape site.

(2) Once an application has been processed and approved, a certificate shall be issued authorizing a producer to represent a site as certified under this section to use the Go Texan [Texas Grown] NativeScape promotional mark.

(d) Use of Logo.

(1) No person shall use, employ, adopt or utilize the Go Texan [Texas Grown] NativeScape promotional mark, unless prior application for certification has been made to the department and permission to make such use, employment, adoption, or utilization has been granted.

(2) The "Go Texan [Texas Grown] NativeScape" promotional mark may only be utilized by a producer to designate a site certified under this section.

(3) Termination of use of the Go Texan [Texas Grown] NativeScape promotional mark shall be in accordance with §17.56 of this title (relating to Termination of Registration To Use the TAP, Taste of Texas, Vintage Texas, Texas Grown, [or] Naturally Texas or Go Texan Promotional Mark).

(e) (No Change.)

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

Filed with the Office of the Secretary of State, on March 22, 1999.

TRD-9901712
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 463–4075

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TITLE 10. COMMUNITY DEVELOPMENT

Part I. Texas Department of Housing and Community Affairs

Chapter 5. Community Services Program

The Texas Department of Housing and Community Affairs (TDHCA) proposes amendments to the following Sections of Chapter 5 issued under the Texas Government Code, Chapter 2306, concerning the Community Services Block Grant Program (CSBG) and the Emergency Nutrition Temporary Emergency Relief Program (ENTERP): §§5.1; 5.101-5.106; 5.108-5.114; 5.116-5.121. The amendments are being proposed to change the references to the State Agency currently administering the program and to establish the standards and procedures by which TDHCA will administer CSBG and ENTERP as well as comply with Section 167, Article IX, of the General Appropriations Act.

Sam Guzman, Director of the Administration and Community Affairs Division of TDHCA, has determined that for the period that the sections are in effect there will be no fiscal implications

for state or local government as a result of enforcing or administering the sections.

Mr. Guzman also has determined that for the period that the sections are in effect, the public benefit as a result of enforcing the sections will be the equitable allocation ENTERP funds to eligible units of general local government and eligible private, nonprofit organizations in Texas. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Anne Paddock (apaddock@tdhca.state.tx.us), Deputy General Counsel, Texas Department of Housing and Community Affairs, 507 Sabine, P.O. Box 13941, Austin, Texas 78711-3941.

Subchapter A. Community Services Block Grant

10 TAC §5.1

The amendment is proposed under Texas Government Code, Chapter 2306, and Section 167, Article IX, of the General Appropriations Act.

Texas Administrative Code, is affected by the proposed amendments.

§5.1. Assurances for the Community Services Block Grant Program

(a) Purpose. This Section establishes a variation from the standard assurances of the Uniform Grant Management Standards (UGMS) [~~Uniform Grant and Contract Management Standards (UGCMS)~~] adopted by the Office of the Governor in 1 TAC §§5.141 et seq.

(b) (No change.)

(c) Variations. Each recipient of CSBG funds assures and certifies that it will comply with the standard assurances of UGMS[~~UGCMS~~] and the following nonstandard assurances.

(1) In the case of community action agency or non profit private organization, the recipient's board of directors will be constituted so as to assure that one-third of the directors are elected public officials, currently holding office, or their designated representatives, at least one-third of the directors are persons chosen in accordance with democratic selections procedures adequate to assure that they are representative of the poor in the area served; and the remainder of the directors are officials or members of business, industry, labor, religious, welfare, education, or other major groups and interests in the community. Additional guidance on this requirement is contained in CSBG Policy Issuance 95-2.2 [~~90-2.1~~] which is adopted herein by reference. A copy of the issuance may be obtained from the Community Services [~~Planning and Support~~]Section, Texas Department of Housing and Community Affairs, P. O. Box 13941[~~13166~~], Austin, Texas 78711-3941[~~78711-3166~~]

[~~(2) For purposes of 5 United States Code, Chapter 15 (the Hatch Act), any nonprofit private organization receiving CSBG funds which has responsibility for planning, developing, and coordinating community antipoverty programs shall be deemed to be a state or local agency. For purposes of clauses (1) and (2) of 5 United States Code §1502(a), any nonprofit private organization receiving assistance under the CSBG program shall be deemed to be a state or local agency. Additional guidance on this requirement is contained in CSBG Issuance 90-8.1 which is adopted herein by reference. A copy of the issuance may be obtained from the Community Services Planning and Support Section, Texas Department of Community Affairs, P. O. Box 13166, Austin, Texas 78711-3166~~]

(2) [~~(3)~~] Recipients may not engage in any activities to provide voters and prospective voter with transportation to the polls or provide similar assistance in connection with an election or any voter registration activity. Private non-profit Community Action Agencies may be designated as non-governmental voter registration sites, pursuant to §7(a)(3)(B)(ii) of the National Voter Registration Act. For more information, see CSBG Policy Issuance #96-11.4.

(3) [~~(4)~~] Recipients may not use any CSBG funds for the purchase or improvement of land, or the purchase, construction, or permanent improvement (other than low-cost residential weatherization or other energy-related home repairs) of any building or other facility unless a waiver is granted pursuant to 42 United States Code §9909(b).

(d) Authority. These variations from the standard assurances of UGMS[~~UGCMS~~] are required by provisions of Chapter 106 of Title 42, United States Code.

This 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 March 22, 1999.

TRD-9901686
Daisy A. Stiner
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 475–3726

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Subchapter B. Emergency Nutrition Temporary Emergency Relief Program

10 TAC §§5.101–5.106, 5.108–5.114, 5.116–5.121

The amendments are proposed under Texas Government Code, Chapter 2306, and section 167, Article IX, of the General Appropriations Act.

Texas Administrative Code, is affected by the proposed amendments.

§5.101. Program Overview.

(a) The Emergency Nutrition and Temporary Emergency Relief Program (ENTERP) is a cooperative effort between the Texas Department of Housing and Community Affairs (TDHCA)[~~DHS~~] and county commissioners courts, other political subdivisions, or private nonprofit organizations to provide relief to needy persons.

(b) TDHCA[~~DHS~~] approves only one program for each county. A single allocation to a county may not [~~exceed $100,000 nor~~] be less than $1,000. Contractors may be required to[~~must~~] provide local matching funds that amount to 100%[~~50%~~] of the contract total.

§5.102. Demonstration of Need.

TDHCA[~~DHS~~] allocates funds to counties based on the following evidence of their demonstrated needs:

(1)-(3) (No change.)

§5.103. Contractor Eligibility.

TDHCA[~~DHS~~] gives each county an opportunity to apply for funds to operate this program in its county. If a county declines to provide services, TDHCA[~~DHS~~] may accept applications from political subdivisions or private nonprofit organizations. If a county submits an application that does not comply with TDHCA[~~DHS~~] requirements or fails to respond within 30 days of receiving a request for application, TDHCA[~~DHS~~] treats the county as if it declined. TDHCA[~~DHS~~] selects another contractor and informs the county of the choice.

§5.104. Scope of Services.

The contractor determines which of the following services are needed and will be delivered:

(1)-(7) (No change.)

(8) other services that are integral but subordinate to the contractor's plan as approved by TDHCA[~~DHS~~], including medical and transportation services.

§5.105. Application Requirements.

To participate in the program, the contractor must submit a completed application on a form provided by TDHCA[~~DHS~~]. In the application, the contractor must include:

(1) minimum personnel practices prescribed by TDHCA[~~DHS~~];

(2)-(5) (No change.)

§5.106. Plan of Service.

(a) In the application, the contractor submits to TDHCA[~~DHS~~] a plan for providing emergency relief services. This plan includes:

(1)-(3) (No change)

(4) a description of how the contractor[~~he~~] will:

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

(b) The contractor may revise eligibility criteria for prospective clients. Before implementing the revised criteria, the contractor[~~he~~] must:

(1) allow adequate notice and opportunity for public comment; and

(2) notify the TDHCA[~~DHS~~] contract manager to obtain TDHCA[~~DHS~~] approval of the revised criteria.

§5.108. Public Notice and Comment.

The contractor must allow adequate notice and opportunity for public comment. The contractor[~~He~~] must notify the public before establishing eligibility criteria and the scope, frequency, and duration of benefits the contractor[~~he~~] proposes to provide under the program. Public comment includes comments from public organizations, private nonprofit organizations, voluntary associations, representatives of low-income people, and other groups that assist the needy.

§5.109. Contractor Requirements for Establishing Client Eligibility.

(a) The contractor must establish the client eligibility level at no less than 75% of the federal poverty level in effect at the time the plan is submitted to TDHCA[~~DHS~~]. The eligibility criteria and operating procedures must include:

(1) client requirements - maximum income levels[~~,~~] based on family size, at which clients are eligible; need, family assets, residency; procedure to request services; and documentation that a prospective client must give the contractor;

(2)-(3) (No change.)

(b) The contractor may revise eligibility criteria for prospective clients. Before implementing the revised criteria, the contractor[~~he~~] must:

(1) (No change.)

(2) notify the TDHCA[~~DHS~~] contract manager to obtain TDHCA[~~DHS~~] approval of the revised criteria.

§5.110. Contract Changes.

Any change in terms of the ENTERP contract required by a change in state or federal law or regulation is automatically incorporated and effective on the date designated by such law or regulation. Any change in terms of the ENTERP contract shall be made by an amendment in writing and signed by all parties to the contract.[~~Amendments are processed in the same manner as the original contract.~~]

§5.111. Contractor Reporting Requirements.

The Monthly Funding/Financial/Performance Report (MFFPR) (TDHCA Forms #129A and #129B) serve as a monthly expenditure report, a request for advance or reimbursement, and a performance report. Contractors providing ENTERP assistance in two or more counties must use additional pages (TDHCA Forms #129-A/2 and #129-B/2). MFFPRs are due to TDHCA no later than the 20th day of the month following the month of actual expenditures reported. A final MFFPR is due to the Department within (60) days after the end of the contract period. For more information see ENTERP Policy Issuance #96-4.3.[~~DHS may deny payments or terminate a contract if the contract does not submit departmental reports in the time frames required by DHS.~~]

§5.112. Payment

(a) TDHCA[~~DHS~~] pays contractors on a grant basis. TDHCA[~~DHS~~] pays the contractor after the effective date of the contract and may pay the contractor before expenses are incurred under the contract.

(b) TDHCA[~~DHS~~] determines the procedures and forms that contractors use to request payment. Contractors must submit all payment requests to TDHCA[~~the DHS contract manager~~].

(c) The contractor must maintain accounting and service delivery records to substantiate the expenditure of state funds and required local matching funds and delivery of allowable services to eligible clients. The contractor must maintain separate records for each county the contractor serves. The contractor must make these records available to TDHCA[~~DHS~~] or its representatives, at reasonable times, for inspection, monitoring, auditing, or evaluation purposes.

(d) The contractor must submit monthly[~~quarterly~~] reports, in a format prescribed by TDHCA[~~DHS~~], on services delivered and expenses incurred under the contract. This report must be received by TDHCA on the 20th of the month following the month on which contractor is reporting, even if no activity occurred during the report month.[~~The contractor must submit quarterly reports to the DHS contract manager within 45 days following the end of the quarter. The quarterly reporting periods are:~~]

[~~(1) September-November~~]

[~~(2) December-February~~]

[~~(3) March-May~~]

[~~(4) June-August.~~]

(e) TDHCA[~~DHS~~], at its option, may deny, suspend, or reduce payment to a contractor who fails to maintain acceptable

accounting and service delivery records for current or prior contract periods or who fails to submit acceptable expenditure and service delivery reports for current or prior contract periods. [~~The contractor may appeal the DHS decision.~~]

(f) The contractor must return unspent or unmatched state funds to TDHCA[~~DHS~~] within 30 days of being notified by TDHCA[~~DHS~~].

§5.113. Records.

(a) Contractor shall maintain fiscal records and supporting documentation for all ENTERP expenditures in accordance with the Uniform Grant Management Standards, Common Rule, §42.

(b) All information collected, assembled or maintained by the contractor shall be made available to the public during normal business hours in compliance with the Texas Open Records Act, TEX. GOV'T CODE ANN. Chapter 552.

(c) Contractor shall give the Department, or its duly authorized representatives, access to and the right to examine and copy, on or off of the premises of contractor, all records pertaining to this contract. Contractor agrees to maintain such records in an accessible location and to include the requirements of this subsection in all subcontracts. [~~The contractor must keep all records pertaining to the contract for three years and 90 days after the end of the contract year that he provided services. If an audit is begun during this time, the contractor must keep the records until the audit is completed and any audit exceptions are resolved. The contractor's accounting system must comply with accepted accounting principles established by the American Institute of Certified Public Accountants.~~]

§5.114. Audit.

The contractor shall arrange for the performance of an annual financial and compliance audit of ENTERP funds as specified by TDHCA. The contractor must make program information available to TDHCA[~~DHS~~] at the time and place requested by TDHCA[~~DHS~~].

§5.116. Contract Termination and Expiration.

(a) TDHCA[~~DHS~~] may terminate a contract before the expiration date if:

(1) TDHCA[~~DHS~~] and the contractor mutually agree to terminate the contract;

(2) either TDHCA[~~DHS~~] or the contractor gives the other party 30 days written notice that the contractor[~~he~~] intends to terminate the contract;

(3) (No change.)

(4) the contractor ceases to operate the program without TDHCA's[~~DHS'~~] approval; or

(5) (No change.)

(b) TDHCA[~~DHS~~] sends the contractor a written notice when a contract is terminated. The contractor[~~He~~] has the right to appeal this action within 15 days of receiving the notice.

§5.117. Oil Overcharge Funding Program Overview.

TDHCA[~~DHS~~] administers the oil overcharge funding according to Emergency Nutrition and Temporary Emergency Relief Program (ENTERP)[~~(EN/TERP)~~] rules and procedures except when in conflict with oil overcharge funding legislation.

§5.118. Oil Overcharge Funding Scope of Services.

(a) Contractors under the Oil Overcharge Program must provide money for payment to vendors of energy utility services to prevent the interruption or termination of energy services or to restore that service to low-income persons.

(b) Oil Overcharge funding must be spent only for energy utility services, defined as payment by voucher for electricity service; natural gas, butane, propane, kerosene, and other heating petroleum products; cord wood and coal;and purchases[~~and repair~~] of essential [~~heating and~~] cooling appliances[~~; and blankets or coats for warmth~~].

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

§5.119. Oil Overcharge Funding Budget.

(a) A local unit of government or nonprofit organization receiving funding from the Oil Overcharge Program may be required to[~~must~~] match the funds with an equal amount of money from other local sources. The contractor must not use funds received from the following sources for local match:

(1) Oil Overcharge Restitutionary Act;

(2) funds used to match the regular ENTERP[~~EN/TERP~~] allocation.[~~; or~~]

[~~(3) other state funds.~~]

[~~(b) Contractors must not use money from federal sources to provide any portion of local matching money unless, after application by the local unit of government or nonprofit organization, the Office of the Governor specifically approves the use.~~]

(b)[~~(c)~~] Contractors may use local government and nonprofit organization funds for the match.

§5.120. Oil Overcharge Contractor Requirements for Establishing Client Eligibility.

Contractors [~~must give priority for assistance to persons who have recently become unemployed and who do not qualify for other income assistance programs~~]shall use the same criteria included in § 5.109.

§5.121. Oil Overcharge Funding Payment and Reports.

(a) TDHCA[~~DHS~~] makes oil overcharge payments to contractors only on a cost reimbursement basis.

(b) (No change.)

(1) This report must be submitted to the TDHCA[~~DHS~~] contract manager by the 20th[~~15th~~] day following the last day of the month in which service is provided.

(2) This report must be submitted each month whether or not payment is requested[~~because of DHS reporting, accounting, and tracking requirements~~].

(3) If the required billing and statistical documentation have not been received by the 30th day following the last day of the month in which service is provided, TDHCA[~~DHS~~] considers this a failure to comply with contract.

This 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 March 22, 1999.

TRD-9901687
Daisy A. Stiner
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 475–3726

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10 TAC §5.115

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

The Texas Department of Housing and Community Affairs (TDHCA) proposes the repeal of §5.115, concerning Audit Resolution. The section is proposed to be repealed in order to remove unnecessary rules, which apply to a predecessor agency as well as to comply with Section 167, Article IX, of the General Appropriations Act.

Daisy A. Stiner, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Ms. Stiner, Executive Director, has determined that for the first five-year period the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be to permit the adoption of new rules for the Department. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

Comments on the proposal may be submitted to Ms. Anne Paddock, Deputy General Counsel, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711-3941 or by fax 512/475-3978 within 30 days of this notice.

The repeal is proposed pursuant to the authority of the Texas Government Code, Chapter 2306; and Section 167, Article IX, of the General Appropriations Act.

The Texas Administrative Code is affected by this repeal.

§ 5.115. Audit Resolution.

This 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 March 22, 1999.

TRD-9901688
Daisy A. Stiner
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 475–3726

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TITLE 13. CULTURAL RESOURCES

Part II. Texas Historical Commission

Chapter 13. State Cemetery

13 TAC §13.1, §13.2

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

The Texas Historical Commission proposes the repeal of §13.1 and §13.2, State Cemetery, due to a conflict with Texas Government Code, section 2165.256(d), (e), passed by the 75th Texas Legislature and placed into effect September 1, 1997. The 74th Texas Legislature in 1995 gave the Texas Historical Commission a lead role in reviewing applications for burial in the Texas State Cemetery, and agency rules were adopted at that time to codify that role. As a result of actions by the 75th Texas Legislature, the Texas State Cemetery Committee now considers and approves applications for burial. Chapter 13 of the THC's rules is therefore in conflict with the referenced statute and needs to be repealed. The Texas Historical Commission has an ex officio position on the Texas State Cemetery Committee and thereby continues to have a voice in the oversight and preservation of the cemetery, including review of applications for burial, but has no need for rules to that effect.

Frances Rickard, Director of the History Programs Division, has determined that there will be no fiscal implications for state or local government as a result of the repeal of this chapter.

Mrs. Rickard also has determined that the public benefit anticipated as a result of repealing Chapter 13 regarding the State Cemetery is to avoid a direct conflict with language presented in Texas Government Code, Section 2165.256(d), (e), as passed by the 75th Texas Legislature, effective September 1, 1997. There will be no effect on small businesses and no anticipated economic cost to persons who are required to comply with the current statute.

Comments on the proposed rules may be submitted to Frances Rickard, Director of the History Programs Division, Texas Historical Commission, P.O. Box 12276, Austin, TX, 78711. Comments will be accepted for 30 days after publication in the Texas Register.

The repeal is proposed under the Texas Government Code, Chapter 442, Section 442.005(q), which provides the Texas Historical Commission the authority to promulgate rules it considers proper for the effective administration of Texas Government Code, Chapter 442 (Senate Bill 365, 74th Legislature, 1995.)

No other statute, article, or code will be affected by this proposal.

§13.1. Persons Eligible for Burial in the State Cemetery.
§3.2. Application Process for Burial in the State Cemetery.

This 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 March 15, 1999.

TRD-9901605
F. Lawerence Oaks
Executive Director
Texas Historical Commission
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 463–6100

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TITLE 16. ECONOMIC REGULATION

Part II. Public Utility Commission of Texas

Chapter 23. Substantive Rules

Subchapter D. Certification

16 TAC §23.38

The Public Utility Commission of Texas (commission) proposes the repeal of §23.38 relating to Standards for Granting of Certificates of Operating Authority and Service Provider Certificates of Operating Authority. Project Number 19582 has been assigned to this proceeding. The Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167) 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). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. As a result of this reorganization, §23.38 will be duplicative of proposed new §§26.109 relating to Standards for Granting of Certificates of Operating Authority (COAs), 26.111 relating to Standards for Granting of Service Provider Certificates of Operating Authority (SPCOAs), and 26.113 relating to Amendment of Certificates of Operating Authority (COAs) or Service Provider Certificates of Operating Authority (SPCOAs) in Chapter 26, Substantive Rules Applicable to Telecommunications Service Providers.

Christopher Green, Assistant General Counsel, Office of Regulatory Affairs, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. Green has determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repeal will be the elimination of a duplicative rule. There will be no effect on small businesses as a result of repealing this section. There is no anticipated economic cost to persons as a result of repealing this section.

Mr. Green has also determined that the proposed repeal should not affect a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

Comments on the proposed repeal (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 30 days after publication. All comments should refer to Project Number 19582.

This repeal is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002.

§23.38. Standards for Granting of Certificates of Operating Authority and Service Provider Certificates of Operating Authority.

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

Filed with the Office of the Secretary of State on March 22, 1999.

TRD-9901679
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 936-7308

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Subchapter I. Universal Service Fund

16 TAC §§23.131, 23.133, 23.134, 23.136, 23.138, 23.142, 23.143, 23.144, 23.145, 23.147, 23.148, 23.150

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

The Public Utility Commission of Texas (commission) proposes the repeal of §23.131, §23.133, §23.134, §23.136, §23.138, §23.142, §23.143, §23.144, §23.145, §23.147, §23.148 and §23.150 of this title relating to the Universal Service Fund. Project Number 20428 has been assigned to this proceeding. The Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167) 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). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. As a result of this reorganization the Universal Service Fund rules in Chapter 23 will be duplicative of proposed new §26.401, §26.403, §26.404, §26.406, §26.408, §26.412, §26.413, §26.414, §26.415, §26.417, §26.418 and §26.420 relating to the Texas Universal Service Fund (TUSF) in Chapter 26, Substantive Rules Applicable to Telecommunications Service Providers.

Mr. Martin Wilson, assistant general counsel, Office of Regulatory Affairs, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. Wilson has determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as

a result of the repeal will be the elimination of a duplicative rule. There will be no effect on small businesses as a result of repealing this section. There is no anticipated economic cost to persons as a result of repealing this section.

Mr. Wilson has also determined that the proposed repeal should not affect a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

Comments on the proposed repeal (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 30 days after publication. All comments should refer to Project Number 20428.

This repeal is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002.

§23.131. Texas Universal Service Fund (TUSF).

§23.133. Texas High Cost Universal Service Plan (THCUSP).

§23.134. Small and Rural Incumbent Local Exchange Carrier (ILEC) Universal Service Plan.

§23.136. Implementation of the Public Utility Regulatory Act §56.025.

§23.138. Additional Financial Assistance (AFA).

§23.142. Lifeline Service and Link Up Service Programs.

§23.143. Tel-Assistance Service.

§23.144. Telecommunications Relay Service.

§23.145. Specialized Distribution Program.

§23.147. Designation of Local Exchange Carriers as Eligible Telecommunications Providers to Receive Texas Universal Service Funds (TUSF).

§23.148. Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds.

§23.150. Administration of Texas Universal Service Fund (TUSF).

This 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 March 17, 1999.

TRD-9901654
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 936-7308

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Chapter 26. Substantive Rules Applicable to Telecommunications Service Providers

The Public Utility Commission of Texas (commission) proposes an amendment to §26.5 and new §26.401, §26.403, §26.404, §26.406, §26.408, §26.412, §26.413, §26.414, §26.415, §26.417, §26.418 and §26.420 relating to the Texas Universal Service Fund (TUSF). The proposed new sections will replace §23.131, §23.133, §23.134, §23.136, §23.138, §23.142, §23.143, §23.144, §23.145, §23.147, §23.148 and §23.150 of this title. Project Number 20428 has been assigned to this proceeding.

The Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167) 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). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules applicable to telecommunications service providers. The duplicative sections of Chapter 23 will be proposed for repeal as each new section is proposed for publication in the new chapter.

General changes to rule language:

The proposed amendment to §26.5 includes the deletion of two definitions: equipment distribution program and equipment distribution program voucher. The deleted definitions will be replaced with definitions for the Specialized Telecommunications Device Assistance Program (STDAP) and STDAP voucher. There are no substantial changes to the content of the definitions, only to the name of the program.

The proposed new sections reflect different section, subsection, and paragraph designations due to the reorganization of the rules. Citations to other sections of the commission's rules have been updated to reflect the new section designations. Some text has been proposed for deletion as unnecessary in the new sections because the dates and requirements in the text no longer apply due to the passage of time and/or fulfillment of the requirements. Some definitions have been deleted from the specific sections to avoid duplication and can be found in §26.5. The *Texas Register* will publish these sections as all new text. Persons who desire a copy of the proposed new sections as they reflect changes to existing sections in Chapter 23 may obtain a redlined version from the commission's Central Records under Project Number 20428.

Other changes specific to each section:

Proposed new §26.404(e)(1)(A) will replace corresponding §23.134 (e)(1)(A) of this title (relating to the Small and Rural Incumbent Local Exchange Carrier (ILEC) Universal Service Plan). The commission proposes to update the subsection by replacing "Texas Exchange Carrier Association (TECA)" with "Texas Universal Service Fund (TUSF) administrator."

Proposed new §26.415 will replace corresponding §23.145 of this title (relating to the Specialized Equipment Distribution

Program). The commission proposes to change the title of the rule to "Specialized Telecommunications Device Assistance Program (STDAP)" to match the statutory title of the program in the Public Utility Regulatory Act (PURA) §3.611.

Proposed new §26.420(g)(5)(A)(ii) will replace corresponding §23.150(g)(5)(A)(ii) of this title (relating to the Administration of the Texas Universal Service Fund (TUSF)). The commission proposes to clarify the subsection by replacing the word "customers" with "services."

Mr. Martin Wilson, assistant general counsel, Office of Regulatory Affairs, has determined that for each year of the first five-year period the proposed sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Wilson has determined that for each year of the first five years the proposed sections are in effect the public benefit anticipated as a result of enforcing the sections will be to implement a competitively neutral mechanism that enables all residents of the state to obtain the basic telecommunications services needed to communicate with other residents, businesses, and governmental entities. There will be no effect on small businesses as a result of enforcing these sections. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Mr. Wilson has also determined that for each year of the first five years the proposed sections are in effect there should be no affect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

The commission invites specific comments to the following question: Does the phrase "retail customers" as used in PUC Substantive Rule §23.150(g)(5) mean retail customers subject to tax under Tax Code Chapter 151?

Comments on the proposed Texas Universal Service Fund rules (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be filed within 45 days after publication. The commission also invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed sections. The commission will consider the costs and benefits in deciding whether to adopt the sections. The commission also invites specific comments regarding the Section 167 requirement as to whether the reason for adopting or readopting the rule continues to exist. All comments should refer to Project Number 20428.

Subchapter A. General Provisions

16 TAC §26.5

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross-Index to Statutes: Public Utility Regulatory Act §14.002, §56.021, Acts 1997, 75th Legislature, ch. 149, §3.608(a), and Acts 1997, 75th Legislature, ch. 149, §3.611.

§26.5. Definitions.

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

(1)-(76) (No change.)

~~[(77) Equipment distribution program (EDP) - Program to assist individuals who are deaf or hard of hearing or who have an impairment of speech to purchase specialized telecommunications devices for telephone service access, authorized by 1997 Texas General Laws Chapter 149, to be jointly administered by the commission and the Texas Commission for the Deaf and Hard of Hearing.]~~

~~[(78) Equipment distribution program (EDP) voucher - a voucher issued by Texas Commission for the Deaf and Hard of Hearing under the equipment distribution program, in accordance with its rules, that an eligible individual may use to acquire eligible specialized telecommunications devices from a vendor of such equipment.]~~

(77) [~~(79)~~] Exchange area - The geographic territory delineated as an exchange area by official commission boundary maps. An exchange area usually embraces a city or town and its environs. There is usually a uniform set of charges for telecommunications service within the exchange area. An exchange area may be served by more than one central office and/or one certificated telephone utility. An exchange area may also be referred to as an exchange.

(78) [~~(80)~~] Expenses - Costs incurred in the provision of services that are expensed, rather than capitalized, in accordance with the Uniform System of Accounts applicable to the carrier.

(79) [~~(81)~~] Experimental service - A new service that is proposed to be offered on a temporary basis for a specified period not to exceed one year from the date the service is first provided to any customer.

(80) [~~(82)~~] Extended area service (EAS) - A telephone switching and trunking arrangement which provides for optional calling service by dominant certificated telecommunications utilities within a local access and transport area and between two contiguous exchanges or between an exchange and a contiguous metropolitan exchange local calling area. For purposes of this definition, a metropolitan exchange local calling area shall include all exchanges having local or mandatory EAS calling throughout all portions of any of the following exchanges: Austin metropolitan exchange, Corpus Christi metropolitan exchange, Dallas metropolitan exchange, Fort Worth metropolitan exchange, Houston metropolitan exchange, San Antonio metropolitan exchange, or Waco metropolitan exchange. EAS is provided at rate increments in addition to local exchange rates, rather than at toll message charges.

(81) [~~(83)~~] Extended local calling service (ELCS) - Service provided pursuant to §23.49(c) of this title (relating to Telephone Extended Area Service and Expanded Toll-free Local Calling Areas).

(82) [~~(84)~~] Facilities - All the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any public utility, including any construction work in progress allowed by the commission.

(83) [~~(85)~~] Facilities-based provider - A telecommunications provider that provides telecommunications services using facil-

ities that it owns or leases or a combination of facilities that it owns and leases, including unbundled network elements.

(84) [~~(86)~~] Foreign exchange (FX) - exchange service furnished by means of a circuit connecting a customer's station to a primary serving office of another exchange.

(85) [~~(87)~~] Foreign serving office (FSO) - Exchange service furnished by means of a circuit connecting a customer's station to a serving office of the same exchange but outside of the serving office area in which the station is located.

(86) [~~(88)~~] Forward-looking common costs - Economic costs efficiently incurred in providing a group of elements or services that cannot be attributed directly to individual elements or services.

(87) [~~(89)~~] Forward-looking economic cost - The sum of the total element long-run incremental cost of an element and a reasonable allocation of its forward-looking common costs.

(88) [~~(90)~~] Forward-looking economic cost per unit - The forward-looking economic cost of the element as defined in this section, divided by a reasonable projection of the sum of the total number of units of the element that the dominant certificated telephone utility (DCTU) is likely to provide to requesting telecommunications carriers and the total number of units of the element that the DCTU is likely to use in offering its own services, during a reasonable time period.

(89) [~~(91)~~] Geographic scope - The geographic area in which the holder of a Certificate of Operating Authority or of a Service Provider Certificate of Operating Authority is authorized to provide service.

(90) [~~(92)~~] Grade of service - The number of customers a line is designated to serve.

(91) [~~(93)~~] Hearing - Any proceeding at which evidence is taken on the merits of the matters at issue, not including prehearing conferences.

(92) [~~(94)~~] Hearing carryover - A technology that allows an individual who is speech-impaired to hear the other party in a telephone conversation and to use specialized telecommunications devices to send communications through the telecommunications relay service operator.

(93) [~~(95)~~] High cost area - A geographic area for which the costs established using a forward-looking economic cost methodology exceed the benchmark levels established by the commission.

(94) [~~(96)~~] High cost assistance (HCA) - A program administered by the commission in accordance with the provisions of §23.133 of this title (relating to Texas High Cost Universal Service Plan (THCUSP).

(95) [~~(97)~~] Identity - The name, address, telephone number, and/or facsimile number of a person, whether natural, partnership, municipal corporation, cooperative corporation, corporation, association, governmental subdivision, or state agency and the relationship of the person to the entity being represented.

(96) [~~(98)~~] Impulse noise - Any momentary occurrence of the noise on a channel significantly exceeding the normal noise peaks. It is evaluated by counting the number of occurrences that exceed a threshold. This noise degrades voice and data transmission.

(97) [~~(99)~~] Incumbent local exchange company (ILEC) - A local exchange company that had a certificate of convenience and necessity on September 1, 1995.

(98) [~~(100)~~] Information sharing program - Instruction, learning, and training that is transmitted from one site to one or more sites by telecommunications services that are used by a library predominantly for such instruction, learning, or training, including video, data, voice, and electronic information.

(99) [~~(101)~~] Integrated services digital network (ISDN) - a digital network architecture that provides a wide variety of communications services, a standard set of user-network messages, and integrated access to the network. Access methods to the ISDN are the Basic Rate Interface (BRI) and the Primary Rate Interface (PRI).

(100) [~~(102)~~] Interactive multimedia communications - Real-time, two-way, interactive voice, video and data communications conducted over networks that link geographically dispersed locations. This definition includes interactive communications within or between buildings on the same campus or library site.

(101) [~~(103)~~] Intercept service - A service arrangement provided by the local exchange carrier whereby calls placed to a disconnected or discontinued telephone number are intercepted and the calling party is informed by an operator or by a recording that the called telephone number has been disconnected, discontinued, changed to another number, or otherwise is not in service.

(102) [~~(104)~~] Interconnection - Generally means: The point in a network where a customer's transmission facilities interface with the dominant carrier's network under the provisions of this section. More particularily it means: The termination of local traffic (including basic telecommunications service as delineated in §24.32 of this title (Relating to Universal Service) or integrated services digital network (ISDN) as defined in this section and/or extended area service/extended local calling service traffic of a certificated telephone utility (CTU) using the local access lines of another CTU, as described in section §23.97(d)(4)(A)(i) of this title (relating to Interconnection). Interconnection shall include nondiscriminatory access to signaling systems, databases, facilities and information as required to ensure interoperability of networks and efficient, timely provision of services to customers without permitting access to network proprietary information or customer proprietary network information, as defined in §23.57 of this title (relating to Telecommunications Privacy), unless otherwise permitted in §23.97 of this title.

(103) [~~(105)~~] Interconnector - A customer that interfaces with the dominant carrier's network under the provisions of §23.92 of this title (relating to Expanded Interconnection).

(104) [~~(106)~~] Interexchange carrier (IXC) - A carrier providing any means of transporting intrastate telecommunications messages between local exchanges, but not solely within local exchanges, in the State of Texas. The term may include a certificated telecommunications utility (CTU) or CTU affiliate to the extent that it is providing such service. An entity is not an IXC solely because of:

(A) the furnishing, or furnishing and maintenance of a private system;

(B) the manufacture, distribution, installation, or maintenance of customer premises equipment;

(C) the provision of services authorized under the FCC's Public Mobile Radio Service and Rural Radio Service rules; or

(D) the provision of shared tenant service.

(105) [~~(107)~~] Interoffice trunks - Those communications circuits which connect central offices.

(106) [~~(108)~~] IntraLATA equal access - The ability of a caller to complete a toll call in a local access and transport area (LATA) using his or her provider of choice by dialing "1" or "0" plus an area code and telephone number.

(107) [~~(109)~~] Intrastate - Refers to communications which both originate and terminate within Texas state boundaries.

(108) [~~(110)~~] Least cost technology - The technology, or mix of technologies, that would be chosen in the long run as the most economically efficient choice. The choice of least cost technologies, however, shall:

(A) be restricted to technologies that are currently available on the market and for which vendor prices can be obtained;

(B) be consistent with the level of output necessary to satisfy current demand levels for all services using the basic network function in question; and

(C) be consistent with overall network design and topology requirements.

(109) [~~(111)~~] License - The whole or part of any commission permit, certificate, approval, registration, or similar form of permission required by law.

(110) [~~(112)~~] Licensing - The commission process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(111) [~~(113)~~] Lifeline Service - A program certified by the Federal Communications Commission to provide for the reduction or waiver of the federal subscriber line charge for residential consumers.

(112) [~~(114)~~] Line - A circuit or channel extending from a central office to the customer's location to provide telecommunications service. One line may serve one customer, or all customers served by a multiparty line.

(113) [~~(115)~~] Local access and transport area (LATA) - A geographic area established for the provision and administration of communications service. It encompasses one or more designated exchanges, which are grouped to serve common social, economic and other purposes. For purposes of these rules, market areas, as used and defined in the Modified Final Judgment and the GTE Final Judgment, are encompassed in the term local access and transport area.

(114) [~~(116)~~] Local call - A call within the certificated telephone utility's toll- free calling area including calls which are made toll-free through a mandatory extended area service (EAS) or expanded local calling (ELC) proceeding.

(115) [~~(117)~~] Local calling area - The area within which telecommunications service is furnished to customers under a specific schedule of exchange rates. A local calling area may include more than one exchange area.

(116) [~~(118)~~] Local exchange company (LEC) - A telecommunications utility that has been granted either a certificate of convenience and necessity or a certificate of operating authority to provide local exchange telephone service, basic local telecommunications service, or switched access service within the state. A local exchange company is also referred to as a local exchange carrier.

(117) [~~(119)~~] Local exchange telephone service or local exchange service - A telecommunications service provided within an exchange to establish connections between customer premises within the exchange, including connections between a customer premises and a long distance provider serving the exchange. The term includes tone dialing service, service connection charges, and directory assistance services offered in connection with basic local telecommunications service and interconnection with other service providers. The term does not include the following services, whether offered on an intraexchange or interexchange basis:

(A) central office based PBX-type services for systems of 75 stations or more;

(B) billing and collection services;

(C) high-speed private line services of 1.544 megabits or greater;

(D) customized services;

(E) private line or virtual private line services;

(F) resold or shared local exchange telephone services if permitted by tariff;

(G) dark fiber services;

(H) non-voice data transmission service offered as a separate service and not as a component of basic local telecommunications service;

(I) dedicated or virtually dedicated access services;

(J) a competitive exchange service; or

(K) any other service the commission determines is not a "local exchange telephone service."

(118) [~~(120)~~] Local message - A completed call between customer access lines located within the same local calling area.

(119) [~~(121)~~] Local message charge - The charge that applies for a completed telephone call that is made when the calling customer access line and the customer access line to which the connection is established are both within the same local calling area, and a local message charge is applicable.

(120) [~~(122)~~] Local service charge - The charge for furnishing facilities to enable a customer to send or receive telecommunications within the local calling area. This local calling area may include more than one exchange area.

(121) [~~(123)~~] Local telecommunications traffic -

(A) Telecommunications traffic between a dominant certificated telecommunications utility (DCTU) and a telecommunications carrier other than a commercial mobile radio service (CMRS) provider that originates and terminates within the mandatory single or multi-exchange local calling area of a DCTU including the mandatory extended area service (EAS) areas served by the DCTU; or

(B) Telecommunications traffic between a DCTU and a CMRS provider that, at the beginning of the call, originates and terminates within the same major trading area.

(122) [~~(124)~~] Long distance telecommunications service - That part of the total communication service rendered by a telecommunications utility which is furnished between customers in different local calling areas in accordance with the rates and regulations specified in the utility's tariff.

(123) [~~(125)~~] Long run - A time period long enough to be consistent with the assumption that the company is in the planning stage and all of its inputs are variable and avoidable.

(124) [~~(126)~~] Long run incremental cost (LRIC) - The change in total costs of the company of producing an increment of output in the long run when the company uses least cost technology. The LRIC should exclude any costs that, in the long run, are not brought into existence as a direct result of the increment of output.

(125) [~~(127)~~] Mandatory minimum standards - The standards established by the Federal Communications Commission, outlining basic mandatory telecommunication relay services.

(126) [~~(128)~~] Meet point billing - An access billing arrangement for services to access customers when local transport is jointly provided by more than one certificated telecommunications utility. In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates.

(127) [~~(129)~~] Message - A completed customer telephone call.

(128) [~~(130)~~] Message rate service - A form of local exchange service under which all originated local messages are measured and charged for in accordance with the utility's tariff.

(129) [~~(131)~~] Minor change - A change, including the restructuring of rates of existing services, that decreases the rates or revenues of the small local exchange company (SLEC) or that, together with any other rate or proposed or approved tariff changes in the 12 months preceding the date on which the proposed change will take effect, results in an increase of the SLEC's total regulated intrastate gross annual revenues by not more than 5.0%. Further, with regard to a change to a basic local access line rate, a minor change may not, together with any other change to that rate that went into effect during the 12 months preceding the proposed effective date of the proposed change, result in an increase of more than 10%.

(130) [~~(132)~~] Municipality - A city, incorporated village, or town, existing, created, or organized under the general, home rule, or special laws of the state.

(131) [~~(133)~~] National integrated services digital network (ISDN) - the standards and services promulgated for integrated services digital network by Bellcore.

(132) [~~(134)~~] Negotiating party - A certificated telecommunications utility (CTU) or other entity with which a requesting CTU seeks to interconnect in order to complete all telephone calls made by or placed to a customer of the requesting CTU.

(133) [~~(135)~~] New service - Any service not offered on a tariffed basis prior to the date of the application relating to such service and specifically excludes basic local telecommunications service including local measured service. If a proposed service could serve as an alternative or replacement for a service offered prior to the date of the new-service application and does not provide significant improvements (other than price) over, or significant additional services not available under, a service offered prior to the date of such application, it shall not be considered a new service.

(134) [~~(136)~~] Non-discriminatory - Type of treatment that is not less favorable than that an interconnecting certificated telecommunications utility (CTU) provides to itself or its affiliates or other CTUs.

(135) [~~(137)~~] Non-dominant certificated telecommunications utility (NCTU) - A certificated telecommunications utility (CTU) that is not a dominant certificated telecommunications utility (DCTU) and has been granted a certificate of convenience and necessity (CCN) (after September 1, 1995, in an area already certificated to a DCTU), a certificate of operating authority (COA), or a service provider certificate of operating authority (SPCOA) to provide local exchange service.

(136) [~~(138)~~] Nondominant carrier -

(A) An interexchange telecommunications carrier (including a reseller of interexchange telecommunications services).

(B) Any of the following that is not a dominant carrier:

(i) a specialized communications common carrier;

(ii) any other reseller of communications;

(iii) any other communications carrier that conveys, transmits, or receives communications in whole or in part over a telephone system; or

(iv) a provider of operator services that is not also a subscriber.

(137) [~~(139)~~] Open network architecture - The overall design of an incumbent local exchange company's (ILEC's) network facilities and services to permit all users of the network, including the enhanced services operations of an ILEC and its competitors, to interconnect to specific basic network functions on an unbundled and non-discriminatory basis.

(138) [~~(140)~~] Operator service - Any service using live operator or automated operator functions for the handling of telephone service, such as local collect, toll calling via collect, third number billing, credit card, and calling card services. The transmission of "1-800" and "1-888" numbers, where the called party has arranged to be billed, is not operator service.

(139) [~~(141)~~] Operator service provider (OSP) - Any person or entity that provides operator services by using either live or automated operator functions. When more than one entity is involved in processing an operator service call, the party setting the rates shall be considered to be the OSP. However, subscribers to customer-owned pay telephone service shall not be deemed to be OSPs.

(140) [~~(142)~~] Originating line screening (OLS) - A two digit code passed by the local switching system with the automatic number identification (ANI) at the beginning of a call that provides information about the originating line.

(141) [~~(143)~~] Out-of-service trouble report - An initial customer trouble report in which there is complete interruption of incoming or outgoing local exchange service. On multiple line services a failure of one central office line or a failure in common equipment affecting all lines is considered out of service. If an extension line failure does not result in the complete inability to receive or initiate calls, the report is not considered to be out of service.

(142) [~~(144)~~] Partial deregulation - The ability of a cooperative to offer new services on an optional basis and/or change its rates and tariffs under the provisions of the Public Utility Regulatory Act, §§53.351 - 53.359.

(143) [~~(145)~~] Pay-per-call-information services - Services that allow a caller to dial a specified 1-900-XXX-XXXX or 976-XXXX number. Such services routinely deliver, for a predetermined (sometimes time-sensitive) fee, a pre- recorded or live message or interactive program. Usually a telecommunications utility will transport the call and bill the end-user on behalf of the information provider.

(144) [~~(146)~~] Pay telephone access service (PTAS) - A service offered by a certificated telecommunications utility which provides a two-way, or optionally, a one-way originating-only business access line composed of the serving central office line equipment, all outside plant facilities needed to connect the serving central office with the customer premises, and the network interface; this service is sold to pay telephone service providers.

(145) [~~(147)~~] Pay telephone service (PTS) - A telecommunications service utilizing any coin, coinless, credit card reader, or cordless instrument that can be used by members of the general public, or business patrons, employees, and/or visitors of the premise's owner, provided that the end user pays for local or toll calls from such instrument on a per call basis. Pay per call telephone service provided to inmates of confinement facilities is PTS. For purposes of this section, coinless telephones provided in guest rooms by a hotel/motel are not pay telephones. A telephone that is primarily used by business patrons, employees, and/or visitors of the premise's owner is not a pay telephone if all local calls and "1-800" and "1-888" type calls from such telephone are free to the end user.

(146) [~~(148)~~] Per-call blocking - A telecommunications service provided by a telecommunications provider that prevents the transmission of calling party information to a called party on a call-by-call basis.

(147) [~~(149)~~] Per-line blocking - A telecommunications service provided by a telecommunications utility that prevents the transmission of calling party information to a called party on every call, unless the calling party acts affirmatively to release calling party information.

(148) [~~(150)~~] Percent interstate usage (PIU) - An access customer-specific ratio or ratios determined by dividing interstate access minutes by total access minutes. The specific ratio shall be determined by the certificated telecommunications utility (CTU) unless the CTU's network is incapable of determining the jurisdiction of the access minutes. A PIU establishes the jurisdiction of switched access usage for determining rates charged to switched access customers and affects the allocation of switched access revenue and costs by CTUs between the interstate and intrastate jurisdictions. In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates.

(149) [~~(151)~~] Person - Any natural person, partnership, municipal corporation, cooperative corporation, corporation, association, governmental subdivision, or public or private organization of any character other than an agency.

(150) [~~(152)~~] Pleading - A written document submitted by a party, or a person seeking to participate in a proceeding, setting forth allegations of fact, claims, requests for relief, legal argument, and/or other matters relating to a proceeding.

(151) [~~(153)~~] Prepaid local telephone service (PLTS) - Prepaid local telephone service means:

(A) voice grade dial tone residential service consisting of flat rate service or local measured service, if chosen by the customer and offered by the dominant certificated telecommunications utility (DCTU);

(B) if applicable, mandatory services, including extended area service, extended metropolitan service, or expanded local calling service;

(C) tone dialing service;

(D) access to 911 service;

(E) access to dual party relay service;

(F) the ability to report service problems seven days a week;

(G) access to business office;

(H) primary directory listing;

(I) toll blocking service; and

(J) non-published service and non-listed service at the customer's option.

(152) [~~(154)~~] Premises - A tract of land or real estate including buildings and other appurtenances thereon.

(153) [~~(155)~~] Pricing flexibility - Discounts and other forms of pricing flexibility may not be preferential, prejudicial, or discriminatory. Pricing flexibility includes:

(A) customer specific contracts;

(B) volume, term, and discount pricing;

(C) zone density pricing;

(D) packaging of services; and

(E) other promotional pricing flexibility.

(154) [~~(156)~~] Primary interexchange carrier (PIC) - The provider chosen by a customer to carry that customer's toll calls.

(155) [~~(157)~~] Primary interexchange carrier (PIC) freeze indicator - An indicator that the end user has directed the certificated telecommunications utility to make no changes in the end user's PIC.

(156) [~~(158)~~] Primary rate interface (PRI) integrated services digital network (ISDN) - One of the access methods to ISDN, the 1.544-Mbps PRI comprises either twenty-three 64 Kbps B-channels and one 64 Kbps D-channel (23B+D) or twenty-four 64 Kbps B-channels (24B) when the associated call signaling is provided by another PRI in the group.

(157) [~~(159)~~] Primary service - The initial provision of voice grade access between the customer's premises and the switched telecommunications network. This includes the initial connection to a new customer or the move of an existing customer to a new premises but does not include complex services.

(158) [~~(160)~~] Print translations - The temporary storage of a message in an operator's screen during the actual process of relaying a conversation.

(159) [~~(161)~~] Privacy issue - An issue that arises when a telecommunications provider proposes to offer a new telecommunications service or feature that would result in a change in the outflow of information about a customer. The term privacy issue is to be construed broadly. It includes, but is not limited to, changes in the following:

(A) the type of information about a customer that is released;

(B) the customers about whom information is released;

(C) the entity or entities to whom the information about a customer is released;

(D) the technology used to convey the information;

(E) the time at which the information is conveyed; and

(F) any other change in the collection, use, storage, or release of information.

(160) [~~(162)~~] Private line - A transmission path that is dedicated to a customer and that is not connected to a switching facility of a telecommunications utility, except that a dedicated transmission path between switching facilities of interexchange carriers shall be considered a private line.

(161) [~~(163)~~] Proceeding - A hearing, investigation, inquiry, or other procedure for finding facts or making a decision. The term includes a denial of relief or dismissal of a complaint. It may be rulemaking or nonrulemaking; rate setting or non-rate setting.

(162) [~~(164)~~] Promotional rate - A temporary tariff, fare, toll, rental or other compensation charged by a certificated telecommunications utility (DCTU) to new or new and existing customers and designed to induce customers to test a service. A promotional rate shall incorporate a reduction or a waiver of some rate element in the tariffed rates of the service, or a reduction or waiver of the service's installation charge and/or service connection charges, and shall not incorporate any charge for discontinuance of the service by the customer. Such rates may not be offered for basic local telecommunications service, including local measured service.

(163) [~~(165)~~] Provider of pay telephone service - The entity that purchases pay telephone access service (PTAS) from a certificated telecommunications utility (CTU) and registers with the Public Utility Commission as a provider of pay telephone service (PTS) to end users.

(164) [~~(166)~~] Public utility or utility - A person or river authority that owns or operates for compensation in this state equipment or facilities to convey, transmit, or receive communications over a telephone system as a dominant carrier. The term includes a lessee, trustee, or receiver of any of those entities, or a combination of those entities. The term does not include a municipal corporation. A person is not a public utility solely because the person:

(A) furnishes or furnishes and maintains a private system;

(B) manufactures, distributes, installs, or maintains customer premise communications equipment and accessories; or

(C) furnishes a telecommunications service or commodity only to itself, its employees, or its tenants as an incident of employment or tenancy, if that service or commodity is not resold to or used by others.

(165) [~~(167)~~] Public Utility Regulatory Act (PURA) - The enabling statute for the Public Utility Commission of Texas, located in the Texas Utilities Code Annotated, §§11.001 - 63.063, (Vernon 1998).

(166) [~~(168)~~] Qualifying low-income consumer - A consumer that participates in one of the following programs: Medicaid, food stamps, Supplemental Security Income, federal public housing assistance, or Low-Income Home Energy Assistance Program.

(167) [~~(169)~~] Qualifying services -

(A) residential flat rate basic local exchange service;

(B) residential local exchange access service; and

(C) residential local area calling usage.

(168) [~~(170)~~] Rate - Includes:

(A) any compensation, tariff, charge, fare, toll, rental, or classification that is directly or indirectly demanded, observed, charged, or collected by a public utility for a service, product, or commodity, described in the definition of utility in the Public Utility Regulatory Act §§31.002 or 51.002; and

(B) a rule, practice, or contract affecting the compensation, tariff, charge, fare, toll, rental, or classification.

(169) [~~(171)~~] Reciprocal compensation - An arrangement between two carriers in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

(170) [~~(172)~~] Reclassification area - The geographic area within the electing ILEC's territory, consisting of one or more exchange areas, for which it seeks reclassification of a service.

(171) [~~(173)~~] Redirect the call - A procedure used by operator service providers (OSPs) that transmits a signal back to the originating telephone instrument that causes the instrument to disconnect the OSP's connection and to redial the digits originally dialed by the caller directly to the local exchange carrier's network.

(172) [~~(174)~~] Regulatory authority - In accordance with the context where it is found, either the commission or the governing body of a municipality.

(173) [~~(175)~~] Relay Texas Advisory Committee (RTAC) - The committee authorized by the Public Utility Regulatory Act, §56.110 and 1997 Texas General Laws Chapter 149.

(174) [~~(176)~~] Relay Texas - The name by which telecommunications relay service in Texas is known.

(175) [~~(177)~~] Relay Texas administrator - The individual employed by the commission to oversee the administration of statewide telecommunications relay service.

(176) [~~(178)~~] Repeated trouble report - A customer trouble report regarding a specific line or circuit occurring within 30 days or one calendar month of a previously cleared trouble report on the same line or circuit.

(177) [~~(179)~~] Residual charge - The per-minute charge designed to account for historical contribution to joint and common costs made by switched transport services.

(178) [~~(180)~~] Retail service - A telecommunications service is considered a retail service when it is provided to residential or business end users and the use of the service is other than resale. Each tariffed or contract offering which a customer may purchase to the exclusion of other offerings shall be considered a service. For example: the various mileage bands for standard toll services are rate elements, not services; however, individual optional calling plans that can be purchased individually and which are offered as alternatives to each other are services, not rate elements.

(179) [~~(181)~~] Return-on-assets - After-tax net operating income divided by total assets.

(180) [~~(182)~~] Reversal of partial deregulation - The ability of a minimum of 10% of the members of a partially deregulated cooperative to request, in writing, that a vote be conducted to determine whether members prefer to reverse partial deregulation. Ten percent shall be calculated based upon the total number of members of record as of the calendar month preceding receipt of the request from members for reversal of partial deregulation.

(181) [~~(183)~~] Rule - A statement of general applicability that implements, interprets, or prescribes law or policy, or describes

the procedure or practice requirements of the commission. The term includes the amendment or repeal of a prior rule but does not include statements concerning only the internal management or organization of the commission and not affecting private rights or procedures.

(182) [~~(184)~~] Rulemaking proceeding - A proceeding conducted pursuant to the Administrative Procedure Act, Texas Government Code, §§2001.021 - 2001.037 to adopt, amend, or repeal a commission rule.

(183) [~~(185)~~] Rural incumbent local exchange company (ILEC) - An ILEC that qualifies as a "rural telephone company" as defined in 47 United States Code §3(37) and/or 47 United States Code §251(f)(2).

(184) [~~(186)~~] Separation - The division of plant, revenues, expenses, taxes, and reserves applicable to exchange or local service if these items are used in common to provide public utility service to both local exchange telephone service and other service, such as interstate or intrastate toll service.

(185) [~~(187)~~] Service - Has its broadest and most inclusive meaning. The term includes any act performed, anything supplied, and any facilities used or supplied by a public utility in the performance of the utility's duties under the Public Utility Regulatory Act to its patrons, employees, other public utilities, and the public. The term also includes the interchange or facilities between two or more public utilities. The term does not include the printing, distribution, or sale of advertising in a telephone directory.

(186) [~~(188)~~] Service connection charge - A charge designed to recover the costs of non-recurring activities associated with connection of local exchange telephone service.

(187) [~~(189)~~] Service provider certificate of operating authority (SPCOA) reseller - A holder of a service provider certificate of operating authority that uses only resold telecommunications services provided by an incumbent local exchange company (ILEC) or by a certificate of operating authority (COA) holder or by a service provider certificate of operating authority (SPCOA) holder.

(188) [~~(190)~~] Service restoral charge - A charge applied by the DCTU to restore service to a customer's telephone line after it has been suspended by the DCTU.

(189) [~~(191)~~] Serving wire center (SWC) - The certificated telecommunications utility designated central office which serves the access customer's point of demarcation. In Chapter 23 of this title, this term is applicable only to dominant certificated telecommunications utilities when the context clearly indicates.

(190) [~~(192)~~] Signaling for tandem switching - The carrier identification code (CIC) and the OZZ code or equivalent information needed to perform tandem switching functions. The CIC identifies the interexchange carrier and the OZZ digits identify the call type and thus the interexchange carrier trunk to which traffic should be routed.

(191) [~~(193)~~] Small certificated telecommunications utility (CTU) - A CTU with fewer than 2.0% of the nation's subscriber lines installed in the aggregate nationwide.

(192) [~~(194)~~] Small local exchange company (SLEC) - Any incumbent certificated telecommunications utility as of September 1, 1995, that has fewer than 31,000 access lines in service in this state, including the access lines of all affiliated incumbent local exchange companies within the state, or a telephone cooperative organized pursuant to the Telephone Cooperative Act, Texas Utilities Code Annotated, Chapter 162.

(193) [~~(195)~~] Small incumbent local exchange company (Small ILEC) - An incumbent local exchange company that is a cooperative corporation or has, together with all affiliated incumbent local exchange companies, fewer than 31,000 access lines in service in Texas.

(194) [~~(196)~~] Spanish speaking person - a person who speaks any dialect of the Spanish language exclusively or as their primary language.

(195) [~~(197)~~] Special access - A transmission path connecting customer designated premises to each other either directly or through a hub or hubs where bridging, multiplexing or network reconfiguration service functions are performed and includes all exchange access not requiring switching performed by the dominant carrier's end office switches.

(196) Specialized Telecommunications Device Assistance Program (STDAP) - The program described in Substantive Rule §26.415 of this title (relating to Specialized Telecommunications Device Assistance Program).

(197) Specialized Telecommunications Device Assistance Program (STDAP) voucher - A voucher issued by the Texas Commission for the Deaf and Hard of Hearing under the equipment distribution program, in accordance with its rules, that an eligible individual may use to acquire eligible specialized telecommunications devices from a vendor of such equipment.

(198)-(209) (No change.)

~~[(210) Texas Universal Service Fund (TUSF) - The fund authorized by the Public Utility Regulatory Act, §56.021 and 1997 Texas General Laws Chapter 149.]~~

(210) [~~(211)~~] Telecommunications relay service (TRS) - A service using oral and print translations by either live or automated means between individuals who are hearing-impaired or speech-impaired who use specialized telecommunications devices and others who do not have such devices. Unless specified in the text, this term shall refer to intrastate telecommunications relay service only.

(211) [~~(212)~~] Telecommunications relay service (TRS) carrier - The telecommunications carrier selected by the commission to provide statewide telecommunications relay service.

(212) [~~(213)~~] Telecommunications utility -

(A) a public utility;

(B) an interexchange telecommunications carrier, including a reseller of interexchange telecommunications services;

(C) a specialized communications common carrier;

(D) a reseller of communications;

(E) a communications carrier who conveys, transmits, or receives communications wholly or partly over a telephone system;

(F) a provider of operator services as defined by §55.081, unless the provider is a subscriber to customer-owned pay telephone service; and

(G) a separated affiliate or an electronic publishing joint venture as defined in the Public Utility Regulatory Act, Chapter 63.

(213) [~~(214)~~] Telephones intended to be utilized by the public - Telephones that are accessible to the public, including, but not limited to, pay telephones, telephones in guest rooms and common

areas of hotels, motels, or other lodging locations, and telephones in hospital patient rooms.

(214) [~~(215)~~] Telephone solicitation - An unsolicited telephone call.

(215) [~~(216)~~] Telephone solicitor - A person who makes or causes to be made a consumer telephone call, including a call made by an automatic dialing/announcing device.

(216) [~~(217)~~] Test year - The most recent 12 months, beginning on the first day of a calendar or fiscal year quarter, for which operating data for a public utility are available.

(217) Texas Universal Service Fund (TUSF) - The fund authorized by the Public Utility Regulatory Act, §56.021 and 1997 Texas General Laws Chapter 149.

(218)-(237) (No change.)

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

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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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Subchapter P. Texas Universal Service Fund

16 TAC §§26.401, 26.403, 26.404, 26.406, 26.408, 26.412-26.415, 26.417, 26.418, 26.420

These sections are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, PURA §56.021, which requires the commission to adopt and enforce rules requiring local exchange carriers to establish a universal service fund.

Cross-Index to Statutes: Public Utility Regulatory Act §14.002, §56.021, Acts 1997, 75th Legislature, ch. 149, §3.608(a), and Acts 1997, 75th Legislature, ch. 149, §3.611.

§26.401. Texas Universal Service Fund (TUSF).

(a) Purpose. The purpose of the Texas Universal Service Fund is to implement a competitively neutral mechanism that enables all residents of the state to obtain the basic telecommunications services needed to communicate with other residents, businesses, and governmental entities. Because targeted financial support may be needed in order to provide and price basic telecommunications services in a manner to allow accessibility by consumers, the TUSF will assist local exchange companies (LECs) in providing basic local telecommunications service at reasonable rates in high cost rural areas. In addition, the TUSF will reimburse qualifying entities for revenues lost as a result of providing Lifeline, Link Up and Tel-assistance services to qualifying low-income consumers under the Public Utility Regulatory Act (PURA); reimburse telecommunications carriers providing statewide telecommunications relay access service and qualified vendors providing specialized telecommunications device distribution service for the hearing- impaired and speech-impaired; and reimburse the Texas Department of Human Services, the Texas Department for the Deaf and Hard of Hearing, the TUSF administrator, and the Public Utility Commission for costs incurred in implementing the provisions of PURA Chapter 56 (relating to Telecommunications Assistance and Universal Service Fund).

(b) Programs included in the TUSF.

(1) Section 26.403 of this title (relating to the Texas High Cost Universal Service Plan (THCUSP));

(2) Section 26.404 of this title (relating to the Small and Rural Incumbent Local Exchange Company (ILEC) Universal Service Plan);

(3) Section 26.406 of this title (relating to the Implementation of the Public Utility Regulatory Act §56.025);

(4) Section 26.408 of this title (relating to Additional Financial Assistance (AFA));

(5) Section 26.412 of this title (relating to Lifeline and Link Up Service);

(6) Section 26.413 of this title (relating to Tel-Assistance Service);

(7) Section 26.414 of this title (relating to Telecommunications Relay Service);

(8) Section 26.415 of this title (relating to Specialized Telecommunications Device Assistance Program (STDAP);

(9) Section 26.417 of this title (relating to Designation of Local Exchange Companies as Eligible Telecommunications Providers to Receive Texas Universal Service Funds (TUSF));

(10) Section 26.418 of this title (relating to Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds (FUSF)); and

(11) Section 26.420 of this title (relating to Administration of the Texas Universal Service Fund (TUSF)).

§26.403. Texas High Cost Universal Service Plan (THCUSP).

(a) Purpose. This section establishes guidelines for financial assistance to eligible telecommunications providers (ETPs) that serve the high cost rural areas of the state, other than study areas of small and rural incumbent local exchange companies (ILECs), so that basic local telecommunications service may be provided at reasonable rates in a competitively neutral manner.

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

(1) Benchmark - The per-line amount above which THCUSP support will be provided.

(2) Business line - The telecommunications facilities providing the communications channel that serves a single-line business customer's service address. For the purpose of this definition, a single-line business line is one to which multi-line hunting, trunking, or other special capabilities do not apply.

(3) Eligible line - A residential line and a single-line business line over which an ETP provides the service supported by the THCUSP through its own facilities, purchase of unbundled network elements (UNEs), or a combination of its own facilities and purchase of UNEs.

(4) Eligible telecommunications provider (ETP) - A local exchange company (LEC) designated by the commission pursuant

to §26.417 of this title (relating to Designation of Local Exchange Carriers as Eligible Telecommunications Providers to Receive Texas Universal Service Funds (TUSF)).

(5) Residential line - The telecommunications facilities providing the communications channel that serves a residential customer's service address. For the purpose of this definition, a residential line is one to which multi-line hunting, trunking, or other special capabilities do not apply.

(c) Application. This section applies to LECs that have been designated ETPs by the commission pursuant to §26.417 of this title.

(d) Service to be supported by the THCUSP. The THCUSP shall support basic local telecommunications services provided by an ETP in high cost rural areas of the state and is limited to those services carried on all flat rate residential lines and the first five flat rate single-line business lines at a business customer's location. Local measured residential service, if chosen by the customer and offered by the ETP, shall also be supported.

(1) Initial determination of the definition of basic local telecommunications service. Local telecommunications service shall consist of the following:

(A) flat rate, single party residential and business local exchange telephone service, including primary directory listings;

(B) tone dialing service;

(C) access to operator services;

(D) access to directory assistance services;

(E) access to 911 service where provided by a local authority;

(F) dual party relay service;

(G) the ability to report service problems seven days a week;

(H) availability of an annual local directory;

(I) access to toll services; and

(J) lifeline and tel-assistance services.

(2) Subsequent determinations.

(A) Timing of subsequent determinations.

(i) The definition of the services to be supported by the THCUSP shall be reviewed by the commission every three years from February 10, 1998.

(ii) The commission may initiate a review of the definition of the services to be supported on its own motion at any time.

(B) Criteria to be considered in subsequent determinations. In evaluating whether services should be added to or deleted from the list of supported services, the commission may consider the following criteria:

(i) the service is essential for participation in society;

(ii) a substantial majority, 75% of residential customers, subscribe to the service;

(iii) the benefits of adding the service outweigh the costs; and

(iv) the availability of the service, or subscription levels, would not increase without universal service support.

(e) Criteria for determining amount of support under THCUSP. The TUSF administrator shall disburse monthly support payments to ETPs qualified to receive support pursuant to this section. The amount of support available to each ETP shall be calculated using the base support amount available as provided under paragraph (1) of this subsection as adjusted by the requirements of paragraph (4) of this subsection.

(1) Determining base support amount available to ETPs. The monthly per-line support amount available to each ETP shall be determined by comparing the forward-looking economic cost, computed pursuant to subparagraph (A) of this paragraph, to the applicable benchmark as determined pursuant to subparagraph (B) of this paragraph. The monthly base support amount is the sum of the monthly per-line support amounts for each eligible line served by the ETP, as required by subparagraph (C) of this paragraph.

(A) Calculating the forward-looking economic cost of service. The monthly cost per-line of providing the basic local telecommunications services and other services included in the benchmark shall be calculated using a forward-looking economic cost methodology.

(B) Determination of the benchmark. The commission shall establish two benchmarks for the state, one for residential service and one for single-line business service. The benchmarks for both residential and single-line businesses will be calculated using the statewide average revenue per line as described in clause (i) and (ii) of this subparagraph for all ETPs participating in the THCUSP.

(i) Residential revenues per line are the sum of the residential revenues generated by basic and discretionary local services, as well as a reasonable portion of toll and access services, for the year ending December 31, 1997, divided by the average number of residential lines served for the same period, divided by 12.

(ii) Business revenues per line are the sum of the business revenues generated by basic and discretionary local services for single-line business lines, as well as a reasonable portion of toll and access services for the year ending December 31, 1997, divided by the average number of single-line business lines served for the same period, divided by 12.

(C) Support under the THCUSP is portable with the consumer. An ETP shall receive support for residential and the first five single-line business lines at the business customer's location that it is serving over eligible lines in such ETP's THCUSP service area.

(2) Proceedings to determine THCUSP base support.

(A) Timing of determinations.

(i) The commission shall review the forward-looking cost methodology, the benchmark levels, and/or the base support amounts every three years from February 10, 1998.

(ii) The commission may initiate a review of the forward-looking cost methodology, the benchmark levels, and/or the base support amounts on its own motion at any time.

(B) Criteria to be considered in determinations. In considering the need to make appropriate adjustments to the forward-looking cost methodology, the benchmark levels, and/or the base support amount, the commission may consider current retail rates and revenues for basic local service, growth patterns, and income levels in low-density areas.

(3) Calculating amount of THCUSP support payments to individual ETPs. After the monthly base support amount is determined, the TUSF administrator shall make the following adjustments each month in order to determine the actual support payment that each ETP may receive each month.

(A) Access revenues adjustment. If an ETP is an ILEC that has not reduced its rates pursuant to §26.417 of this title, the base support amount that such ETP is eligible to receive shall be decreased by such ETP's carrier common line (CCL), residual interconnection charge (RIC), and toll revenues for the month.

(B) Adjustment for federal USF support. The base support amount an ETP is eligible to receive shall be decreased by the amount of federal universal service high cost support received by the ETP.

(C) Adjustment for service provided solely through the purchase of unbundled network elements (UNEs). If an ETP provides supported services over an eligible line solely through the purchase of UNEs, the commission shall determine the manner in which any THCUSP support for such eligible line may be allocated between the ETP providing service to the end user and the ETP providing the UNEs.

(f) Reporting requirements. An ETP eligible to receive support pursuant to this section shall report the following information to the commission or the TUSF administrator.

(1) Monthly reporting requirements. An ETP shall report the following to the TUSF administrator on a monthly basis:

(A) information regarding the access lines on the ETP's network including:

(i) the total number of access lines on the ETP's network,

(ii) the total number of access lines sold as UNEs,

(iii) the total number of access lines sold for total service resale,

(iv) the total number of access lines serving end use customers, and

(v) the total number of eligible lines for which the ETP seeks TUSF support;

(B) the rate that the ETP is charging for residential and single-line business customers for the services described in subsection (d) of this section; and

(C) a calculation of the base support computed in accordance with the requirements of subsection (e)(1) of this section showing the effects of the adjustments required by subsection (e)(3) of this section.

(2) Annual reporting requirements. An ETP shall report annually to the TUSF administrator that it is qualified to participate in the THCUSP.

(3) Other reporting requirements. An ETP shall report any other information that is required by the commission or the TUSF administrator.

(g) Review of THCUSP after implementation of federal universal service support. The commission shall initiate a project to review the THCUSP within 90 days of the Federal Communications Commission's adoption of an order implementing new or amended federal universal service support rules for rural, insular, and high cost areas.

§26.404. Small and Rural Incumbent Local Exchange Company (ILEC) Universal Service Plan.

(a) Purpose. This section establishes guidelines for financial assistance to eligible telecommunications providers (ETPs) that provide service in the study areas of rural ILECs areas and small ILECs' areas in the state so that basic local telecommunications service may be provided at reasonable rates in a competitively neutral manner.

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

(1) Eligible line - A residential line and a single-line business line over which an ETP provides the service supported by the Small and Rural ILEC Universal Service Plan through its own facilities, purchase of unbundled network elements (UNEs), or a combination of its own facilities and purchase of UNEs.

(2) Eligible telecommunications provider (ETP) - A telecommunications provider designated by the commission pursuant to §26.417 of this title (relating to the Designation of Local Exchange Companies as Eligible Telecommunications Providers to Receive Texas Universal Service Funds (TUSF)).

(3) Small incumbent local exchange company (ILEC) - An ILEC that qualifies as a "small local exchange company" as defined in the Public Utility Regulatory Act, §53.304(a)(1).

(4) Test year - The fiscal year ending in 1997.

(c) Application.

(1) Small or rural ILECs. This section applies to small ILECs and rural ILECs, as defined in subsection (b) of this section and/or §26.5 of this title (relating to Definitions), that have been designated ETPs by the commission pursuant to §26.417 of this title.

(2) Other ETPs providing service in small or rural ILEC study areas. This section applies to LECs other than small or rural ILECs that provide service in small or rural ILEC study areas that have been designated ETPs by the commission pursuant to §26.417 of this title.

(d) Service to be supported by the Small and Rural ILEC Universal Service Plan. The Small and Rural ILEC Universal Service Plan shall support the provision by ETPs of basic local telecommunications service as defined in §26.403(d) of this title (relating to the Texas High Cost Universal Service Plan (THCUSP)).

(e) Small and Rural ILEC Universal Service Plan monthly per-line support. A monthly per-line amount of support for each small or rural ILEC study area shall be determined in a one-time calculation using data from such small or rural ILEC's test year that has been audited by an independent auditor in conformance with generally accepted accounting principles (GAAP).

(1) Calculation of the monthly per-line amount of support for each small or rural ILEC. The toll pool amounts and access/toll revenue reductions determined in accordance with subparagraphs (A) and (B) of this paragraph shall be added together. To calculate the per-line amount of support, the resulting sum will then be divided by the average number of eligible lines served by such small or rural ILEC during the test year. To calculate the monthly per-line amount of support, the result shall be divided by 12.

(A) Toll pool amounts. The toll pool amount for a small or rural ILEC shall be determined by subtracting the actual toll billed by the small or rural ILEC during the test year from its toll

pool revenue requirement for the test year, as certified by the Texas Universal Service Fund (TUSF) administrator.

(B) Access/toll revenue reduction. At the time this section is implemented, a small or rural ILEC may reduce carrier common line (CCL), residual interconnection charge (RIC), and/or intraLATA toll rates. Upon commission approval a small or rural ILEC may recover a reasonable amount of the difference between the previous rates and the new rates, computed on the basis of minutes of use in the test year. This amount is calculated by multiplying the difference between the previous rates and the new rates by the test year minutes of use.

(2) Freeze on support levels. The per-line amount of support calculated in paragraph (1) of this subsection shall remain constant as long as the small or rural ILEC is eligible to receive funds pursuant to this section.

(f) Small and Rural ILEC Universal Service Plan support payments to ETPs. The TUSF administrator shall disburse monthly support payments to ETPs qualified to receive support pursuant to this section.

(1) Payments to small or rural ILEC ETPs. The payment to each small or rural ILEC ETP shall be computed by multiplying the per-line amount established in subsection (e) of this section by the number of eligible lines served by the small or rural ILEC ETP for the month.

(2) Payments to ETPs other than small or rural ILECs. The payment to each ETP other than a small or rural ILEC shall be computed by multiplying the per-line amount established in subsection (e) of this section for a given small or rural ILEC study area by the number of eligible lines served by the ETP in such study area for the month.

(g) Reporting requirements. An ETP eligible to receive support under this section shall report information as required by the commission and the TUSF administrator.

(1) Monthly reporting requirements. An ETP shall report the total number of eligible lines served by the ETP in its study area to the TUSF administrator on a monthly basis.

(2) Annual reporting requirements. An ETP shall report annually to the TUSF administrator that it is qualified to participate in the Small and Rural ILEC Universal Service Plan.

(3) Other reporting requirements. An ETP shall report any other information required by the commission or the TUSF administrator.

(h) Review of Small and Rural ILEC Universal Service Plan after implementation of federal universal service support. Within 90 days of the Federal Communications Commission's adoption of an order implementing new or amended federal universal service support rules for rural, insular, and high cost areas, the commission shall initiate a project to investigate a mechanism by which ETPs receiving support pursuant to this section would transition to receiving support pursuant to §26.403 of this title.

§26.406. Implementation of the Public Utility Regulatory Act §56.025.

(a) Purpose. The purpose of this section is to implement the provisions of the Public Utility Regulatory Act (PURA) §56.025.

(b) Applicability. An incumbent local exchange company (ILEC) serving fewer than five million access lines may seek to recover funds from the Texas Universal Service Fund (TUSF) under this section in the following circumstances:

(1) Commission reduction in the amount of high cost assistance fund. In the event of a commission order, rule, or policy, the effect of which is to reduce the amount of the high cost assistance fund support received by the ILEC as of February 10, 1998, except an order entered in an individual company revenue requirement proceeding, the commission shall allow, through the universal service fund, an ILEC to replace the reasonably projected reduction in revenues caused by that regulatory action.

(2) Change in federal universal service fund revenues. In the event of a Federal Communications Commission order, rule, or policy, the effect of which is to change the federal universal service fund revenues of an ILEC or change costs or revenues assigned to the intrastate jurisdiction, the commission shall, through either the universal service fund or an increase to rates if that increase would not adversely impact universal service, replace the reasonably projected change in revenues caused by the regulatory action.

(3) Commission change in intraLATA dialing access policy. In the event of a commission change in its policy with respect to intraLATA "1+" dialing access, the commission shall, through either the universal service fund or an increase to rates if that increase would not adversely impact universal service, replace the reasonably projected reduction in contribution caused by the action. Contribution for purposes of this paragraph equals average intraLATA long distance message telecommunications service (MTS) revenue, including intraLATA toll pooling and associated impacts, per minute less average MTS cost per minute less the average contribution from switched access times the projected change in intraLATA "1+" minutes of use.

(4) Other governmental agency action. In the event of any other governmental agency issuing an order, rule, or policy, the effect of which is to increase costs or decrease revenues of the intrastate jurisdiction, the commission shall, through either the universal service fund or an increase to rates, if that increase would not adversely impact universal service, replace the reasonably projected increase in costs or decrease in revenues caused by that regulatory action.

(c) Requirements of the ILEC.

(1) Burden of proof. The ILEC seeking to recover funds from the TUSF under this section has the burden of proof. A revenue requirement showing is not required with respect to disbursements from the TUSF under this section.

(2) Contents of application. The ILEC seeking to recover funds from the TUSF under this section shall file an application:

(A) complying with the commission's Procedural Rules §22.73 of this title (relating to General Requirements for Applications); and

(B) providing the amount requested from the TUSF under this section, the calculation of the amount requested, and detailed documentation and workpapers supporting the calculations.

(3) Notice. The ILEC seeking to recover funds from the TUSF under this section shall provide notice as required by the presiding officer pursuant to the commission's Procedural Rules §22.55 of this title (relating to Notice in Other Proceedings). At a minimum, the notice shall state that the ILEC is requesting to recover funds from the TUSF under this section and the Public Utility Regulatory Act §56.025 and state the amount the ILEC is requesting to recover. At a minimum, the notice shall be published in the *Texas Register.*

(d) Commission processing of the application.

(1) The application shall be processed under the commission's Procedural Rules.

(2) The commission shall process applications under this section promptly and efficiently.

(e) Reporting requirements. An ILEC awarded support under this section shall provide the TUSF administrator a copy of the commission's final order indicating the amount of support it is to receive under this section.

§26.408. Additional Financial Assistance (AFA).

(a) Purpose. Incumbent local exchange companies (ILECs) serving high cost and rural areas of the state may require financial assistance, in addition to the funds provided by §26.403 of this title (relating to Texas High Cost Universal Service Plan (THCUSP)), by §26.404 of this title (relating to Small and Rural Incumbent Local Exchange Company (ILEC) Universal Service Plan), or by §26.406 of this title (relating to the Implementation of the Public Utility Regulatory Act §56.025), so that these carriers may provide basic local exchange service at reasonable rates. This section establishes guidelines for requesting Additional Financial Assistance (AFA) from the Texas Universal Service Fund (TUSF).

(b) Application. Any ILEC that has been designated by the commission as an eligible telecommunications provider (ETP) and is not an electing company under the Public Utility Regulatory Act (PURA) Chapter 58 or 59, may request AFA in a PURA §§53.105, 53.151, or 53.306 proceeding.

(c) Establishment of AFA need. The commission may approve an ILEC's AFA request if the commission finds:

(1) that the ILEC has fulfilled the appropriate requirements under PURA §§53.105, 53.151, or 53.306; and

(2) that raising the ILEC's rates for basic local telecommunications service, as defined in §26.403 of this title, would adversely affect universal service in such ILEC's certificated service area.

(d) Reporting requirements. Any ILEC awarded AFA support pursuant to this section through a commission proceeding shall provide the TUSF administrator with a copy of the final order indicating the amount of support.

§26.412. Lifeline Service and Link Up Service Programs.

(a) Application. This section applies to eligible telecommunications carriers as defined by §26.418 of this title (relating to Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds (FUSF)).

(b) Lifeline Service and Link Up Service. Each eligible telecommunications carrier shall provide Lifeline Service and Link Up Service as provided by this section. A consumer eligible for Lifeline Service is automatically eligible for Link Up Service. However, a consumer may qualify for and receive Link Up Service independently of Lifeline Service. Nothing in this section shall prohibit a consumer otherwise eligible to receive Lifeline Service and/or Link Up Service from obtaining and using telecommunications equipment or services designed to aid such consumer in utilizing qualifying telecommunications services.

(c) Lifeline Service Program. Lifeline Service is a retail local service offering available to qualifying low-income consumers.

(1) Provision of Lifeline Service. Lifeline Service shall be provided according to the following requirements.

(A) Designated Lifeline services. The eligible telecommunications carrier shall offer the services or functionalities enumerated in 47 Code of Federal Regulations §54.101(a)(1)-(9) (relating to Supported Services for Rural, Insular and High Cost Areas).

(B) Toll limitation.

(i) Toll limitation requirements. The eligible telecommunications carrier shall offer toll limitation to all qualifying low-income consumers at the time such consumers subscribe to Lifeline Service. If the consumer elects to receive toll limitation, that service shall become part of the consumer's Lifeline Service.

(ii) Waiver. The commission may grant a waiver of the requirement of clause (i) of this subparagraph upon a finding that exceptional circumstances prevent an eligible telecommunications carrier from providing toll limitation. The period for the waiver shall not extend beyond the time that the commission deems necessary for that eligible telecommunications carrier to complete network upgrades to provide toll limitation services.

(C) Disconnection of service.

(i) Disconnection prohibition. An eligible telecommunications carrier may not disconnect Lifeline Service for nonpayment of toll charges.

(ii) Waiver. The commission may grant a waiver of clause (i) of this subparagraph if the eligible telecommunications carrier can demonstrate that:

(I) it would incur substantial costs in complying with this requirement;

(II) it offers toll limitation to its qualifying low-income consumers without charge; and

(III) telephone subscribership among low-income consumers in the eligible telecommunications carrier's service area is greater than or equal to the national subscribership rate for low-income consumers with an income below the poverty level for a family of four residing in the state.

(iii) Review by Federal Communications Commission (FCC).

(I) An eligible telecommunications carrier may file a petition for review of the commission decision pursuant to clause (ii) of this subparagraph with the FCC within 30 days of that decision.

(II) If the commission has not acted on a petition to waive the requirement of clause (i) of this subparagraph within 30 days of the date of the filing of the waiver petition, the eligible telecommunications carrier may file the petition with the FCC on the 31st day after the initial filing date.

(iv) Subsequent waiver requests. An eligible telecommunications carrier may reapply for the waiver set forth in clause (ii) of this subparagraph.

(D) Service deposit prohibition.

(i) Service deposit requirements. An eligible telecommunications carrier may not collect a service deposit in order to initiate Lifeline Service, if the qualifying low-income consumer voluntarily elects toll blocking from the eligible telecommunications carrier.

(ii) Waiver. If a waiver for providing toll blocking has been granted pursuant to subparagraph (B)(ii) of this paragraph, an eligible telecommunications carrier may charge a service deposit.

(2) Lifeline support.

(A) Lifeline support amounts. Lifeline support amounts per qualifying low- income consumer shall be provided according to the provisions of this paragraph.

(i) Federal baseline Lifeline support amount. An eligible telecommunications carrier shall grant a waiver of the $3.50 monthly federal subscriber line charge (SLC) to qualifying low-income consumers. If the eligible telecommunications carrier does not charge the federal SLC, it shall apply the $3.50 federal baseline support amount to reduce its lowest tariffed residential rate for supported services.

(ii) State-approved $1.75 reduction. Pursuant to 47 Code of Federal Regulations §54.403 (relating to Lifeline Support Amount), an eligible telecommunications carrier shall give a qualifying low- income consumer a state-approved reduction of $1.75 in the monthly amount of intrastate charges paid.

(iii) Additional state reduction with federal matching. Pursuant to 47 Code of Federal Regulations §54.403, an eligible telecommunications carrier shall give a qualifying low-income consumer the following:

(I) an additional state-approved reduction of $3.50 in the monthly amount of intrastate charges; and

(II) a further federally approved reduction of $1.75.

(B) Recovery of support amounts.

(i) Federal baseline Lifeline support. An eligible telecommunications carrier shall be entitled to recover the support amount required by subparagraph (A)(i) of this paragraph pursuant to 47 Code of Federal Regulations §54.407 (relating to Reimbursement for offering Lifeline), through the federal USF.

(ii) State-approved $1.75 reduction. An eligible telecommunications carrier shall be entitled to recover federal Lifeline support pursuant to 47 Code of Federal Regulations §54.407 to recover the reduction amount required by subparagraph (A)(ii) of this paragraph.

(iii) Additional state reduction with federal matching.

(I) An eligible telecommunications carrier shall be entitled to recover support from the Texas Universal Service Fund to recover the reduction amount required by subparagraph (A)(iii)(I) of this paragraph. An eligible telecommunications carrier that is also an incumbent local exchange company (ILEC) as defined by §26.5 of this title (relating to Definitions) that offered, as of June 1, 1997, a tariffed $3.50 Lifeline Service rate discount in addition to the $3.50 waiver of the federal SLC, must reduce rates for services determined appropriate by the commission by an amount equivalent to the amount of support it is eligible to receive under this subclause. If such ILEC does not reduce its toll and access rates pursuant to this subclause, it shall not be eligible to receive support under this subclause.

(II) An eligible telecommunications carrier shall be entitled to recover federal Lifeline support pursuant to 47 Code of Federal Regulations §54.407 to recover the reduction amount required by subparagraph (A)(iii)(II) of this paragraph.

(C) Application of support amounts.

(i) Eligible telecommunications carriers that charge the federal SLC or equivalent federal charges shall apply the $3.50 federal baseline Lifeline support to waive a qualified low-income consumer's federal SLC. The state-approved reductions of $1.75 and $3.50 and the additional federally approved reduction of $1.75 shall be applied to reduce the monthly intrastate end user charges paid by the qualifying low-income consumers.

(ii) Eligible telecommunications carriers that do not charge the federal SLC or equivalent federal charges shall apply the $3.50 federal baseline Lifeline support amount, plus the state-approved reductions of $1.75 and $3.50 and the additional federally approved reduction of $1.75 to reduce their lowest tariffed residential rate for the supported services and charge qualified low- income consumers the resulting amount.

(iii) The monthly discounted residential rate for qualified low-income consumers may not be reduced below $2.50.

(d) Link Up Service Program. This is a program certified by the FCC that provides qualifying low-income consumer with the following assistance:

(1) Services.

(A) A qualifying low-income consumer may receive a reduction in the eligible telecommunications carrier's customary charge for commencing telecommunications service for a primary single line connection at the consumer's principal place of residence. The reduction shall be half of the customary charge or $30, whichever is less.

(B) A qualifying low-income consumer may receive a deferred schedule for payment of the charges assessed for commencing service, for which the consumer does not pay interest. The interest charges not assessed the consumer shall be for connection charges of up to $200 that are deferred for a period not to exceed one year. Charges assessed for commencing service include any charges that the carrier customarily assesses to connect subscribers to the network. These charges do not include any permissible security deposit requirements.

(2) Qualifying low-income consumer choice. A qualifying low-income consumer may choose one or both of the programs set forth in paragraphs (1)(A) and (B) of this subsection.

(3) Limitation on receipt. An eligible telecommunications carrier's Link Up program shall allow a qualifying low-income consumer to receive the benefit of the Link Up program for a second or subsequent time only for a principal place of residence with an address different from the residence address at which the Link Up assistance was provided previously.

(e) Obligations of the consumer, Texas Department of Human Services (TDHS), and the eligible telecommunications carrier.

(1) Obligations of the consumer. Consumers may apply for Lifeline Service and Link Up Service by completing and filing an application with TDHS. Consumers who are eligible for Lifeline Service and Link Up Service and who do not have telephone service must additionally initiate a request for service from their serving eligible telecommunications carrier.

(2) Obligations of TDHS. TDHS shall review the consumer's application form and shall determine if the consumer meets the eligibility criteria. TDHS shall provide each eligible telecommunications carrier with an initial list of consumers eligible for Lifeline Service and Link Up Service and shall provide an updated list to each eligible telecommunications carrier on a semi-annual basis.

(3) Obligations of eligible telecommunications carriers.

(A) Lifeline Service.

(i) The eligible telecommunications carrier shall provide Lifeline Service to all eligible consumers identified by TDHS within its service area if the existing service of those consumers meets the qualifications set forth in subsection (d)(1) of this section. The eligible telecommunications carrier shall identify those consumers on the TDHS list to whom it is providing telephone service and shall determine if the existing telephone service qualifies. Within 60 days after receipt of the list, the eligible telecommunications carrier shall begin reduced billing for those qualifying low-income consumers subscribing to qualifying services.

(ii) If the existing telephone service does not qualify, the eligible telecommunications carrier shall advise the eligible consumer by direct mail of changes necessary to satisfy Lifeline criteria. The eligible telecommunications carrier shall advise the eligible consumer by direct mail that persons choosing not to make necessary changes to their telephone service arrangements will not receive Lifeline Service and that the eligible consumer shall not be charged for changes in telephone service arrangements that are made in order to qualify for Lifeline Service, or for service order charges associated with transferring the account into Lifeline Service. If the eligible consumer changes the telephone service to qualifying services or initiates new qualifying service, the eligible telecommunications carrier shall begin reduced billing at the time the change of service becomes effective or at the time new service is established.

(iii) The eligible telecommunications carrier shall notify TDHS on a semi- annual basis of changes in the status of its Lifeline Service consumers.

(B) Link Up Service. The eligible telecommunications carrier shall provide Link Up Service to all qualifying low-income consumers identified by TDHS within its service area, who have initiated a request for service pursuant to subsection (e)(1) of this section.

(C) Qualifying low-income consumer certification. An eligible telecommunications carrier shall obtain from the qualifying low-income consumer that consumer's signature on a document certifying under penalty of perjury that the consumer receives benefits from one of the following: Medicaid, food stamps, Supplemental Security Income, federal public housing assistance, or Low-Income Energy Assistance Program, and shall identify the program(s) from which that consumer receives benefits. On the same document, a qualifying low-income consumer must also agree to notify the eligible telecommunications carrier if that consumer ceases to participate in the program(s) identified.

(f) Tariff requirement. Each carrier seeking designation as an eligible telecommunications carrier shall file a tariff to implement Lifeline Service and Link Up Service, or revise its existing tariff for compliance with this section and with applicable law, prior to filing its application for designation as an eligible telecommunications carrier. No other revision, addition, or deletion unrelated to Lifeline Service and Link Up Service shall be contained in the tariff application.

(g) Reporting requirements.

(1) Texas Universal Service Fund (TUSF). An eligible telecommunications carrier providing Lifeline Service pursuant to this section shall report information as required by the commission or the TUSF administrator, including but not limited to the following information.

(A) Initial reporting requirements. An eligible telecommunications carrier shall provide the commission and the TUSF administrator with information demonstrating that its Lifeline plan meets the requirements of this section.

(B) Monthly reporting requirements. An eligible telecommunications carrier shall report monthly to the TUSF administrator the total number of qualified low-income consumers to whom Lifeline Service was provided for the month by the eligible telecommunications carrier.

(C) Other reporting requirements. An eligible telecommunications carrier shall report any other information required by the commission or the TUSF administrator.

(2) Federal Lifeline Service Program. An eligible telecommunications carrier shall file the following information with the administrator of the Federal Lifeline Program:

(A) information demonstrating that the eligible telecommunications carrier's Lifeline plan meets the criteria set forth in 47 Code of Federal Regulations Subpart E (relating to Universal Service Support for Low-Income Consumers);

(B) the number of qualifying low-income consumers served by the eligible telecommunications carrier;

(C) the amount of state assistance; and

(D) other information required by the administrator of the Federal Lifeline Program.

§26.413. Tel-Assistance Service.

(a) Application. This section applies to local exchange companies (LECs) as defined by §26.5 of this title (relating to Definitions).

(b) Definition. The term "eligible consumer", when used in this section, shall mean that in order to be eligible for Tel-Assistance Service, the consumer must be a head of household and disabled, as determined by the Texas Department of Human Services (TDHS); and have a household income at or below the poverty level, as reported annually by the United States Office of Management and Budget in the *Federal Register.*

(c) Provision of Tel-Assistance Service. Each LEC shall provide Tel-Assistance Service as provided in this section. A consumer eligible for Tel-Assistance Service also qualifies for Lifeline Service and Link Up Service as provided in §26.412 of this title (relating to Lifeline Service and Link Up Service). Nothing in this section shall prohibit a person otherwise eligible to receive Tel-Assistance Service from obtaining and using telecommunications equipment or services designed to aid such person in utilizing qualifying telecommunications services.

(1) Rate reductions under Tel-Assistance Service.

(A) Each LEC shall provide Tel-Assistance Service to all eligible consumers within its certificated area in the form of a 65% reduction in the applicable tariff rate for the qualifying services provided.

(B) The reduction for local area calling usage shall be limited to an amount such that, together with the reduction for local exchange access service, the overall rate reduction does not exceed the comparable reduction applicable to flat rate service.

(2) Texas Universal Service Fund (TUSF) reimbursement. LECs providing Tel- Assistance Service to eligible consumers under this section are eligible for reimbursement from the TUSF of the lost

revenue associated with the application of a 65% reduction in the applicable tariff rate for those accounts.

(d) Obligations of the consumer, TDHS, and the LEC.

(1) Consumer. Consumers may apply for Tel-Assistance Service by obtaining an application form from TDHS. Persons who are eligible for Tel-Assistance Service, but do not have telephone service at the time TDHS provides its eligibility list to LECs, are responsible for initiating a request for qualifying services from their serving LEC.

(2) TDHS. TDHS shall review the consumer's application form and shall determine if the consumer meets the eligibility criteria. TDHS shall provide each LEC with an initial list of persons eligible for Tel-Assistance Service and shall provide an updated list to each LEC on a semi-annual basis.

(3) LEC.

(A) The LEC shall provide Tel-Assistance Service to all eligible consumers identified by TDHS within its certificated area if the existing service of those consumers meets the qualifications set forth in subsection (b)(2) of this section. The LEC shall identify those consumers on the TDHS list to whom it is providing telephone service and shall determine if the existing telephone service qualifies. Within 60 days after receipt of the list, the LEC shall begin reduced billing for those eligible consumers subscribing to qualifying services.

(B) If the existing telephone service does not qualify, the LEC shall advise the eligible consumer by direct mail of changes necessary to satisfy Tel- Assistance Service criteria. The LEC shall advise the eligible consumer by direct mail that persons choosing not to make necessary changes to their telephone service arrangements will not receive Tel-Assistance Service and that the eligible consumer shall not be charged for changes in telephone service arrangements that are made in order to qualify for Tel- Assistance Service, or for service order charges associated with transferring the account into Tel-Assistance Service. If the eligible consumer changes the existing telephone service to qualifying services or initiates new qualifying service, the LEC shall begin reduced billing at the time the change of service becomes effective or at the time new service is established.

(C) The LEC shall notify TDHS on a semi-annual basis of changes in the status of its Tel-Assistance Service consumers.

(e) Specific service exceptions for Tel-Assistance Service. No other local voice service may be provided to the dwelling place of a Tel-Assistance Service consumer, nor may single or party line optional extended area service, optional extended area calling service, foreign zone service or foreign exchange service be provided to a Tel-Assistance Service consumer.

(f) Retroactive prohibition for Tel-Assistance Service. Tel-Assistance Service shall not be available on a retroactive basis except for such instances in which the LEC failed to initiate reduced billing within the time frame established in subsection (d)(3)(A) of this section.

(g) Termination of Tel-Assistance Service. Consumer certification is provided by TDHS subject to annual renewal. Reduced billing will continue until such time as either the TDHS notifies the LEC that the consumer is no longer eligible or the consumer establishes telephone service arrangements that do not satisfy the qualifications for Tel- Assistance Service. After Tel-Assistance Service is established, if the recipient requests a change in telephone service arrangements such that the new arrangements do not meet the qualifications, before making such changes, the LEC shall advise the consumer by direct mail that the requested changes will result in removal of the Tel-Assistance Service discount. If the consumer then chooses to have such changes made, the LEC shall terminate the discount at the time the change of service becomes effective.

(h) Reporting requirements for the provision of Tel-Assistance Service. LECs shall file monthly reports with the TUSF administrator detailing the lost revenues associated with the 65% discount applied to Tel-Assistance Service accounts. The LECs shall also file activity reports showing the total number of accounts transferred into and out of Tel- Assistance Service in the previous month and the total number of Tel-Assistance Service accounts at the end of the month.

(i) Tariff requirement. Each LEC shall file a tariff to implement Tel-Assistance Service in compliance with this section and with applicable law within 30 days of beginning to provide service. No other revision, addition, or deletion unrelated to Tel-Assistance Service shall be contained in the tariff.

§26.414. Telecommunications Relay Service (TRS).

(a) Purpose. The provisions of this section are intended to establish a statewide telecommunications relay service for individuals who are hearing-impaired or speech-impaired using specialized telecommunications devices and operator translations. Telecommunications relay service shall be provided on a statewide basis by one telecommunications carrier. Certain aspects of telecommunications relay service operations are applicable to local exchange companies and other telecommunications providers.

(b) Provision of TRS. TRS shall provide individuals who are hearing-impaired or speech- impaired with access to the telecommunications network in Texas equal to that provided to other customers.

(1) Components of TRS. TRS shall meet the mandatory minimum standards defined in §26.5 of this title (relating to Definitions) and further shall consist of the following:

(A) switching and transmission of the call;

(B) oral and print translations by either live or automated means between individuals who are hearing-impaired or speech-impaired who use specialized telecommunications devices and others who do not have such devices;

(C) sufficient operators and facilities to meet the following grade and quality of service standards established by the commission for TRS:

(i) the operator answering performance standards listed in §26.61(e)(3)(A)(i) and (3)(B) of this title (relating to Telephone Utilities); and

(ii) not more than one out of one hundred calls shall encounter a busy signal when calling the TRS numbers;

(D) appropriate procedures for handling emergency calls;

(E) confidentiality regarding existence and content of conversations;

(F) capability of providing sufficient information to allow calls to be accurately billed;

(G) capability of providing for technologies such as hearing carryover or voice carryover;

(H) operator training to relay the contents of the call as accurately as possible without intervening in the communications;

(I) operator training in American Sign Language and familiarity with the special communications needs of individuals who are hearing-impaired or speech- impaired;

(J) capability for callers to place calls through TRS from locations other than their primary location and to utilize alternate billing arrangements;

(K) capability of providing both inbound and outbound intrastate and interstate service;

(L) capability for carrier of choice; and

(M) other service enhancements approved by the commission.

(2) Conditions for interstate service. The TRS carrier shall not be reimbursed from the Texas Universal Service Fund (TUSF) for the cost of providing interstate TRS. Interstate TRS shall be funded through the interstate jurisdiction as mandated by the Federal Communications Commission. Separate funds and records shall be maintained for intrastate TRS and interstate TRS.

(3) Rates and charges. The following rates and charges shall apply to TRS:

(A) Local calls. The calling and called parties shall bear no charges for calls originating and terminating within the same toll-free local calling scope.

(B) Intrastate long distance calls. The TRS carrier shall discount its tariffed intrastate rates by 50% for TRS users.

(C) Access charges. Local exchange companies shall not impose access charges on calls that make use of this service and which originate and terminate within the same toll-free local calling scope.

(D) Billing and collection services. Upon request by the TRS carrier, local exchange companies shall provide billing and collection services in support of this service at just and reasonable rates.

(c) Contract for the TRS carrier.

(1) Selection. On or before April 1, 2000, the commission shall issue a request for proposal and select a carrier to provide statewide TRS based on the following criteria: price, the interests of individuals who are hearing-impaired and speech- impaired in having access to a high quality and technologically-advanced telecommunications system, and all other factors listed in the commission's request for proposals. The commission shall consider each proposal in a manner that does not disclose the contents of the proposal to competing offerers. The commission's determination shall include evaluations of charges for the service, service enhancements proposed by the offerers, and technological sophistication of the network proposed by the offerers. The commission shall make a written award of the contract to the offerer whose proposal is the most advantageous to the state.

(2) Location. The operator centers used to provide statewide TRS shall be located in Texas.

(3) Contract administration.

(A) Contract amendments. All recommendations for amendments to the contract shall be filed with the executive director of the commission on June 1 of each year. The executive director is authorized to approve or deny all amendments to the contract between the TRS carrier and the commission, provided, however, that the commission specifically shall approve any amendment that will increase the cost of TRS.

(B) Reports. The TRS carrier and telecommunications providers shall submit reports of their activities relating to the provision of TRS upon request of the commission or the Relay Texas administrator.

(C) Compensation. The TRS carrier shall be compensated by the TUSF for providing TRS at the rates, terms, and conditions established in its contract with the commission, subject to the following conditions:

(i) Reimbursement shall include the TRS costs that are not paid by the calling or the called party, except the TRS carrier shall not be reimbursed for the 50% discount set forth in subsection (b)(3)(B) of this section.

(ii) Reimbursement may include a return on the investment required to provide the service and the cost of unbillable and uncollectible calls placed through the service, provided that the cost of unbillable and uncollectible calls shall be subject to a reasonable limitation as determined by the commission.

(iii) The TRS carrier shall submit a monthly report to the commission justifying its claims for reimbursement under the contract. Upon approval by the commission, the TUSF shall make a disbursement in the approved amount.

(d) Advisory Committee. The commission shall appoint an Advisory Committee, to be known as the Relay Texas Advisory Committee (RTAC) to assist the commission in administering TRS and the equipment distribution program, as specified by Texas Utilities Code Annotated §56.111 (Vernon 1998) and 1997 Texas General Laws Chapter 149, §3. The Relay Texas administrator shall serve as a liaison between the RTAC and the commission. The Relay Texas administrator shall ensure that the RTAC receives clerical and staff support, including a secretary or court reporter to document RTAC meetings.

(1) Composition. The commission shall appoint RTAC members based on recommended lists of candidates submitted by the organizations named as follows. The RTAC shall be composed of:

(A) one deaf person recommended by the Texas Deaf Caucus;

(B) one deaf person recommended by the Texas Association of the Deaf;

(C) one hearing-impaired person recommended by Self-Help for the Hard of Hearing;

(D) one hearing-impaired person recommended by the American Association of Retired Persons;

(E) one deaf and blind person recommended by the Texas Deaf/Blind Association;

(F) one speech-impaired person and one speech-impaired and hearing-impaired person recommended by the Coalition of Texans with Disabilities;

(G) two representatives of telecommunications utilities, one representing a local exchange company and one representing a telecommunications carrier other than a local exchange company, chosen from a list of candidates provided by the Texas Telephone Association;

(H) two persons, at least one of whom is deaf, with experience in providing relay services, recommended by the Texas Commission for the Deaf; and

(I) two public members recommended by organizations representing consumers of telecommunications services.

(2) Conditions of membership. The term of office of each RTAC member shall be two years. A member whose term has expired shall continue to serve until a qualified replacement is appointed. In the event a member cannot complete his or her term, the commission shall appoint a qualified replacement to serve the remainder of the term. RTAC members shall serve without compensation but shall be entitled to reimbursement at rates established for state employees for travel and per diem incurred in the performance of their official duties, provided such reimbursement is authorized by the Texas Legislature in the General Appropriations Act.

(3) Responsibilities. The RTAC shall undertake the following responsibilities:

(A) monitor the establishment, administration, and promotion of the statewide TRS;

(B) advise the commission regarding the pursuit of services that meet the needs of individuals who are hearing-impaired or speech-impaired in communicating with other users of telecommunications services;

(C) advise the commission regarding issues related to the contract between the TRS carrier and the commission, including any proposed amendments to such contract;

(D) advise the commission and the Texas Commission for the Deaf and Hard of Hearing, at the request of either commission, regarding issues related to the equipment distribution program.

(4) Committee activities report. After each RTAC meeting, the Relay Texas administrator shall prepare a report to the commission regarding the RTAC activities and recommendations.

(A) The Relay Texas administrator shall file in Central Records under Project Number 13928, and provide to each commissioner, a report containing:

(i) the minutes of the meeting;

(ii) a memo summarizing the meeting; and

(iii) a list of items, recommended by the RTAC, for the Relay Texas administrator to discuss with the TRS carrier, including issues related to the provisioning of the service that do not require amendments to the contract.

(B) Within 20 days after a report is filed, any commissioner may request that one or more items described in the report be placed on an agenda to be discussed during an open meeting of the commission. If no commissioner requests that the list be placed on an agenda for an open meeting, the report is deemed approved by the commission.

(5) Evaluation of RTAC costs and effectiveness. The commission shall evaluate the advisory committee annually. The evaluation shall be conducted by an evaluation team appointed by the executive director of the commission. The commission liaison, RTAC members, and other commission employees who work directly or indirectly with the RTAC, TRS, or the equipment distribution program shall not be eligible to serve on the evaluation team. The evaluation team will report to the commission in open meeting each August of its findings regarding:

(A) the committee's work;

(B) the committee's usefulness; and

(C) the costs related to the committee's existence, including the cost of agency staff time spent in support of the committee's activities.

§26.415. Specialized Telecommunications Device Assistance Program (STDAP).

(a) Purpose. The provisions of this section are intended to establish procedures for an equipment distribution program and for reimbursement to vendors who submit vouchers issued under the program.

(b) Program responsibilities.

(1) Texas Commission for the Deaf and Hard of Hearing (TCDHH) responsibilities. TCDHH is responsible for:

(A) Adopting rules and procedures regarding the issuance of STDAP vouchers to eligible individuals;

(B) Establishing a database containing sufficient information to enable the commission to verify the issuance of a particular STDAP voucher; and

(C) Depositing amounts paid by eligible individuals for STDAP vouchers into the Texas Universal Service Fund (TUSF).

(2) Commission responsibilities. The commission is responsible for:

(A) Adopting rules and procedures regarding the reimbursement to vendors for properly redeemed STDAP vouchers;

(B) Administering the TUSF to ensure adequate funding of the equipment distribution program; and

(C) Appointing and providing administrative support for the RTAC, in accordance with PURA, Texas Utilities Code Annotated §56.110 and §56.112 (Vernon 1998).

(c) Program administration.

(1) Vendor registration. To facilitate the timely reimbursement of STDAP vouchers, the TUSF administrator may specify that a vendor who accepts STDAP vouchers shall register with the administrator by providing the vendor's name, contact person, address, telephone number, facsimile number (if available), and information sufficient to permit the administrator to reimburse the vendor by direct deposit rather than by check.

(2) Vendor reimbursement. A vendor who exchanges an STDAP voucher for the purchase of approved equipment in accordance with the terms of the equipment distribution program specified by TCDHH shall be eligible for reimbursement of the lesser of the face value of the STDAP voucher or the actual price of the equipment. TUSF disbursements shall be made only upon receipt from the vendor of a completed STDAP voucher and a receipt showing the actual price of the equipment exchanged for the STDAP voucher. TUSF disbursements may also be subject to such other limitations or conditions as determined by the commission to be just and reasonable, including investigation of whether the presentation of an STDAP voucher represents a valid transaction for equipment under the equipment distribution program. The TUSF administrator shall ensure that reimbursement to vendors for STDAP vouchers shall be issued within 45 days after the STDAP voucher is received by the TUSF administrator.

§26.417. Designation of Local Exchange Carriers as Eligible Telecommunications Providers to Receive Texas Universal Service Funds (TUSF).

(a) Purpose. This section provides the requirements for the commission to designate local exchange companies (LECs) as eligible telecommunications providers (ETPs) to receive funds from the Texas Universal Service Fund (TUSF) under §26.403 of this title (relating to the Texas High Cost Universal Service Plan (THCUSP)) and §26.404 of this title (relating to the Small and Rural Incumbent Local Exchange Carrier (ILEC) Universal Service Plan). Only LECs designated by the commission as ETPs shall qualify to receive universal service support under these programs.

(b) Requirements for establishing ETP service areas.

(1) THCUSP service area. THCUSP service area shall be based upon census block groups (CBGs) or other geographic area as determined appropriate by the commission. A LEC may be designated an ETP for any or all CBGs that are wholly or partially contained within its certificated service area. An ETP must serve an entire CBG, or other geographic area as determined appropriate by the commission, unless its certificated service area does not encompass the entire CBG, or other geographic area as determined appropriate by the commission.

(2) Small and Rural ILEC Universal Service Plan service area. A Small and Rural ILEC Universal Service Plan service area for an ETP serving in a small or rural ILEC's territory shall include the entire study area of such small or rural ILEC.

(c) Criteria for designation of ETPs.

(1) LECs. A LEC, as defined in §26.5 of this title (relating to Definitions), shall be eligible to receive TUSF support pursuant to §26.403 or §26.404 of this title in each service area for which it seeks ETP designation if it meets the following requirements:

(A) the LEC has been designated an eligible telecommunications carrier, pursuant to §26.418 of this title (relating to the Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds (FUSF)), and provides the federally designated services to customers in order to receive federal universal service support;

(B) the LEC defines its ETP service area pursuant to subsection (c) of this section and assumes the obligation to offer any customer in its ETP service area basic local telecommunications services, as defined in §26.403 of this title, at a rate not to exceed 150% of the ILEC's tariffed rate;

(C) the LEC offers basic local telecommunications services using either its own facilities, purchased unbundled network elements (UNEs), or a combination of its own facilities, purchased UNEs, and resale of another carrier's services;

(D) the LEC renders continuous and adequate service within the area or areas, for which the commission has designated it an ETP, in compliance with the quality of service standards defined in §23.61(c),(d) and (e) of this title (relating to Telephone Utilities);

(E) the LEC offers services in compliance with §26.412 of this title (relating to Lifeline Service and Link Up Service) and §26.413 of this title (relating to Tel-Assistance Service); and

(F) the LEC advertises the availability of, and charges for, supported services using media of general distribution.

(2) ILECs. If the LEC is an ILEC, as defined in §26.5 of this title, it shall be eligible to receive TUSF support pursuant to §26.403 of this title in each service area for which it seeks ETP designation if it meets the requirements of paragraph (1) of this subsection and the following requirements:

(A) if the ILEC is regulated pursuant to Chapter 58 or 59 of the Public Utility Regulatory Act it shall either:

(i) reduce rates for services determined appropriate by the commission to an amount equal to its THCUSP support amount; or

(ii) provide a statement that it agrees to a reduction of its THCUSP support amount equal to its CCL, RIC and intraLATA toll revenues.

(B) if the ILEC is not regulated pursuant to Chapter 58 or 59 of the Public Utility Regulatory Act it shall reduce its rates for services determined appropriate by the commission by an amount equal to its THCUSP support amount.

(d) Designation of more than one ETP.

(1) In areas not served by small or rural ILECs, as defined in §26.404(b) of this title, the commission may designate, upon application, more than one ETP in an ETP service area so long as each additional provider meets the requirements of subsection (c) of this section.

(2) In areas served by small or rural ILECs as defined in §26.404(b) of this title, the commission may designate additional ETPs if the commission finds that the designation is in the public interest.

(e) Proceedings to designate LECs as ETPs.

(1) At any time, a LEC operating with a certificate of convenience and necessity (CCN) or a certificate of operating authority (COA) may seek commission approval to be designated an ETP for a requested service area.

(2) In order to receive support under §26.403 or §26.404 of this title for exchanges purchased from an unaffiliated provider, the acquiring ETP shall file an application, within 30 days after the date of the purchase, to amend its ETP service area to include those geographic areas in the purchased exchanges that are eligible for support.

(3) If an ETP receiving support under §26.403 or §26.404 of this title sells an exchange to an unaffiliated provider, it shall file an application, within 30 days after the date of the sale, to amend its ETP designation to exclude, from its designated service area, those exchanges for which it was receiving support.

(f) Requirements for application for ETP designation and commission processing of application.

(1) Requirements for notice and contents of application for ETP designation.

(A) Notice of application. Notice shall be published in the *Texas Register.* The presiding officer may require additional notice. Unless otherwise required by the presiding officer or by law, the notice shall include at a minimum a description of the service area for which the applicant seeks designation, the proposed effective date of the designation, and the following language: "Persons who wish to comment on this application should notify the Public Utility Commission by (specified date, ten days before the proposed effective date). Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing-

and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136, or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477."

(B) Contents of application. A LEC seeking to be designated as an ETP for a high cost service area in this state shall file with the commission an application complying with the requirements of this section. In addition to copies required by other commission rules, one copy of the application shall be delivered to the commission staff and one copy shall be delivered to the Office of Public Utility Counsel.

(i) LEC. The application shall:

(I) show that the applicant is a LEC as defined in §26.5 of this title;

(II) show that the applicant has been designated by the commission as a telecommunications provider eligible for federal universal service support and show that the applicant offers federally supported services to customers pursuant to the terms of 47 United States Code §214(e) (relating to Provision of Universal Service) in order to receive federal universal service support;

(III) specify the THCUSP or small and rural ILEC service area in which the applicant proposes to be an ETP, show that the applicant offers each of the designated services, as defined in §26.403 of this title, throughout the THCUSP or small and rural ILEC service area for which it seeks an ETP designation, and show that the applicant assumes the obligation to offer the services, as defined in §26.403 of this title, to any customer in the THCUSP or small and rural ILEC service area for which it seeks ETP designation;

(IV) show that the applicant does not offer the designated services, as defined in §26.403 of this title, solely through total service resale;

(V) show that the applicant renders continuous and adequate service within the area or areas, for which it seeks designation as an ETP, in compliance with the quality of service standards defined in §23.61 (c), (d), and (e) of this title;

(VI) show that the applicant offers Lifeline, Link Up, and Tel- Assistance services in compliance with §26.412 and §26.413 of this title;

(VII) show that the applicant advertises the availability of and charges for designated services, as defined in §26.403 of this title, using media of general distribution;

(VIII) a statement detailing the method and content of the notice the applicant has provided or intends to provide to the public regarding the application and a brief statement explaining why the notice proposal is reasonable and that the notice proposal complies with applicable law;

(IX) provide a copy of the text of the notice;

(X) state the proposed effective date of the designation; and

(XI) provide any other information which the applicant wants considered in connection with the commission's review of its application.

(ii) ILECs. If the applicant is an ILEC, in addition to the requirements of clause (i) of this subparagraph, the application shall show compliance with the requirements of subsection (c)(2) of this section.

(2) Commission processing of application.

(A) Administrative review. An application considered under this section may be reviewed administratively unless the LEC requests the application be docketed or the presiding officer, for good cause, determines at any point during the review that the application should be docketed.

(i) The effective date of the ETP designation shall be no earlier than 30 days after the filing date of the application or 30 days after notice is completed, whichever is later.

(ii) The application shall be examined for sufficiency. If the presiding officer concludes that material deficiencies exist in the application, the applicant shall be notified within ten working days of the filing date of the specific deficiency in its application. The earliest possible effective date of the application shall be no less than 30 days after the filing of a sufficient application with substantially complete information as required by the presiding officer. Thereafter, any deadlines shall be determined from the 30th day after the filing of the sufficient application and information or from the effective date if the presiding officer extends that date.

(iii) While the application is being administratively reviewed, the commission staff and the staff of the Office of Public Utility Counsel may submit requests for information to the applicant. Three copies of all answers to such requests for information shall be provided to the commission staff and the Office of Public Utility Counsel within ten days after receipt of the request by the applicant.

(iv) No later than 20 days after the filing date of the application or the completion of notice, whichever is later, interested persons may provide written comments or recommendations concerning the application to the commission staff. The commission staff shall and the Office of Public Utility Counsel may file with the presiding officer written comments or recommendations regarding the application.

(v) No later than 35 days after the proposed effective date of the application, the presiding officer shall issue an order approving, denying, or docketing the application.

(B) Approval or denial of application. The application shall be approved by the presiding officer if it meets the following requirements.

(i) The provision of service constitutes basic local telecommunications service as defined in §26.403 of this title.

(ii) Notice was provided as required by this section.

(iii) The applicant has met the requirements contained in subsection (c) of this section.

(iv) The ETP designation is consistent with the public interest in a technologically advanced telecommunications system and consistent with the preservation of universal service.

(C) Docketing. If, based on the administrative review, the presiding officer determines that one or more of the requirements have not been met, the presiding officer shall docket the application. The requirements of subsection (c) of this section may not be waived.

(D) Review of the application after docketing. If the application is docketed, the effective date of the application shall be automatically suspended to a date 120 days after the applicant has filed all of its direct testimony and exhibits, or 155 days after the proposed effective date, whichever is later. Three copies of all answers to requests for information shall be filed with the commission within ten days after receipt of the request. Affected persons may

move to intervene in the docket, and a hearing on the merits shall be scheduled. A hearing on the merits shall be limited to issues of eligibility. The application shall be processed in accordance with the commission's rules applicable to docketed cases.

(g) Relinquishment of ETP designation. A LEC may seek to relinquish its ETP designation.

(1) Area served by more than one ETP. The commission shall permit a LEC to relinquish its ETP designation in any area served by more than one ETP upon:

(A) written notification not less than 90 days prior to the proposed effective date of the relinquishment;

(B) determination by the commission that the remaining ETP or ETPs can provide basic local service to the relinquishing LEC's customers; and

(C) determination by the commission that sufficient notice of relinquishment has been provided to permit the purchase or construction of adequate facilities by any remaining ETP or ETPs.

(2) Area where the relinquishing LEC is the sole ETP. In areas where the relinquishing LEC is the only ETP, the commission may permit it to relinquish its ETP designation upon:

(A) written notification that the LEC seeks to relinquish its ETP designation; and

(B) commission designation of a new ETP for the service area or areas through the auction procedure provided in subsection (h) of this section.

(3) Relinquishment for non-compliance. The TUSF administrator shall notify the commission when the TUSF administrator is aware that an ETP is not in compliance with the requirements of subsection (c) of this section. The commission shall revoke the ETP designation of any LEC determined not to be in compliance with subsection (c) of this section.

(h) Auction procedure for replacing the sole ETP in an area. In areas where a LEC is the sole ETP and seeks to relinquish its ETP designation, the commission shall initiate an auction procedure to designate another ETP. The auction procedure will use a competitive, sealed bid, single-round process to select a telecommunications provider meeting the requirements of subsection (f)(1) of this section that will provide basic local telecommunications service at the lowest cost.

(1) Announcement of auction. Within 30 days of receiving a request from the last ETP in a service area to relinquish its designation, the commission shall provide notice in the *Texas Register* of the auction. The announcement shall at minimum detail the geographic location of the service area, the total number of access lines served, the forward-looking economic cost computed pursuant to §26.403 of this title, of providing basic local telecommunications service and the other services included in the benchmark calculation, existing tariffed rates, bidding deadlines, and bidding procedure.

(2) Bidding procedure. Bids must be received by the TUSF administrator not later than 60 days from the date of publication in the *Texas Register.*

(A) Every bid must contain:

(i) the level of assistance per line that the bidder would need to provide all services supported by universal service mechanisms;

(ii) information to substantiate that the bidder meets the eligibility requirements in subsection (c)(1) of this section; and

(iii) information to substantiate that the bidder has the ability to serve the relinquishing ETP's customers.

(B) The TUSF administrator shall collect all bids and within 30 days of the close of the bidding period request that the commission approve the TUSF administrator's selection of the successful bidder.

(C) The commission may designate the lowest qualified bidder as the ETP for the affected service area or areas.

§26.418. Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds.

(a) Purpose. This section provides the requirements for the commission to designate common carriers as eligible telecommunications carriers to receive support from the federal universal service fund (FUSF). Only common carriers designated by the commission pursuant to 47 United States Code §214(e) (relating to Provision of Universal Service) as eligible for federal universal service support may qualify to receive universal service support under the FUSF.

(b) Service areas. The commission may designate eligible telecommunications carrier service areas according to the following criteria.

(1) Non-rural service area. To be eligible to receive federal universal service support in non-rural areas, a carrier must provide federally supported services pursuant to 47 Code of Federal Regulations §54.101 (relating to Supported Services for Rural, Insular, and High Cost Areas) throughout the area for which the carrier seeks to be designated an eligible telecommunications carrier.

(2) Rural service area. In the case of areas served by a rural telephone company, as defined in §26.404 of this title (relating to the Small and Rural Incumbent Local Exchange Company (ILEC) Universal Service Plan), a carrier must provide federally supported services pursuant to 47 Code of Federal Regulations §54.101 throughout the study area of the rural telephone company in order to be eligible to receive federal universal service support.

(c) Criteria for determination of eligible telecommunications carriers. A common carrier shall be designated as eligible to receive federal universal service support if it:

(1) offers the services that are supported by the federal universal service support mechanisms under 47 Code of Federal Regulations §54.101 either using its own facilities or a combination of its own facilities and resale of another carrier's services; and

(2) advertises the availability of and charges for such services using media of general distribution.

(d) Criteria for determination of receipt of federal universal service support. In order to receive federal universal service support, a common carrier must:

(1) meet the requirements of subsection (c) of this section;

(2) offer Lifeline Service to qualifying low-income consumers in compliance with 47 Code of Federal Regulations Part 54, Subpart E (relating to Universal Service Support for Low-Income Consumers); and

(3) offer toll limitation services in accordance with 47 Code of Federal Regulations §54.400 (relating to Terms and Definitions) and §54.401 (relating to Lifeline Defined).

(e) Designation of more than one eligible telecommunications carrier.

(1) Non-rural service areas. In areas not served by rural telephone companies, as defined in §26.404 of this title, the commission shall designate, upon application, more than one eligible telecommunications carrier in a service area so long as each additional carrier meets the requirements of subsection (b)(1) of this section and subsection (c) of this section.

(2) Rural service areas. In areas served by rural telephone companies, as defined in §26.404 of this title, the commission may designate as an eligible telecommunications carrier a carrier that meets the requirements of subsection (b)(2) of this section and subsection (c) of this section if the commission finds that the designation is in the public interest.

(f) Proceedings to designate eligible telecommunications carriers.

(1) At any time, a common carrier may seek commission approval to be designated an ETP for a requested service area.

(2) In order to receive support under this section for exchanges purchased from an unaffiliated carrier, the acquiring eligible telecommunications carrier shall file an application, within 30 days after the date of the purchase, to amend its eligible telecommunications carrier service area to include those geographic areas that are eligible for support.

(3) If an eligible telecommunications carrier receiving support under this section sells an exchange to an unaffiliated carrier, it shall file an application, within 30 days after the date of the sale, to amend its eligible telecommunications carrier designation to exclude from its designated service area those exchanges for which it was receiving support.

(g) Application requirements and commission processing of applications.

(1) Requirements for notice and contents of application.

(A) Notice of application. Notice shall be published in the *Texas Register.* The presiding officer may require additional notice. Unless otherwise required by the presiding officer or by law, the notice shall include at a minimum a description of the service area for which the applicant seeks eligibility, the proposed effective date of the designation, and the following statement: "Persons who wish to comment on this application should notify the Public Utility Commission of Texas by (specified date, ten days before the proposed effective date). Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's Office of Customer Protection at (512) 936- 7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136, or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477."

(B) Contents of application for each common carrier seeking eligible telecommunications carrier designation. A common carrier that seeks to be designated as an eligible telecommunications carrier shall file with the commission an application complying with the requirements of this section. In addition to copies required by other commission rules, one copy of the application shall be delivered to the commission's Regulatory Division and one copy shall be delivered to the Office of Public Utility Counsel. The application shall:

(i) show that the applicant offers each of the services that are supported by the FUSF support mechanisms under 47 United States Code §254(c) (relating to Universal Service) either using its own facilities or a combination of its own facilities and resale of another carrier's services throughout the service area for which it seeks designation as an eligible telecommunications carrier;

(ii) show that the applicant assumes the obligation to offer each of the services that are supported by the FUSF support mechanisms under 47 United States Code §254(c) to any consumer in the service area for which it seeks designation as an eligible telecommunications carrier;

(iii) show that the applicant advertises the availability of, and charges for, such services using media of general distribution;

(iv) show the service area in which the applicant seeks designation as an eligible telecommunications carrier;

(v) contain a statement detailing the method and content of the notice the applicant has provided or intends to provide to the public regarding the application and a brief statement explaining why the proposed notice is reasonable and in compliance with applicable law;

(vi) contain a copy of the text of the notice;

(vii) contain the proposed effective date of the designation; and

(viii) contain any other information which the applicant wants considered in connection with the commission's review of its application.

(C) Contents of application for each common carrier seeking eligible telecommunications carrier designation and receipt of federal universal service support. A common carrier that seeks to be designated as an eligible telecommunications carrier and receive federal universal service support shall file with the commission an application complying with the requirements of this section. In addition to copies required by other commission rules, one copy of the application shall be delivered to the commission staff and one copy shall be delivered to the Office of Public Utility Counsel. The application shall:

(i) comply with the requirements of subparagraph (B) of this paragraph;

(ii) show that the applicant offers Lifeline Service to qualifying low- income consumers in compliance with 47 Code of Federal Regulations Part 54, Subpart E; and

(iii) show that the applicant offers toll limitation services in accordance with 47 Code of Federal Regulations §54.400 and §54.401.

(2) Commission processing of application.

(A) Administrative review. An application considered under this section may be reviewed administratively unless the presiding officer, for good cause, determines at any point during the review that the application should be docketed.

(i) The effective date shall be no earlier than 30 days after the filing date of the application or 30 days after notice is completed, whichever is later.

(ii) The application shall be examined for sufficiency. If the presiding officer concludes that material deficiencies exist in the application, the applicant shall be notified within ten

working days of the filing date of the specific deficiency in its application. The earliest possible effective date of the application shall be no less than 30 days after the filing of a sufficient application with substantially complete information as required by the presiding officer. Thereafter, any deadlines shall be determined from the 30th day after the filing of the sufficient application and information or from the effective date if the presiding officer extends that date.

(iii) While the application is being administratively reviewed, the commission staff and the staff of the Office of Public Utility Counsel may submit requests for information to the telecommunications carrier. Three copies of all answers to such requests for information shall be provided to the commission staff and the Office of Public Utility Counsel within ten days after receipt of the request by the telecommunications carrier.

(iv) No later than 20 days after the filing date of the application or the completion of notice, whichever is later, interested persons may provide the commission staff with written comments or recommendations concerning the application. The commission staff shall and the Office of Public Utility Counsel may file with the presiding officer written comments or recommendations regarding the application.

(v) No later than 35 days after the proposed effective date of the application, the presiding officer shall issue an order approving, denying, or docketing the application.

(B) Approval or denial of application.

(i) An application filed pursuant to paragraph (1)(B) of this subsection shall be approved by the presiding officer if the application meets the following requirements:

(I) the provision of service constitutes the services that are supported by the FUSF support mechanisms under 47 United States Code §254(c);

(II) the applicant will provide service using either its own facilities or a combination of its own facilities and resale of another carrier's services;

(III) the applicant advertises the availability of, and charges for, such services using media of general distribution;

(IV) notice was provided as required by this section;

(V) the applicant satisfies the requirements contained in subsection (b) of this section; and

(VI) if, in areas served by a rural telephone company, the eligible telecommunications carrier designation is consistent with the public interest.

(ii) An application filed pursuant to paragraph (1)(C) of this subsection shall be approved by the presiding officer if the application meets the following requirements:

(I) the applicant has satisfied the requirements set forth in clause (i) of this subparagraph;

(II) the applicant offers Lifeline Service to qualifying low-income consumers in compliance with 47 Code of Federal Regulations Part 54, Subpart E; and

(III) the applicant offers toll limitation services in accordance with 47 Code of Federal Regulations §54.400 and §54.401.

(C) Docketing. If, based on the administrative review, the presiding officer determines that one or more of the requirements have not been met, the presiding officer shall docket the application.

(D) Review of the application after docketing. If the application is docketed, the effective date of the application shall be automatically suspended to a date 120 days after the applicant has filed all of its direct testimony and exhibits, or 155 days after the proposed effective date, whichever is later. Three copies of all answers to requests for information shall be filed with the commission within ten days after receipt of the request. Affected persons may move to intervene in the docket, and a hearing on the merits shall be scheduled. A hearing on the merits shall be limited to issues of eligibility. The application shall be processed in accordance with the commission's rules applicable to docketed cases.

(E) Waiver. In the event that an otherwise eligible telecommunications carrier requests additional time to complete the network upgrades needed to provide single-party service, access to enhanced 911 service, or toll limitation, the commission may grant a waiver of these service requirements upon a finding that exceptional circumstances prevent the carrier from providing single-party service, access to enhanced 911 service, or toll limitation. The period for the waiver shall not extend beyond the time that the commission deems necessary for that carrier to complete network upgrades to provide single-party service, access to enhanced 911 service, or toll limitation services.

(h) Designation of eligible telecommunications carrier for unserved areas. If no common carrier will provide the services that are supported by federal universal service support mechanisms under 47 United States Code §254(c) to an unserved community or any portion thereof that requests such service, the commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof.

(i) Relinquishment of eligible telecommunications carrier designation. A common carrier may seek to relinquish its eligible telecommunications carrier designation.

(1) Area served by more than one eligible telecommunications carrier. The commission shall permit a common carrier to relinquish its designation as an eligible telecommunications carrier in any area served by more than one eligible telecommunications carrier upon:

(A) written notification not less than 90 days prior to the proposed effective date that the common carrier seeks to relinquish its designation as an eligible telecommunications carrier;

(B) determination by the commission that the remaining eligible telecommunications carrier or carriers can offer federally supported services to the relinquishing carrier's customers; and

(C) determination by the commission that sufficient notice of relinquishment has been provided to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier or carriers.

(2) Area where the common carrier is the sole eligible telecommunications carrier. In areas where the common carrier is the only eligible telecommunications carrier, the commission may permit it to relinquish its eligible telecommunications carrier designation upon:

(A) written notification not less than 90 days prior to the proposed effective date that the common carrier seeks to relinquish its designation as an eligible telecommunications carrier; and

(B) commission designation of a new eligible telecommunications carrier for the service area or areas.

§26.420. Administration of Texas Universal Service Fund (TUSF).

(a) Purpose. The provisions of this section establish the administration of the Texas Universal Service Fund (TUSF).

(b) Programs included in the TUSF.

(1) Section 26.403 of this title (relating to the Texas High Cost Universal Service Plan (THCUSP));

(2) Section 26.404 of this title (relating to the Small and Rural Incumbent Local Exchange Company (ILEC) Universal Service Plan);

(3) Section 26.406 of this title (relating to the Implementation of the Public Utility Regulatory Act §56.025);

(4) Section 26.408 of this title (relating to Additional Financial Assistance (AFA));

(5) Section 26.412 of this title (relating to Lifeline Service and Link Up Service);

(6) Section 26.413 of this title (relating to Tel-Assistance Service);

(7) Section 26.414 of this title (relating to Telecommunications Relay Service);

(8) Section 26.415 of this title (relating to Specialized Telecommunications Device Assistance Program (STDAP));

(9) Section 26.417 of this title (relating to Designation of Local Exchange Companies as Eligible Telecommunications Providers to Receive Texas Universal Service Funds (TUSF));

(10) Section 26.418 of this title (relating to Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds); and

(11) Section 26.420 of this title (relating to Administration of Texas Universal Service Funds).

(c) Responsibilities of the commission. The commission is the official governing agency for the TUSF, but may delegate the ministerial functions of TUSF administration to another entity (the TUSF administrator) through contractual agreement.

(1) Monitoring, and supervising TUSF administration. The commission reserves the exclusive power to revise rules related to the operation and administration of the TUSF and to monitor and supervise such operation and administration.

(2) Annual audit. The commission annually shall provide for an audit of the TUSF by an independent auditor. The costs of the audit are costs of the commission that are incurred in administering the TUSF, and therefore shall be reimbursed from the TUSF.

(3) Inquiry into administration of the TUSF. The commission may, upon its own motion, upon the petition of the commission staff or the Office of Public Utility Counsel, initiate an inquiry into any aspect of the administration of the TUSF. Any other party may initiate a complaint proceeding pursuant to the commission's procedural rules.

(4) Selection of the TUSF administrator.

(A) The commission shall have the sole discretion in the selection of the TUSF administrator. The selection of the TUSF administrator shall be based on a competitive bidding process.

(B) The TUSF administrator must meet the technical qualifications as provided in subsection (d)(1) of this section as well as other requirements as determined by the commission.

(5) Contract term of the TUSF administrator. The commission shall determine the duration of the TUSF administrator's contract. Prior to expiration of the contract term, the commission may discharge the TUSF administrator of its duties upon 60-days written notice.

(d) TUSF administrator. The TUSF administrator serves at the discretion of the commission.

(1) Technical requirements of the TUSF administrator. The TUSF administrator shall:

(A) be neutral and impartial, not advocate specific positions to the commission in proceedings not related to the administration of the universal service support mechanisms, and not have a direct financial interest in the universal service support mechanisms established by the commission;

(B) possess demonstrated technical capabilities, competence, and resources to perform the duties of the TUSF administrator as described in this section; and

(C) be bonded or bondable.

(2) Duties of the TUSF administrator. The TUSF administrator will administer the TUSF in accordance with the rules set forth in this section and in accordance with the guidelines established by the commission in its contract with the TUSF administrator. The TUSF administrator's general duties shall include, but not be limited to:

(A) managing the daily operations and affairs of the TUSF in an efficient, fair and competitively neutral manner;

(B) taking steps necessary to ensure that all eligible telecommunications providers (ETPs) are in compliance with the relevant sections of this title under which they are receiving universal service support;

(C) calculating and collecting the proper assessment amount from every telecommunications provider and verifying that all telecommunications providers are in compliance with the Public Utility Regulatory Act §56.022;

(D) disbursing the proper support amounts, ensuring that only eligible recipients receive funds, and verifying that all recipients are in compliance with the section or sections of this title under which they are eligible to receive support;

(E) taking steps necessary, including audits, to ensure that all telecommunications providers that are subject to the TUSF assessment are accurately reporting required information;

(F) taking steps necessary, including audits, to ensure that all recipients of TUSF funds are accurately reporting required information;

(G) submitting periodic summary reports to the commission regarding the administration of the TUSF in accordance with specifications established by the commission;

(H) notifying the commission of any telecommunications providers that are in violation of any of the requirements of this section, §26.417 of this title and any reporting requirements; and

(I) performing other duties as determined by the commission.

(e) Transition from existing USF programs to the TUSF.

(1) Continuation of assessments and disbursements for periods prior to the implementation of TUSF programs. The TUSF administrator shall administer all outstanding assessment and disbursement obligations to support mechanisms existing on the effective date of this section, for periods prior to the implementation date of the programs in subsection (b) of this section.

(2) Implementation of programs included in the TUSF and termination of existing support mechanisms. The TUSF administrator shall ensure that the collection of assessments from telecommunication providers pursuant to subsection (g) of this section, the disbursement of support amounts to ETPs pursuant to subsection (h) of this section, and the termination of support mechanisms existing on the effective date of this section, occur on a uniform date. In the event that interim assessments and disbursements are necessary prior to the establishment of final assessment and disbursement levels, they shall be subject to true-up to the final level of funding.

(f) Determination of the amount needed to fund the TUSF.

(1) Amount needed to fund the TUSF. The amount needed to fund the TUSF shall be composed of the following elements.

(A) Costs of TUSF programs. The TUSF administrator shall compute and include the costs of the following TUSF programs:

(i) Texas High Cost Universal Service Plan, §26.403 of this title;

(ii) Small and Rural ILEC Universal Service Plan, §26.404 of this title;

(iii) Implementation of the Public Utility Regulatory Act §56.025, §26.406 of this title;

(iv) Additional Financial Assistance, §26.408 of this title;

(v) Lifeline Service and Link Up Service, §26.412 of this title;

(vi) Tel-Assistance Service, §26.413 of this title;

(vii) Telecommunications Relay Service, §26.414 of this title; and

(viii) Specialized Telecommunications Device Assistance Program (STDAP), §26.415 of this title.

(B) Costs of implementation and administration of the TUSF. The TUSF implementation and administration costs shall include appropriate costs associated with the implementation and administration of the TUSF incurred by the commission (including the costs incurred by the TUSF administrator on behalf of the commission), any costs incurred by the Texas Department of Human Services caused by its administration of the Lifeline, Link Up, and Tel-Assistance programs, and any costs incurred by the Texas Commission for the Deaf and Hard of Hearing caused by its administration of the Specialized Telecommunications Device Assistance Program (STDAP) and the Telecommunications Relay Service programs.

(C) Reserve for contingencies. The TUSF administrator shall establish a reserve for such contingencies as late payments and uncollectibles in an amount authorized by the commission.

(2) Determination of amount needed. After the initial determination, the TUSF administrator shall determine, on a periodic basis, the amount needed to fund the TUSF. The determined amount shall be approved by the commission.

(g) Assessments for the TUSF.

(1) Providers subject to assessments. The TUSF assessments shall be payable by all telecommunications providers having access to the customer base; including but not limited to wireline and wireless providers of telecommunications services.

(2) Basis for assessments. Assessments shall be made to each telecommunications provider based upon its monthly taxable telecommunications receipts reported by that telecommunications provider under Chapter 151, Tax Code.

(3) Assessment. Each telecommunications provider shall pay its TUSF assessment each month as calculated using the following procedures.

(A) Calculation of assessment rate. The TUSF administrator shall determine an assessment rate to be applied to all telecommunications providers on a periodic basis approved by the commission.

(B) Calculation of assessment amount. Payments to the TUSF shall be computed by multiplying the assessment rate determined pursuant to subparagraph (A) of this paragraph by the basis for assessments as determined pursuant to subsection (g)(2) of this section.

(4) Reporting requirements. Every month, each telecommunications provider shall be required to report taxable telecommunications receipts under Chapter 151, Tax Code to the commission or the TUSF administrator.

(5) Recovery of assessments. A telecommunications provider may recover the amount of its TUSF assessment from its retail customers, except Lifeline, Link Up, and Tel-Assistance customers. The commission may order modifications in a telecommunications provider's method of recovery.

(A) Retail customers' bills. In the event a telecommunications provider chooses to recover its TUSF assessment through a surcharge added to its retail customers' bills;

(i) the surcharge must be listed on the retail customers' bills as "the universal service fund surcharge"; and

(ii) the surcharge must be assessed as a percentage of every retail customers' bill, except Lifeline, Link Up, and Tel-Assistance services.

(B) Commission approval of surcharge mechanism. An ILEC choosing to recover the TUSF assessment through a surcharge on its retail customers' bills must file for commission approval of the surcharge mechanism.

(C) Tariff changes. A telecommunications provider choosing to recover the TUSF assessment through a surcharge on its retail customers' bills shall file the appropriate changes to its tariff and provide supporting documentation for the method of recovery.

(D) Recovery period. A single universal service fund surcharge shall not recover more than one month of assessments.

(6) Disputing assessments. Any telecommunications provider may dispute the amount of its TUSF assessment. The telecommunications provider should endeavor to first resolve the dispute with the TUSF administrator. If the telecommunications

provider and the TUSF administrator are unable to satisfactorily resolve their dispute, either party may petition the commission to resolve the dispute. Pending final resolution of disputed TUSF assessment rates and/or amounts, the disputing telecommunications provider shall remit all undisputed amounts to the TUSF administrator by the due date.

(h) Disbursements from the TUSF to ETPs, ILECs, other entities and agencies.

(1) ETPs, ILECs, other entities, and agencies.

(A) ETPs. The commission shall determine whether an ETP qualifies to receive funds from the TUSF. An ETP qualifying for the following programs is eligible to receive funds from the TUSF:

(i) Texas High Cost Universal Service Plan;

(ii) Small and Rural ILEC Universal Service Plan;

(iii) Lifeline Service and Link Up Service; and/or

(iv) Tel-Assistance Service.

(B) ILECs. The commission shall determine whether an ILEC qualifies to receive support from the following TUSF programs:

(i) Implementation of the Public Utility Regulatory Act §56.025; and/or

(ii) Additional Financial Assistance program.

(C) Other entities. The commission shall determine whether other entities qualify to receive funds from the TUSF. Entities qualifying for the following programs are eligible to receive funds from the TUSF:

(i) Telecommunications Relay Service; and/or

(ii) Specialized Telecommunications Device Assistance Program.

(D) Agencies. The commission, the Texas Department of Human Services, the Texas Commission for the Deaf and Hard of Hearing, and the TUSF administrator are eligible for reimbursement of the costs directly and reasonably associated with the implementation of the provisions of the TUSF.

(2) Reporting requirements.

(A) ETPs. An ETP shall report to the TUSF administrator as required by the provisions of the section or sections under which it qualifies to receive funds from the TUSF.

(B) Other entities. A qualifying entity shall report to the TUSF administrator as required by the provisions of the section or sections under which it qualifies to receive funds from the TUSF.

(C) Agencies. A qualifying agency shall report its qualifying expenses to the TUSF administrator each month.

(3) Disbursements. The TUSF administrator shall verify that the appropriate information has been provided by each ETP, local exchange company (LEC), other entities or agencies and shall issue disbursements to ETPs, LECs, other entities and agencies within 30 days of the due date of their reports.

(i) True-up. The assessment amount determined pursuant to subsections (f) and (g) of this section shall be subject to true-up as determined by the TUSF administrator and approved by the commission. True-ups shall be limited to a three year period for under-reporting and a one year period for over-reporting.

(j) Sale or transfer of exchanges.

(1) An ETP that acquires exchanges from an unaffiliated small or rural ILEC receiving support for those exchanges pursuant to §26.404 of this title, shall receive the per-line support amount for which those exchanges were eligible prior to the sale or transfer.

(2) An ETP that acquires exchanges from an unaffiliated ETP receiving support for those exchanges pursuant §26.403 of this title, shall receive the per-line support amount for which those exchanges were eligible prior to the transfer of the exchanges.

(k) Proprietary information. The commission and the TUSF administrator are subject to the Texas Open Records Act, Texas Government Code, Chapter 552. Information received by the TUSF administrator from the individual telecommunications providers shall be treated as proprietary only under the following circumstances:

(1) An individual telecommunications provider who submits information to the TUSF administrator shall be responsible for designating it as proprietary at the time of submission. Information considered to be confidential by law, either constitutional, statutory, or by judicial decision, may be properly designated as proprietary.

(2) An individual telecommunications provider who submits information designated as proprietary shall stamp on the face of such information "PROPRIETARY PURSUANT TO PUC SUBST. R. §26.420(k)".

(3) The TUSF administrator may disclose all information from an individual telecommunications provider to the telecommunications provider who submitted it or to the commission and its designated representatives without notifying the telecommunications provider.

(4) All third party requests for information shall be directed through the commission. If the commission or the TUSF administrator receives a third party request for information that a telecommunications provider has designated proprietary, the commission shall notify the telecommunications provider. If the telecommunications provider does not voluntarily waive the proprietary designation, the commission shall submit the request and the responsive information to the Office of the Attorney General for an opinion regarding disclosure pursuant to the Texas Open Records Act, Texas Government Code, Chapter 552, Subchapter G.

This 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 March 17, 1999.

TRD-9901656
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 936-7308

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Subchapter E. Certification, Licensing and Registration

16 TAC §§26.109, 26.111, 26.113

The Public Utility Commission of Texas (commission) proposes new §26.109 relating to Standards for Granting of Certificates of Operating Authority (COAs), §26.111 relating to Standards for

Granting of Service Provider Certificates of Operating Authority (SPCOAs), and §26.113 relating to Amendment of Certificates of Operating Authority (COA) or Service Provider Certificates of Operating Authority (SPCOA). Project Number 19582 has been assigned to this proceeding. The proposed sections will replace §23.38 of this title (relating to Standards for Granting of Certificates of Operating Authority and Service Provider Certificates of Operating Authority). The proposed sections establish commission rules for implementing the Public Utility Regulatory Act (PURA), Chapter 54, Subchapters C and D. The proposed sections will establish financial and technical standards for the award of certificates of operating authority and service provider certificates of operating authority and will establish the procedure for amending certificates of operating authority and service provider certificates of operating authority.

The Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167) 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). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules applicable to telecommunications service providers. The duplicative sections of Chapter 23 will be proposed for repeal as each new section is proposed for publication in the new chapter.

General changes to rule language:

The proposed new sections reflect different section, subsection, and paragraph designations due to the reorganization of the rules. Citations to the Public Utility Regulatory Act have been updated to conform to the Texas Utilities Code throughout the sections and citations to other sections of the commission's rules have been updated to reflect the new section designations. Some text has been proposed for deletion as unnecessary in the new sections because the dates and requirements in the text no longer apply due to the passage of time and/or fulfillment of the requirements. The *Texas Register* will publish these sections as all new text. Persons who desire a copy of the proposed new sections as they reflect changes to the existing section in Chapter 23 may obtain a redlined version from the commission's Central Records under Project Number 19852. Section 23.38(c) applies only to COAs and is therefore not included in the redline of §26.111 which applies only to SPCOAs; §23.38(d) applies only to SPCOAs and is therefore not included in the redline of §26.109 which applies only to COAs. Proposed §26.113 is redlined only to existing §23.38(g).

Other changes specific to each section:

Proposed new §26.109 will replace §23.38(a), (b), (c), (e) and (f) as they relate to Certificates of Operating Authority. Proposed new §26.111 will replace §23.38(a), (b), (d), (e) and (f) as they relate to Service Provider Certificates of Operating Authority. Proposed new §26.113 will replace §23.38(g) as it relates to both COAs and SPCOAs.

The following defined terms in existing §23.38(b) have not been included in proposed new §26.109 or §26.111 as these definitions were moved to §26.5 of this title (relating to Definitions): "affiliate", "assumed name", "capitalization", "corporate name", "geographic scope", "incumbent local exchange company (ILEC)", "SPCOA reseller", "return on assets", and "working capital requirements". The acronyms "COA" and "SPCOA" are explained in the text of the sections and are not included in the definitions. The term "telecommunications facilities" has been deleted, as it is not used in the sections. The terms "capital expenditures" and "control" have been deleted because they are standard definitions, which are not necessary to understand the rule.

Proposed new §26.109(b)(1) and §26.109(b)(1)(F) - (J) have deleted references to the COA build-out requirements and the limitation of 31,000 access lines as preempted by the Order FCC 97-346 on September 26, 1997. Proposed new §26.109(b)(1)(C)(iii) and §26.111(b)(1)(C)(iii) have been added to clarify that the complaint histories shall include the type of complaint, status of complaints, resolution of complaints and number of customers in each state where the complaints occurred. Proposed new §26.109(b)(1)(D) and §26.111(b)(1)(D) have been added to clarify what the quality of service standards shall include. Proposed new §§26.109(d)(1)(C), 26.111(d)(1)(C), and 26.113(a)(1)(B) have been added to review the requested name of a utility for deceptive, misleading or vague implications before granting certification. Proposed new §26.109(e) and §26.111(e) have been added to establish reporting requirements for COA and SPCOA holders. Proposed new §26.111(b)(2)(H) has been added to allow data-only SPCOA providers a waiver from 911 and local number portability compliance as related to voice services.

Proposed new §26.113(a)(1)(A) has been added to allow the commission to grant approval of simple name changes on an administrative basis. Proposed new §26.113(a)(3) has been added to clarify when a utility is required to file an amendment relating to selling, transferring, assigning, or leasing an SPCOA or COA certification. Proposed new §26.113(e) has been added to establish the standards for discontinuing optional services or relinquishing a certification.

Questions for parties who comment on the proposed rule: (1) What language should be adopted in §26.113 to clarify the commission's policy of granting a certificate in only one name, consistent with §26.109(d)(1) and §26.111(d)(1)?

Christopher Green, Assistant General Counsel, Office of Regulatory Affairs, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Christopher Green has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be rules that enable the commission to better protect the public interest against entities that are not qualified to provide basic local exchange telephone service, basic local telecommunications service, and switched access service, while encouraging the

development of a competitive marketplace for local exchange telecommunications services. There will be no effect on small businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Christopher Green has also determined that the proposed new sections should not affect a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

The commission staff will conduct a public hearing on this rulemaking under Government Code §2001.029 at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on May 11, 1999, at 10:00 a.m.

Comments on the proposed new sections (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 30 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. The commission also invites specific comments regarding the Section 167 requirement as to whether the reason for adopting or readopting the rule continues to exist. All comments should refer to Project Number 19582.

These new sections are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically, PURA §§54.102-54.111, which grant the commission authority to determine the criteria for financial and technical qualifications of applicants for certificates of operating authority, and PURA §§54.152-54.159, which grant the commission authority to determine the criteria for financial and technical qualifications of applicants for service provider certificates of operating authority.

Cross-Index to Statutes: Public Utility Regulatory Act §14.002, §§54.102-54.111, and §§54.152-54.159.

§26.109. Standards for Granting of Certificates of Operating Authority (COAs).

(a) Scope and purpose. This section applies to the certification of persons and entities to provide basic local exchange telephone service, basic local telecommunications service, and switched access service as holders of certificates of operating authority established in the Public Utility Regulatory Act, Chapter 54, Subchapter C. Through this section, the commission strives to protect the public interest against entities that are not qualified to provide basic local exchange telephone service, basic local telecommunications service, and switched access service, while also encouraging the development of a competitive marketplace for local exchange telecommunications services that is free of unreasonable barriers to entry that restrict or impede the development of a market that will provide consumers with the best services at the lowest cost.

(b) Standards for granting certification to COA applicants.

(1) The commission shall consider the factors listed in subparagraphs (A)-(E) of this paragraph in deciding whether to grant a COA to an applicant proposing to serve an exchange of an incumbent local exchange company (ILEC).

(A) Whether the applicant has satisfactorily provided all of the information required in the Application for a Certificate of Operating Authority.

(B) Whether the applicant is financially qualified to be a facilities-based local service provider. To prove financial qualification as a facilities-based utility, an applicant shall provide evidence sufficient to establish that:

(i) Applicant possesses the greater of $100,000 cash or cash equivalent or sufficient cash or cash equivalent to meet start up expenses, working capital requirements and capital expenditures, liquid and readily available to meet the applicant's startup expenses, working capital requirements and capital expenditures for the first two years of Texas operations; or

(ii) Applicant is an established business entity and is able to demonstrate evidence of profitability in existing operations for two years preceding the date of application by submitting a balance sheet and income statement audited or reviewed by a certified public accountant establishing all of the following:

(I) A long-term debt to capitalization ratio of less than 60%;

(II) A return-on-assets ratio of at least 10%; and,

(III) The greater of $50,000 cash or cash equivalent or sufficient cash or cash equivalent to meet startup expenses, working capital requirements and capital expenditures, liquid and readily available to meet the applicant's startup expenses, working capital requirements and capital expenditures for a minimum of the first two years of Texas operations.

(C) Whether the applicant is technically qualified. The commission shall determine whether an applicant possesses sufficient technical qualifications to be awarded a COA based upon a review of the following information.

(i) Prior experience by the applicant or one or more of the applicant's principals or employees in the telecommunications industry or a related industry.

(ii) Any complaint history regarding the applicant, applicant's affiliates, predecessors in interest, shareholders, and principals on file at the Public Utility Commission of Texas.

(iii) Any complaint history regarding the applicant, applicant's affiliates, predecessors in interest, shareholders, and principals with Public Utility Commissions or Public Service Commissions in other states where the applicant is doing business. The complaint history shall include, but not be limited to, the type of complaint, status of complaint, resolution of complaint and the number of customers in each state where complaints occur.

(iv) Any complaint history regarding the applicant, applicant's affiliates, predecessors in interest, shareholders, and principals on file with the Office of the Texas Attorney General and the Attorney General in other states where the applicant is doing business.

(v) The compliance record of the applicant, applicant's affiliates, predecessors in interest, shareholders, and principals at the Texas Comptroller's Office.

(vi) The compliance record of the applicant, applicant's affiliates, predecessors in interest, shareholders, and principals at the Public Utility Commission of Texas.

(D) Whether the applicant is able to meet the commission's quality of service standards. Quality of service standards

shall include, but not be limited to, 911 compliance, local number portability capability and Y2K compliance of all telecommunications equipment.

(E) Whether certification of the applicant is in the public interest.

(2) If, after considering the factors in this subsection, the commission finds it to be in the public interest to do so, the commission may limit the geographic scope of the COA.

(c) Financial instruments that will meet the cash requirements established in this section.

(1) Applicants for COAs shall be permitted to use any of the financial instruments set out in subparagraphs (A)-(F) of this paragraph to satisfy the cash requirements established in this rule to prove financial qualification.

(A) Cash or cash equivalent, including cashier's check or sight draft.

(B) A certificate of deposit with a bank or other financial institution.

(C) A letter of credit issued by a bank or other financial institution, irrevocable for a period of at least 12 months beyond certification of the applicant by the commission.

(D) A line of credit or other loan, issued by a bank or other financial institution, irrevocable for a period of at least 12 months beyond certification of the applicant by the commission and payable on an interest-only basis for the same period.

(E) A loan issued by a subsidiary or affiliate of applicant, or a corporation holding controlling interest in the applicant, irrevocable for a period of at least 12 months beyond certification of the applicant by the commission, and payable on an interest-only basis for the same period.

(F) A guaranty issued by a shareholder or principal of applicant, a subsidiary or affiliate of applicant, or a corporation holding controlling interest in the applicant, irrevocable for a period of at least 12 months beyond the certification of the applicant by the commission.

(2) To the extent that the applicant relies upon a loan or guaranty provided in paragraph (1)(E) or (F) of this subsection, the applicant shall provide evidence sufficient to establish that the lender or guarantor possesses sufficient cash or cash equivalent to fund the loan or guaranty.

(3) All cash and instruments listed in paragraph (1)(A)-(F) of this subsection shall be unencumbered by pledges as collateral and shall be subject to verification and review by the commission prior to certification of the applicant and for a period of 12 months beyond the date of certification of the applicant by the commission. Failure to comply with this requirement may void an applicant's certification or result in such other action as the commission deems in the public interest, including, but not limited to, assessment of reasonable penalties and all other available remedies under the Public Utility Regulatory Act.

(d) Name on certificates.

(1) All basic local exchange telephone service, basic local telecommunications service, and switched access service provided under a COA shall be provided in the name under which certification was granted by the commission. The commission shall grant the certificate in only one name.

(A) If the applicant is a corporation, the commission shall issue the certificate in the corporate or assumed name of the applicant.

(B) If the applicant is an unincorporated business entity or an individual, the commission shall issue the certificate in the assumed name of the entity or the individual.

(C) Commission staff shall review the requested name to determine if the name is deceptive, misleading, vague, inappropriate, or duplicative of an existing certificated telecommunications utility. If the staff determines that the requested name is deceptive, misleading, vague, inappropriate, or duplicative, it shall notify the applicant and the applicant shall modify the name to alleviate the staff's concerns. If the name is not adequately modified, the application may be denied.

(2) The holder of a COA may request commission approval to change the name on the certificate by filing an application to amend its certificate with the commission.

(e) Reporting requirements

(1) All COA holders shall file updated information set forth in paragraph (2) of this subsection on an annual basis, by June 30 of each year.

(2) Annual reportable information shall consist of, but not be limited to the following:

(A) Changes in addresses, telephone numbers, authorized contacts and other information for contacting COA holders in Project Number 19421, *Notification of Changes in Address, Contact Representative, and/or Telephone Numbers, Pursuant to P.U.C. Substantive Rule §26.89;*

(B) A description of the type(s) of communications services being provided and the exchanges in which the services are being provided.

§26.111. Standards for Granting of Service Provider Certificates of Operating Authority (SPCOAs).

(a) Scope and purpose. This section applies to the certification of persons and entities to provide basic local exchange telephone service, basic local telecommunications service, and switched access service as holders of service provider certificates of operating authority, established in the Public Utility Regulatory Act, Chapter 54, Subchapter D. Through this section, the commission strives to protect the public interest against entities that are not qualified to provide basic local exchange telephone service, basic local telecommunications service, and switched access service, while also encouraging the development of a competitive marketplace for local exchange telecommunications services that is free of unreasonable barriers to entry that restrict or impede the development of a market that will provide consumers with the best services at the lowest cost.

(b) Standards for granting certification to SPCOA applicants.

(1) The commission may condition or limit the scope of a SPCOA's service in at least the following ways:

(A) Facility-based;

(B) Resale-only;

(C) Data-only;

(D) Geographic scope;

(E) Some combination of the above, as appropriate.

(2) The commission shall consider the following factors in deciding whether and how to condition or limit a SPCOA:

(A) Whether the applicant has satisfactorily provided all of the information required in the application for a SPCOA.

(B) Whether the applicant is financially qualified as a facilities-based SPCOA. To prove financial qualifications as a facilities-based SPCOA, the applicant shall meet the standards set forth in §26.109(b)(1)(B) of this title (relating to Standards for Granting Certificates of Operating Authority).

(C) Whether the applicant is financially qualified as a resale-only SPCOA. To prove financial qualifications as a resale-only SPCOA, an applicant shall provide evidence sufficient to establish that:

(i) Applicant possesses the greater of $25,000 cash or cash equivalent or sufficient cash or cash equivalent to meet startup expenses, working capital requirements and capital expenditures, liquid and readily available to meet the applicant's startup expenses, working capital requirements and capital expenditures for the first year of Texas operations; or

(ii) Applicant is an established business entity and is able to demonstrate evidence of profitability in existing operations for two years preceding the date of application by submitting a balance sheet and income statement audited or reviewed by a certified public accountant establishing all of the following:

(I) A long-term debt to capitalization ratio of less than 60%;

(II) A return-on-assets ratio of at least 10%; and,

(III) The greater of $10,000 cash or cash equivalent or sufficient cash or cash equivalent to meet startup expenses, working capital requirements and capital expenditures, liquid and readily available to meet the applicant's startup expenses, working capital requirements and capital expenditures for the first year of Texas operations.

(D) Whether the applicant is technically qualified. The commission shall determine whether an applicant possesses sufficient technical qualifications to be awarded a facilities-based SPCOA certification or whether applicant should be restricted to a resale-only SPCOA certification, based upon a review of the following information.

(i) Prior experience by the applicant or one or more of the applicant's principals or employees in the telecommunications industry or a related industry.

(ii) Any complaint history regarding the applicant, applicant's affiliates, predecessors in interest, shareholders, and principals on file at the Public Utility Commission of Texas, the Texas Attorney General, or with the Public Utility Commissions, Public Service Commissions, or Attorneys General in other states where the applicant is doing business. The complaint history shall include, but not be limited to, the type of complaint, status of complaint, resolution of complaint, and the number of customers in each state where complaints have occurred.

(iii) The compliance record of the applicant, applicant's affiliates, predecessors in interest, shareholders, and principals at the Texas Comptroller's Office.

(iv) The compliance record of the applicant, applicant's affiliates, predecessors in interest, shareholders, and principals at the Public Utility Commission of Texas.

(E) Whether the applicant is able to meet the commission's quality of service standards. The quality of service standards shall include, but not be limited to, 911 compliance, local number portability capability and Y2K compliance of all telecommunications equipment.

(F) Whether certification of the applicant is in the public interest.

(G) Whether the applicant, together with affiliates, had in excess of 6.0% of the total intrastate switched access minutes of use as measured by the most recent 12-month period preceding the filing of the application for which data is available.

(H) Whether the applicant has limited its operation to data-only services. If the applicant is limited to data-only services, the applicant will be eligible for a data-only SPCOA, and the applicant shall be waived from 911 and local number portability compliance as related to switched voice services. If the applicant intends to add voice services at a future date, the applicant must first file an amendment, subject to approval of the commission, which shows that the applicant is in compliance with all of the commission's quality of service standards.

(3) If, after considering the factors in this subsection, the commission finds it to be in the public interest to do so, the commission may limit the geographic scope of the SPCOA.

(c) Financial instruments that will meet the cash requirements established in this section.

(1) Applicants for SPCOAs shall be permitted to use any of the financial instruments set out in subparagraphs (A)-(F) of this paragraph to satisfy the cash requirements established in this rule to prove financial qualification.

(A) Cash or cash equivalent, including cashier's check or sight draft.

(B) A certificate of deposit with a bank or other financial institution.

(C) A letter of credit issued by a bank or other financial institution, irrevocable for a period of at least 12 months beyond certification of the applicant by the commission.

(D) A line of credit or other loan, issued by a bank or other financial institution, irrevocable for a period of at least 12 months beyond certification of the applicant by the commission and payable on an interest-only basis for the same period.

(E) A loan issued by a subsidiary or affiliate of applicant, or a corporation holding controlling interest in the applicant, irrevocable for a period of at least 12 months beyond certification of the applicant by the commission, and payable on an interest-only basis for the same period.

(F) A guaranty issued by a shareholder or principal of applicant, a subsidiary or affiliate of applicant, or a corporation holding controlling interest in the applicant, irrevocable for a period of at least 12 months beyond the certification of the applicant by the commission.

(2) To the extent that the applicant relies upon a loan or guaranty provided in paragraph (1)(E) or (F) of this subsection, the applicant shall provide evidence sufficient to establish that the lender or guarantor possesses sufficient cash or cash equivalent to fund the loan or guaranty.

(3) All cash and instruments listed in paragraph (1) (A) - (F) of this subsection shall be unencumbered by pledges as collateral

and shall be subject to verification and review by the commission prior to certification of the applicant and for a period of 12 months beyond the date of certification of the applicant by the commission. Failure to comply with this requirement may void an applicant's certification or result in such other action as the commission deems in the public interest, including, but not limited to, assessment of reasonable penalties and all other available remedies under the Public Utility Regulatory Act.

(d) Name on certificates.

(1) All basic local exchange telephone service, basic local telecommunications service, and switched access service provided under an SPCOA shall be provided in the name under which certification was granted by the commission. The commission shall grant the certificate in only one name.

(A) If the applicant is a corporation, the commission shall issue the certificate in the corporate or assumed name of the applicant.

(B) If the applicant is an unincorporated business entity or an individual, the commission shall issue the certificate in the assumed name of the entity or the individual.

(C) Commission staff shall review the requested name to determine if the name is deceptive, misleading, vague, inappropriate, or duplicative of an existing certificated telecommunications utility. If the staff determines that the requested name is deceptive, misleading, vague, inappropriate, or duplicative, it shall notify the applicant and the applicant shall modify the name to alleviate the staff's concerns. If the name is not adequately modified, the application may be denied.

(2) The holder of an SPCOA may request commission approval to change the name on the certificate by filing an application to amend its certificate with the commission.

(e) Reporting requirements

(1) All SPCOA holders shall file updated information set forth in paragraph (2) of this subsection on an annual basis, by June 30 of each year.

(2) Annual reportable information shall consist of, but not be limited to the following:

(A) Changes in addresses, telephone numbers, authorized contacts and other information for contacting SPCOA holders in Project Number 19421, *Notification of Changes in Address, Contact Representative, and/or Telephone Numbers, Pursuant to P.U.C. Substantive Rule §26.89;*

(B) A description of the type(s) of communications services being provided and the exchanges in which the services are being provided.

§26.113. Amendment of Certificate of Operating Authority (COA) or Service Provider Certificate of Operating Authority (SPCOA).

(a) A person or entity granted a COA or an SPCOA by the commission shall be required to file an application to amend the COA or an SPCOA on a commission approved form in order to:

(1) Change the corporate name or assumed name of the certificate holder.

(A) Name change amendments may be granted on an administrative basis, if the holder is in compliance with §26.109(b)(1)(C) of this title (relating to Standards for Granting Certificates of Operating Authority) or §26.111(b)(2)(C) of this title (relating to Standards for Granting Service Provider Certificates of Operating Authority), and no hearing is requested.

(B) Commission staff shall review the requested name to determine if the name is deceptive, misleading, vague, inappropriate, or duplicative of an existing certificated telecommunications utility. If the staff determines that the requested name is deceptive, misleading, vague, inappropriate, or duplicative, it shall notify the applicant and the applicant shall modify the name to alleviate the staff's concerns. If the name is not adequately modified, the amendment may be denied.

(2) Change the geographic scope of the COA or SPCOA;

(3) Sell, transfer, assign, or lease a controlling interest in the COA or the SPCOA or sell, transfer, or lease a controlling interest in the entity holding the COA or the SPCOA.

(4) Remove the resale-only restriction on a resale-only SPCOA certificate.

(5) Remove the data-only restriction on a data-only SPCOA certificate.

(b) If a COA holder sells, merges, assigns, or leases its certificate or the entity holding the certificate to an SPCOA holder with an identical geographic scope, the surviving entity shall hold a COA certificate and shall have all the obligations of a COA holder set forth under state and federal law; the surviving entity shall also notify the commission within 30 days of the sale, merger, assignment, or lease.

(c) If the application to amend is for a name change of the certificate holder and is not a sale, transfer, assignment, or lease of the COA or the SPCOA or a sale, transfer, or lease of the entity holding the COA or the SPCOA, applicant will be required to provide a general description of the applicant, including the following:

(1) Legal name and all assumed names of the entity to which the commission issued the certificate.

(2) All other assumed names, if any, under which the certificate holder does business.

(3) Certificate number of the COA or SPCOA.

(4) Address and telephone number of the principal office of certificate holder.

(5) Name, address, and office location of each partner, officer, and the five largest shareholders of certificate holder.

(6) Proposed amendment to legal name or assumed name of certificate holder.

(d) If the application to amend requests any change other than a name change, the commission shall consider the factors set forth in §26.109 of this title and §26.111 of this title in determining whether to approve the amendment to the certificate.

(e) Standards for discontinuing optional services or relinquishing certifications.

(1) Utility discontinuing optional services or relinquishing an SPCOA or COA certification shall comply with PURA §54.253. Notification to the commission shall consist of filing an amendment, which provides the following information:

(A) Name, address, and phone number of utility;

(B) SPCOA or COA number being discontinued or relinquished;

(C) Commission docket number in which the SPCOA or COA was granted;

(D) A sworn statement stating the authority to discontinue service or relinquish certification, notification of customers, and that the information provided in the amended application is true and correct;

(E) Notification to each customer.

(i) The notification letter shall clearly state the intent of the utility to either cease an optional service or cease operations and a copy of the letter shall be provided to the commission;

(ii) The notification letter shall give customers a minimum of 60 days notice of relinquishment of certification or discontinuation of optional services;

(iii) The notification letter shall inform customers of the carrier of last resort or make other arrangements to provide service as approved by the customers.

(2) All customer deposits and credits shall be returned within 60 days of notification to relinquish certification;

(3) Any switchover fees that will be charged to affected customers shall be paid by the utility relinquishing the certification;

(4) The relinquishing utility shall maintain operations until it has obtained commission authorization to cease operations or services. Upon receiving commission authorization to cease operations, the relinquishing utility shall void its existing interconnection agreement(s).

(f) No later than five days after filing an application to amend, the applicant shall notify the Advisory Commission on State Emergency Communications and all affected 9-1-1 entities by providing a copy of the application to amend.

This 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 March 22, 1999.

TRD-9901680
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 936-7308

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Part IX. Texas Lottery Commission

Chapter 401. Administration of State Lottery Act

Subchapter D. Lottery Game Rules

16 TAC §401.308

The Texas Lottery Commission proposes amendments to §401.308, relating to Cash 5 On-line game. The proposed amendments will allow advanced play and extended multi-draw purchases. A lottery player will be able to purchase a Cash 5 ticket for any of the four Cash 5 drawings immediately following the current drawings. Additionally, the proposed amendments will allow a player to purchase a Cash 5 ticket for up to 20 consecutive draws beginning with the current draw.

Lynn Gunn, Senior Financial Manager, has determined that for the first five-year period the section as proposed will be in effect the fiscal implications for state government as a result of enforcing or administering the section will be a net gain to the State as follows: FY 1999, $50,639; FY 2000, $202,557; FY 2001, $202,557; FY 2002, $202,557; and, FY 2003, $202,557.

Ms. Gunn also has determined that for each year of the first five-year period the section as proposed is in effect there will be no fiscal implication for local government as a result of enforcing or administering the section as proposed.

Ms. Gunn also has determined that for each year of the first five-year period the section as proposed is in effect the public benefit anticipated as a result of enforcing the section as proposed will be to generate additional revenue for the State of Texas through advance sales and through the ability to purchase tickets for multiple draws. Ms. Gunn has also determined that there will be no cost to small businesses or individuals who are required to comply with the section as proposed, and no effect on local employment is anticipated.

Comments on the proposed amendments may be submitted to Kimberly L. Kiplin, General Counsel, Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630.

The amendments are proposed under Texas Government Code, Section 466.015 which provides the Texas Lottery Commission with the authority to adopt rules governing the operation of the lottery.

Texas Government Code, Chapter 466 is affected by the proposed amendments.

§401.308. "Cash 5" On-Line Game Rule.

(a) (No change.)

(b) Definitions. In addition to the definitions provided in §401.304 of this title (relating to On-Line Games Rules (General)), and unless the context in this rule otherwise requires, the following definitions apply.

(1) Advance Play - A player may purchase a Cash 5 ticket for any of the three Cash 5 drawings immediately following the current drawing. Example: On Monday, before the drawing, a Cash 5 ticket can be purchased for Tuesday, Thursday, or Friday drawings.

(2) Multi draw - A player may purchase a Cash 5 ticket for up to 20 consecutive drawings beginning with the current draw.

(3) [~~(1)~~] Number - Any play integer from one through 39 inclusive.

(4)[~~(2)~~] Play - The five numbers selected on each play board and printed on the ticket.

(5)[~~(3)~~] Play board - A field of the 39 numbers found on the playslip.

(6)[~~(4)~~] Playslip - An optically readable card issued by the Texas Lottery used by players of Cash 5 to select plays. There shall be five play boards on each playslip identified at A, B, C, D, and E. A playslip has no pecuniary value and shall not constitute evidence of ticket purchase or of numbers selected.

(c) Price of ticket. The price of each Cash 5 play shall be $1.00. A player may purchase up to five plays on one ticket. Multiple draws are available for up to [~~10~~]20 consecutive draws beginning with

the current draw. A player may purchase a Cash 5 ticket for advance play.

(d)-(h) (No change.)

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

Filed with the Office of the Secretary of State, on March 15, 1999.

TRD-9901639

Kimberly L. Kiplin

General Counsel

Texas Lottery Commission

Earliest possible date of adoption: May 2, 1999

For further information, please call: (512) 344–5113

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TITLE 22. EXAMINING BOARDS

Part XV. Texas State Board of Pharmacy

Chapter 309. Generic Substitution

22 TAC §309.10

The Texas State Board of Pharmacy proposes new §309.10, regarding refills of prescription drug orders. The proposed rule, if adopted, will set forth the statutory requirements of section 40(m) of the Texas Pharmacy Act and will also establish a list of narrow therapeutic index drugs subject to the provisions of section 40(m) of the Texas Pharmacy Act.

The proposed §309.10 is substantially similar to §309.3(d), which also addresses refills of prescription drug orders. The Texas State Board of Pharmacy proposed amendments to §309.3 and published notice of the proposed rule in the July 3, 1998, issue of the *Texas Register* (23 TexReg 6829). Subsequent to the Board business meeting in August 1998, at which the Texas State Board of Pharmacy voted to adopt the proposed amendments to §309.3, a lawsuit regarding the amendments to §309.3 was filed against the Texas State Board of Pharmacy. On December 16, 1998, following arguments by legal counsel for the parties, the trial court held that the Texas State Board of Pharmacy failed to adopt the amendments to §309.3 rule in compliance with the Administrative Procedure Act and that the rule was null and void and of no force or effect. On January 13, 1999, the trial court entered the Final Judgment. At the Board business meeting on February 2, 1999, the Texas State Board of Pharmacy voted to pursue an appeal of the trial court judgment regarding the amendments to §309.3. The Texas State Board of Pharmacy also voted to propose a rule as mandated by section 40(m) of the Texas Pharmacy Act.

Accordingly, the current provision of 22 TAC §309.3(d) has been held invalid by a trial court and is the subject of a pending appeal to an appellate court by the Texas State Board of Pharmacy. The Texas State Board of Pharmacy, however, proposes new §309.10, which fulfills the requirements of section 40(m) of the Texas Pharmacy Act with respect to refills of prescription drug orders involving narrow therapeutic index drugs.

The proposed new rule incorporates the recommendations of a Task Force composed of representatives from the Texas State Board of Pharmacy, Texas State Board of Medical Examiners, pharmacy and medical associations, and generic and brand-name manufacturers. The proposed new rule outlines the conditions under which the substitution of a narrow therapeutic index drug may occur on the refill of a prescription. The proposed new rule, as specified in the legislation, requires a pharmacist to notify the patient and the prescribing physician if the pharmacist refills a prescription for a narrow therapeutic index drug with a generically equivalent product different from the product used on the previous refill. The proposed new rule also establishes a list of narrow therapeutic index drugs, which are subject to the provisions of section 40(m) of the Texas Pharmacy Act. Narrow therapeutic index drugs are drugs in which small variances in the blood levels of the drug can change the effectiveness or toxicity of the drug. The list in the proposed new rule contains those drugs that health-care practitioners generally monitor closely through lab tests to ensure that the drug remains at the appropriate blood level for the individual patient. The Texas State Board of Medical Examiners has reviewed the list recommended by the task force and agrees that the list of drugs in the proposed rule is appropriate for the purpose of section 40(m) of the Texas Pharmacy Act.

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

The fiscal implications for the state are based on the cost of an enforcement action by the Texas State Board of Pharmacy. Fiscal implications for the agency are anticipated to be minimal because the enforcement and administration of the proposed rule can be adequately managed with existing resources. In fiscal year 1997, as stated in the agency's Annual Report, the agency resolved 1,697 complaints and, of those complaints, only four complaints alleged violations of the laws and rules regarding substitution of narrow therapeutic index drugs. The agency cannot accurately project whether the adoption of the proposed rule will increase the number of complaints received by the agency or the number of disciplinary cases that may proceed to formal hearing. However, by using FY97 agency data, the agency can estimate the possible costs to the state for an agency enforcement action. For example, if the agency investigated and initiated disciplinary action on the four complaints involving narrow therapeutic index drugs that were received by the agency in FY97, then the cost to the agency as a result of enforcing or administering the rule is approximately $1,745.56. This estimated amount is based on the cost of a resolved jurisdictional complaint ($436.39) times the number of complaints (4). The cost of a resolved jurisdictional complaint is based on the total funds and personnel costs expended for processing and investigating a complaint, as well as the funds and personnel costs required to adjudicate a licensee who is the subject of a complaint. The funds expended include all direct costs associated with complaint resolution. These direct costs are identified in the agency's internal operating budget and, where applicable, include percent of salaries according to estimated time, rent, supplies, travel, postage, subpoena and witness expenses, cost of court reporter for hearings, charges by the State Office of Administrative Hearings, and other operating expenses directly related to the agency's enforcement function only. Indirect costs are not included in the calculation of the cost of a resolved jurisdictional complaint. Based on this calculation and assuming that complaints remain constant, the cost to the Texas State Board of Pharmacy for the next five years would be

as follows: FY2000–$1,745.56; FY2001–$1,745.56; FY2002–$1,745.56; FY2003–$1,745.56; and FY2004–$1,745.56.

In addition, there may be fiscal implications to the state Medicaid program. For each Medicaid prescription dispensed by a pharmacy, the state Medicaid program pays the pharmacy a price based on a set formula. The formula includes a cost for the drug plus a dispensing fee. A pharmacist is prohibited from charging the state Medicaid program more for a prescription that calls for a narrow therapeutic index drug despite any additional time spent by the pharmacist in dispensing the prescription. Therefore, increased costs to the state Medicaid program may occur if a pharmacist refuses to substitute a lower-priced generic prescription drug product when permitted to do so, and instead dispenses a higher-priced brand name prescription drug product. In an effort to estimate the possible cost to the state Medicaid program, the agency has assumed that all pharmacists will refuse to substitute a lower-priced generic prescription drug product when permitted to do so in all cases. By using this assumption, the agency can estimate the highest possible increase in cost to the state Medicaid program. In addition, the agency calculated its estimated cost to the state Medicaid program on only six of the nine drugs on the list of narrow therapeutic index drugs in the proposed rule. The three drugs not used in the agency's calculation are digoxin, levothyroxine, and divalproex sodium. These three drugs were not included because none of these drugs have a generic equivalent in an oral dosage form that may be substituted under Texas laws and rules. The six drugs used in the agency's calculation of costs to the state Medicaid program are: phenytoin, warfarin, theophylline, carbamazepine, lithium, and valproic acid. Given the factors described above and based on information provided by the Texas Department of Health, Vendor Drug Program, which administers the Texas Medicaid Program, the agency estimates that the proposed new rule may result in increased costs to the state Medicaid program in the estimated amount of approximately $4,567,820.74 per year. The chart, in Figure: 22 TAC Chapter 309–Preamble, shows the costs of the individual drugs and the calculation used. (Please note that this is the highest possible costs and does not take into consideration possible reductions in costs as a result of manufacturer rebates to the Vendor Drug Program nor possible reductions in costs caused by the effect of the setting of Maximum Allowable Cost (MAC) on some dosage forms to the six drugs by the Vendor Drug Program. A MAC price on a drug indicates that the Vendor Drug Program has set a maximum cost that will be paid for the drug regardless of the cost of the drug to the dispensing pharmacy.)

Figure: 22 TAC Chapter 309–Preamble.

Based on the calculations and assumptions in Figure: 22 TAC Chapter 309–Preamble, the estimated cost to the Texas Vendor Drug (Medicaid) Program for the next five years would be: FY2000–$4,567,820.74; FY2001–$4,567,820.74; FY2002–$4,567,820.74; FY2003–$4,567,820.74; and FY2004–$4,567,820.74.

Ms. Dodson also 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 be the establishment of a list of narrow therapeutic index drugs subject to section 40(m) of the Texas Pharmacy Act. The notice requirement in the proposed rule promotes good communication between the patient, the prescribing practitioner, and the pharmacist, particularly with regard to critical care medications that require frequent monitoring of performance.

Section 2006.002 of the Texas Government Code requires that a state agency, before adopting a rule that would have an adverse economic effect on small businesses, shall prepare a statement of the effect of the rule on small businesses, defined in section 2006.001(1). The statement must include the following: (1) an analysis of the cost of compliance with the rule for small businesses; and (2) a comparison of the cost of compliance for small businesses with the cost of compliance for the largest businesses affected by the rule, using at least one of the following standards: (A) cost for each employee; (B) cost for each hour of labor; (C) cost for each $100 of sales. The Texas Pharmacy Act prohibits the agency access to pharmacy financial data. This lack of access to financial data limits the agency's ability to identify and analyze estimated costs to licensees. The costs/fiscal implications to a small business are dependent on the number of prescriptions filled by the licensee, the costs of the prescription drug dispensed by the licensee, and the costs assigned to the amount of time that the licensee must allocate to notify the prescribing practitioner that a product has been substituted for the prescribed product. The following factors also affect the agency's ability to estimate costs to small businesses: the number of prescriptions filled by a pharmacy may vary on a daily basis, the number of prescriptions that may be subject to the proposed rule may vary on a daily basis, and the prescription volume for licensed pharmacies vary according to size, number of pharmacists and pharmacy employees, demographics, and location in the state (rural versus urban pharmacy).

Given the limitations and variables that affect the agency's ability to estimate the costs, the agency is unable to give an accurate assessment of the costs. The agency does not have information with which to make a comparison between the cost of compliance for a small business and the cost of compliance for a large business affected by the rule based on costs per each employee, per each hour of labor, or per $100 of sales. Because the proposed rule requires a pharmacist to notify a patient and a prescribing practitioner of a substitution, the cost to small and large businesses will be the cost of the pharmacist's time that is necessary to make this notification. It is estimated that the notification will require no more than two minutes of the pharmacist's time per prescription. If the agency uses $26.51 as the average hourly salary for a pharmacist (Drug Topics, April 7, 1997), the costs to businesses from compliance with the rule will be approximately 88 cents per prescription. The agency cannot accurately estimate the number of prescriptions that this proposed rule will affect nor the costs to businesses because data is not available on the number of prescriptions written for the drugs on the list on which a prescribing practitioner has allowed substitution and on which a pharmacist has substituted.

There are possible economic costs to pharmacists, who are the individuals required to comply with the proposed rule. Pharmacists who are also owners of pharmacies may be affected by the various factors outlined above that effect the costs to large and small businesses. Because the agency cannot estimate the number of prescriptions that the proposed rule will affect, the agency is unable to give an accurate assessment of the fiscal implications to pharmacists.

A public hearing to receive oral comments on the rule will be held at 9:00 a.m. on Tuesday, May 4, 1999, in the Health Professions Council Board Room, William P. Hobby State Office

Building, Tower 2, Room 2-225, 333 Guadalupe, Austin, Texas. Written comments on the proposal may be submitted to Gay Dodson, R.Ph., Executive Director/Secretary, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Box 21, Austin, Texas, 78701-3942. Written comments will be accepted through Friday, June 2, 1999.

The new section is proposed under Sections 4, 16(a), and 40(m) of the Texas Pharmacy Act (Article 4542a-1, Texas Civil Statutes). The Board interprets section 4 as authorizing the agency to adopt rules to protect the public health, safety, and welfare through the effective control and regulation of the practice of pharmacy. The Board interprets section 16(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets section 40(m) as directing the agency to consult with the Board of Medical Examiners and by rule to establish a list of narrow therapeutic index drugs.

The statutes affected by this rule: Texas Civil Statutes, Article 4542a-1.

§309.10. Refills of Narrow Therapeutic Index Drugs.

(a) Original substitution instructions. Refills shall follow the original substitution instructions unless otherwise indicated by the practitioner or practitioner's agent.

(b) Narrow therapeutic index drugs.

(1) A prescription for a narrow therapeutic index drug on which a physician has originally allowed generic substitution may be refilled only by using the same drug product by the same manufacturer that the pharmacist last dispensed under the prescription, unless otherwise agreed to by the prescribing physician.

(2) If a pharmacist does not have the same drug product by the same manufacturer in stock to refill the prescription, the pharmacist may dispense a drug product that is generically equivalent if the pharmacist notifies:

(A) the patient, at the time the prescription is dispensed, that a substitution of the prescribed drug product has been made; and

(B) the prescribing practitioner of the drug product substitution by telephone, facsimile, or mail, at the earliest reasonable time, but not later than 72 hours after dispensing the prescription.

(3) For the purpose of this subsection, narrow therapeutic index drugs shall be all oral dosage forms of the following:

(A) digoxin

(B) phenytoin

(C) warfarin sodium

(D) theophylline

(E) levothyroxine

(F) carbamazepine

(G) valproic acid

(H) lithium

(I) divalproex sodium

(4) The board, in consultation with the Board of Medical Examiners, shall review the list of narrow therapeutic index drugs subject to this subsection when deemed appropriate but at least every two years.

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

Filed with the Office of the Secretary of State, on March 22, 1999.

TRD-9901698
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 305–8028

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TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 37. Maternal and Child Health Services

Subchapter M. Texas Perinatal Care System

25 TAC §§37.251–37.259

The Texas Department of Health (department) proposes new §§37.251-37.259, concerning the establishment of a voluntary perinatal health care system. These rules are proposed to implement Senate Bill 1229, 74th Legislature, 1995, which amended Health and Safety Code, Chapter 32, the Maternal and Infant Health Improvement Act (MIHIA). Specifically, the new sections cover the purpose of the rules; definitions; professional standards/guidelines; statewide oversight of the perinatal care system and interstate cooperation; perinatal planning areas; perinatal resource coordinating groups; perinatal networks; perinatal plans; data analysis and progress report; and designation of perinatal care facilities.

The intent of the legislation and these sections is the promotion of safe, quality care for women and for their infants; continuity and comprehensiveness of care; optimal and cost-effective utilization of perinatal personnel and facilities; and the provision of health promotion and health education for women from preconception through the postpartum period, and parenting information through the first year of their infants' lives.

Lesa Ross Brown, Director, Financial Management Division, Community Health and Resources Development Associateship, has determined that, for the first five years the new sections are in effect, there will be fiscal implications as a result of administering the sections as proposed. The effect on state government will be increased expenditures of approximately $240,000 per year paid from currently budgeted funds for staff, marketing, automation, and data management to establish the statewide perinatal care system. There will be no impact on local government.

Ms. Ross Brown has also determined that for the first five years these sections are in effect, the public benefit anticipated as a result of enforcing these sections will be improved safety and quality of care for women and their infants, as well as improved access for women to health promotion and health education from preconception through the postpartum period and parenting information through the first year of their infants' lives. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to

comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposed rules may be sent to Kathleen Hamilton, Acting Chief, Bureau of Children's Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 457-7700. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The new sections are proposed under Health and Safety Code, §32.042, which authorizes the Texas Board of Health (board) to adopt rules to implement a perinatal health care system; and Health and Safety Code, §12.001, which authorizes the board to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health.

The new sections affect Health and Safety Code, Chapter 32.

§37.251. Purpose.

The purpose of these sections is to establish the procedures and standards for the implementation of a statewide system for perinatal health care that fosters:

(1) safe, quality care for women and for their infants;

(2) continuity and comprehensiveness of care;

(3) optimal and cost-effective utilization of perinatal personnel and facilities; and

(4) access for women to health promotion and health education from preconception through the postpartum period, and parenting information through the first year of their infants' lives.

§37.252. Definitions.

The following words and terms pertain explicitly to this subchapter and shall have the following meanings, unless the context clearly indicates otherwise.

(1) Basic perinatal facility - An inpatient facility providing care during the prenatal period for women and infants whose care is or is expected to be uncomplicated.

(2) Department - Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

(3) Health education - Provision of health information and anticipatory guidance concerning nutrition, fitness, and the prevention and early recognition of perinatal risk conditions and/or illnesses.

(4) Health promotion - Provision of information or activities which motivate individuals to adopt healthy behaviors, including the appropriate use of health resources.

(5) Infant - An individual from birth through the first year of life.

(6) Intrapartum - The period beginning at the onset of labor or childbirth and ending with delivery.

(7) Neonate - An infant from birth through the completion of the 27th day of life.

(8) Parenting information - Information provided to any person responsible for the care of a child about practices which promote the child's mental and physical health and quality of life.

(9) Perinatal - The period which begins before conception in a woman of child-bearing age and ends on the infant's first birthday.

(10) Postpartum - The six-week period following delivery.

(11) Prenatal - The period beginning on the date of conception and ending with the commencement of labor or childbirth.

(12) Provider - A person, facility, and/or organized entity that delivers or affects the delivery of perinatal care.

(13) Specialty perinatal facility - An inpatient facility providing care during the prenatal period for women and infants whose care is or is expected to be uncomplicated as well as for the majority of those women and infants who are at high risk for or who require complicated care.

(14) State - The State of Texas.

(15) Subspecialty perinatal facility - An inpatient facility providing care during the prenatal period for all pregnant women and infants, including those with serious illnesses and abnormal health conditions, which is supervised by a full-time board certified/eligible maternal-fetal specialist and/or a board certified/eligible neonatal-perinatal medicine specialist.

§37.253. Professional Standards/Guidelines.

(a) Activities of the department and providers pursuant to this subchapter will be conducted in accordance with guidelines and standards for perinatal care found in the following obstetric and pediatric professional publications:

(1) *Guidelines for Perinatal Care, Fourth Edition* (American Academy of Pediatrics, American College of Obstetricians and Gynecologists, 1997).

(A) Table 1-1: Ambulatory Prenatal Care Provider Capabilities and Expertise, page 3;

(B) Table 1-2: Health Screening for Women of Reproductive Age, page 10;

(C) Table 2-1: Recommended Nurse/Patient Ratios for Perinatal Care Services, page 19;

(D) Table 4-2: Risk Factors Associated with Spontaneous Preterm Labor and Birth, page 89;

(E) Appendix B: Early Pregnancy Risk Identification for Consultation, page 299;

(F) Appendix C: Ongoing Pregnancy Risk Identification for Consultation, page 301;

(G) Appendix D: Federal Requirements for Patient Screening and Transfer, page 303;

(H) In-Hospital Perinatal Care, pages 4-7;

(I) Inpatient Perinatal Care Services, pages 14-50;

(J) Interhospital Care of the Perinatal Patient, pages 52-61;

(K) Patient Education, pages 68-69;

(L) Intrapartum Care, pages 94-96; and

(2) *Toward Improving The Outcomes of Pregnancy, The 90s and Beyond* (March of Dimes, American Academy of Pediatrics, and American College of Obstetricians and Gynecologists, 1993); Appendix 6: Levels of Inpatient Perinatal Care, pages 102-115.

(b) Copies of these publications may be viewed during normal business hours at the Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199 or they may be obtained from the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, or the March of Dimes publications office. Contact numbers for these organizations are available from the department at the address in this subsection.

§37.254. Statewide Oversight of the Perinatal Care System and Interstate Cooperation.

(a) The department shall develop and maintain a reporting and analysis system to monitor outcomes of the statewide perinatal care system.

(b) The department shall request information as specific issues arise from persons with expertise in the provision of perinatal care, data analysis, and community networking/systems development, including, but not limited to, individuals from academic institutions, professional groups, advocacy groups, and other state agencies. The department shall also seek ongoing input from consumers or recipients of perinatal care and from representatives of their identified community-based social support systems (e.g. extended families, churches).

(c) The department shall facilitate the organization and operations of the perinatal resource coordinating groups described in §37.256 of this title (relating to Perinatal Resource Coordinating Groups).

(d) The department shall facilitate cooperation and coordination with perinatal care providers and systems in adjoining states.

§37.255. Perinatal Planning Areas.

(a) Eight perinatal planning areas (PPAs), encompassing every county in the state, shall be established for descriptive, planning, and continuous quality improvement purposes. The PPA boundaries shall be based upon the regional organization of the Texas Health and Human Services Commission (HHSC).

(b) PPA boundaries are not intended to restrict decisions concerning client referral or transfer to other facilities or providers.

(c) The perinatal planning areas shall include the following counties:

(1) Area One (HHSC Region 1): Armstrong, Bailey, Briscoe, Carson, Castro, Childress, Cochran, Collingsworth, Crosby, Dallam, Deaf Smith, Dickens, Donley, Floyd, Garza, Gray, Hale, Hall, Hansford, Hartley, Hemphill, Hockley, Hutchinson, King, Lamb, Lipscomb, Lubbock, Lynn, Moore, Motley, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, Terry, Wheeler, and Yoakum;

(2) Area Two (HHSC Region 2/3): Archer, Baylor, Brown, Callahan, Clay, Coleman, Collin, Comanche, Cooke, Cottle, Dallas, Denton, Eastland, Ellis, Erath, Fannin, Fisher, Foard, Grayson, Hardeman, Haskell, Hood, Hunt, Jack, Johnson, Jones, Kaufman, Kent, Knox, Mitchell, Montague, Navarro, Nolan, Palo Pinto, Parker, Rockwall, Runnels, Scurry, Shackelford, Somervell, Stephens, Stonewall, Tarrant, Taylor, Throckmorton, Wichita, Wilbarger, Wise, and Young;

(3) Area Three (HHSC Region 4/5): Anderson, Angelina, Bowie, Camp, Cass, Cherokee, Delta, Franklin, Gregg, Harrison, Henderson, Hopkins, Houston, Jasper, Lamar, Marion, Morris, Nacogdoches, Newton, Panola, Polk, Rains, Red River, Rusk, Sabine, San Augustine, San Jacinto, Shelby, Smith, Titus, Trinity, Tyler, Upshur, Van Zandt, and Wood;

(4) Area Four (HHSC Region 6/5): Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Matagorda, Montgomery, Orange, Walker, Waller, and Wharton;

(5) Area Five (HHSC Region 7): Blanco, Bosque, Brazos, Burleson, Burnet, Caldwell, Coryell, Falls, Fayette, Freestone, Grimes, Hamilton, Hays, Hill, Lampasas, Lee, Leon, Limestone, Llano, McLennan, Madison, Milam, Mills, Robertson, San Saba, Travis, Washington, and Williamson;

(6) Area Six (HHSC Region 8): Atascosa, Bandera, Bexar, Calhoun, Comal, De Witt, Dimmit, Edwards, Frio, Gillespie, Goliad, Gonzales, Guadalupe, Jackson, Karnes, Kendall, Kerr, Kinney, La Salle, Lavaca, Maverick, Medina, Real, Uvalde, Val Verde, Victoria, Wilson, and Zavala;

(7) Area Seven (HHSC Region 9/10): Andrews, Borden, Brewster, Coke, Concho, Crane, Crockett, Culberson, Dawson, Ector, El Paso, Gaines, Glasscock, Howard, Hudspeth, Irion, Jeff Davis, Kimble, Loving, McCulloch, Martin, Mason, Menard, Midland, Pecos, Presidio, Reagan, Reeves, Schleicher, Sterling, Sutton, Terrell, Tom Green, Upton, Ward, and Winkler; and

(8) Area Eight (HHSC Region 11): Aransas, Bee, Brooks, Cameron, Duval, Hidalgo, Jim Hogg, Jim Wells, Kenedy, Kleberg, Live Oak, McMullen, Nueces, Refugio, San Patricio, Starr, Webb, Willacy, and Zapata.

§37.256. Perinatal Resource Coordinating Groups.

(a) A perinatal resource coordinating group (PRCG) shall be established within each perinatal planning area (PPA) to examine outcomes, to develop community-based plans for continuous improvement of perinatal care services, to work with communities in order to establish perinatal networks, and to develop at-risk and emergency transfer/transport protocols, considering the standards/guidelines listed in §37.253 of this title (relating to Professional Standards/Guidelines).

(b) A PRCG shall be established in each PPA within five years from the date this subchapter becomes effective.

(c) PRCG members shall be initially recruited by the following department staff:

(1) the Regional Medical Director or designee from the region in which most of the counties in the PPA are located;

(2) a representative of the Emergency Medical Services Division; and

(3) representatives from the Medicaid and maternal and child health programs.

(d) PRCG membership shall include broad-based community representation from the counties in the PPA; providers from basic, specialty, and subspecialty perinatal care facilities; advocacy groups; consumers; social support systems; and primary care residency programs. PRCG membership shall reflect the demographics of the population.

(e) Each PRCG shall adopt bylaws describing the purpose; membership and member terms; officers and their terms of office; and periodicity of meetings.

(f) The department shall provide data and technical assistance to the PRCGs.

(g) Each PRCG shall be charged with:

(1) analyzing perinatal data, including, but not limited to the following:

(A) reports provided by the department concerning the perinatal vital statistics in the PPA; and

(B) aggregated reports of problems identified by the maternal, neonatal, and infant mortality review committees of each participating facility and by communities in the PPA;

(2) responding to consumer and/or provider complaints that pertain to perinatal care and that have been directed to the PRCG;

(3) responding to complaints that pertain to perinatal care originally received by the Texas Department of Insurance and/or the department;

(4) identifying and supporting health care delivery systems and social support infrastructures within the communities of the PPA that enhance the quality of perinatal health care;

(5) providing technical assistance to communities to establish perinatal networks composed of providers (including perinatal transport providers), consumers, and community-based support entities that coordinate planning and delivery of perinatal services within the PPA;

(6) identifying unmet community needs, such as gaps in perinatal care or breakdowns in communications; and

(7) developing a community-based perinatal plan to coordinate existing services and address unmet needs that builds upon and bolsters community strengths, health care delivery systems, and social support infrastructures. The plan will address community-based, culturally competent health promotion activities, both consumer and provider health education, the development and support of perinatal networks, and referral/transport protocols for high-risk pregnant women and newborn infants.

§37.257. Perinatal Plans.

(a) The perinatal resource coordinating group (PRCG) in each perinatal planning area (PPA) shall submit for approval to the department an initial perinatal plan concerning the provision of perinatal care for women of child-bearing age and infants within the PPA. The plan shall be submitted in a format specified by the department.

(b) Each PRCG shall submit an annual revised plan in a format specified by the department.

(c) The initial plan and any revisions shall be subject to approval by the department, contingent upon documentation of the following:

(1) individuals representing the geographic and demographic diversity of all counties within the PPA have been involved in the development and implementation of the plan;

(2) individuals representing all perinatal care facilities have been given an opportunity to participate in the planning and implementation process, through participation in either the PRCG or the perinatal networks;

(3) mechanisms are in place for communication and coordination of services among the PPA perinatal networks;

(4) the plan includes:

(A) a list of participants in the PRCG and the perinatal networks;

(B) a list of identified strengths and unmet needs of the PPA based on analysis of the PPA data, registered complaints, and discussions with consumers, community-based support entities, and providers;

(C) a list of goals and objectives to improve the quality of perinatal care based upon the identified strengths and unmet needs in the PPA and the health outcomes measures referenced in §37.258 of this title (relating to Data Analysis and Progress Report);

(D) mechanisms for completing referrals and returning reports of care provided among the perinatal care providers;

(E) protocols for exchange of confidential patient records among participating providers in the perinatal planning area;

(F) descriptions of emergency transport capability requirements and protocols;

(G) protocols for at-risk and emergency maternal and neonatal transfer from one hospital to another for the purpose of receiving more intensive or specialized care;

(H) protocols for return transfer of a pregnant woman and/or her infant from a referral center to the original referring hospital or to a local hospital for continuing care;

(I) triage criteria for appropriate level referrals; and

(J) mechanisms and protocols for:

(i) conducting high-risk screening and counseling guidance;

(ii) increasing community awareness of the existence of the perinatal plan(s) and the importance of early and preventive care for women of child-bearing age and infants;

(iii) increasing consumer access to the perinatal network(s);

(iv) continuing improvement of the quality of perinatal care; and

(v) community-based and area-wide perinatal health education, health promotion, and dissemination of parenting information.

§37.258. Data Analysis and Progress Report.

(a) Annually the department shall provide each perinatal resource coordinating group (PRCG) with:

(1) information pertaining to the population of women of child-bearing age and infants within its perinatal planning area (PPA), including:

(A) neonatal mortality rate, postneonatal (from 28 days up to 12 months of age) mortality rate, infant mortality rate, and maternal mortality rate;

(B) information collated from birth and death certificates, including but not limited to:

(i) trimester of entry into prenatal care;

(ii) number of prenatal visits related to time of entry into prenatal care;

(iii) maternal use of tobacco, drugs, and alcohol;

(iv) number of low birth weight infants;

(v) number of pre-term infants;

(vi) numbers and rates of low birth weight and very low birth weight infants by facility of birth;

(vii) causes of infant deaths;

(viii) maternal transports and infant transports; and

(C) other information available from state reported data and registries upon request of the PRCG; and

(2) information recorded by the department pertaining to the perinatal care facilities within the PPA, including licensure status and level designation as perinatal center.

(b) Each PRCG shall file an annual report in a format approved by the department describing its activities and progress toward outcome objectives projected in the plan or in the revised plan, as described in §37.257 of this title (relating to Perinatal Plans). The report shall include:

(1) evidence that the members of the PRCG and perinatal networks are involved in evaluation and management of the plan;

(2) changes in the membership of the PRCG;

(3) documentation of community-based consumer education, including topics concerning prevention of health risks; the importance of early and regular preventive health check-ups; and access to the perinatal care systems;

(4) documentation of provider education in the availability of high risk screening tools, patient counseling, referral protocols, and population-based health needs assessment; and

(5) documentation of progress toward the goals and objectives stated in their plan.

(c) The department shall maintain the confidentiality of all information in these reports to the extent authorized by the Texas Open Records Act, Government Code, Chapter 552.

§37.259. Designation of Perinatal Care Facilities.

(a) The department or its designee(s) shall request inpatient facilities to report to the department their self-designations as basic, specialty, or subspecialty perinatal care facilities. Designations shall be self-reported by facilities based upon the standards and guidelines in the publications listed in §37.253 of this title (relating to Professional Standards/Guidelines). Facilities shall select the designation category that most accurately describes their capacity to provide perinatal care.

(b) Each facility providing inpatient perinatal care may voluntarily report to the department its self-designated category.

(c) The department shall publish the designation categories of all participating perinatal facilities in each perinatal planning area annually.

(d) The department or its designees may evaluate a facility to confirm the facility's self-declared designation category through a random review process or upon request by a perinatal resource coordinating group (PRCG), at the discretion of the department.

(e) The review team for specialty and subspecialty perinatal facilities may include board certified/eligible specialists in obstetrics, maternal-fetal medicine, pediatrics, and/or neonatal-perinatal medicine, as appropriate for the facility to be reviewed, and a department representative.

(f) The review team for basic perinatal facilities may include an active perinatal care provider and a department representative.

(g) The department shall provide a copy of the review report and recommendations to the reviewed facility, the review team, and the PRCG.

(h) Whenever a facility review is conducted, the department may confirm the self-declared designation or approve a different designation.

(i) If a perinatal care facility disagrees with the department's designation decision, the facility may request an administrative hearing which shall be conducted according to §§1.51-1.55 of this title (relating to Fair Hearing Procedures).

(j) A participating perinatal care facility shall notify the department and its PRCG within 30 days if it is unable or chooses not to continue providing perinatal care commensurate with its designation category.

This 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 March 19, 1999.

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Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 458–7236

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Chapter 205. Product Safety

The Texas Department of Health (department) proposes the repeal of §205.11; amendments to §§205.1 - 205.6, §§205.8 - 205.10; and new §§205.11 - 205.17, concerning the regulation of manufacturers, renovators, importers, wholesalers, distributors, processors and business establishments that sanitize and rent or sell mattresses and other sleep products. Specifically, the amendments, and the new sections are proposed to implement Chapter 345, Health and Safety Code, as amended by Senate Bill 1284, 75th Legislature, 1997, and to clarify and bring the rules into conformity with the *Texas Register* format.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, requires each state agency to review and consider for readoption each rule adopted by the agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 205.1 - 205.11 have been reviewed and the department has determined that the reasons for adopting the sections continue to exist in that the rules are being revised, and §205.11 is being repealed and proposed as a new rule.

The amendment to §205.1 is for clarification. The amendment to §205.2 adds definitions from Chapter 345, Health and Safety Code, as amended by Senate Bill 1284, 75th Legislature, 1997; and other definitions. The amendment to §205.3 clarifies applicability of the regulations; exempts from labeling requirements custom upholstery businesses that do not repair or renovate bedding for resale; prohibits removal of required labels; deletes the obsolete 20% variance in the contents stated on the label of feather and down products consistent with the repeal of the variance by the Federal Trade Commission; prohibits the comingling of new and secondhand bedding articles; and requires that all mattresses and mattress pads sold in the state meet federal flammability standards. The amendment to §205.4 imposes new labeling requirements for secondhand bedding articles and authorizes the use of languages other than English when used on separate labels. The amendment to §205.5 deletes the obsolete 20% variance in the contents stated on the label of down products consistent with the repeal of the variance by the Federal Trade Commission; and adds three new filling material definitions. The amendments to §205.6 bring the regulations into conformity with the *Texas Register* format.

The amendment to §205.8 clarifies current regulations concerning germicidal treatment of secondhand and renovated bedding; requires the germicidal treatment of sofa beds and studio couches; requires removal and prohibits the use or reuse of contaminated filling materials; requires removal and prohibits reuse of outer covers on renovated mattresses; requires that the chemical method of germicidal treatment be applied prior to the installation of new covers; increases the heating duration of bedding germicidally treated by the dry heat method; authorizes the expanded use of the commercial laundry method as an approved treatment method for certain bedding articles; and clarifies current record keeping requirements. The amendment to §205.9 clarifies current regulations concerning sanitary premises and requires that articles of bedding and materials be securely housed and protected from the elements. The amendment to §205.10 is for clarification.

New §205.11 replaces the repealed §205.11. Stamp Exemption and Reporting, which was deleted by Senate Bill 1284, 75th Legislature, 1997, and proposes general permit requirements for engaging in the business of selling bedding or filling materials in the state; exempts custom upholstery businesses who do not repair or renovate bedding for resale; describes specific types of permits, permit fees and permit application procedures and requirements; and conditions for permit issuance, denial, suspension or revocation. The new permit requirements would be implemented as new permits are issued and expiring permits are renewed. New §205.12 clarifies the department's authority to impose administrative penalties for violations. New §205.13 clarifies the department's authority to detain or embargo bedding for violations. New §205.14 clarifies the department's authority to issue a removal order to secure detained or embargoed bedding for violations. New §205.15 clarifies the department's authority to seek condemnation of bedding for violations. New §205.16 clarifies the department's authority to order bedding to be recalled from commerce for violations. New §205.17 clarifies the department's authority to inspect business establishments and to take samples for inspection, analysis or evidence.

The department published a Notice of Intention to Review §§205.1 - 205.11, as required by Rider 167 in the *Texas Register* on February 5, 1999, (24 Tex Reg 831).

Charles Branton, Director, Product Safety Division, has determined that for each year of the first five years the proposed rules are in effect, there will be fiscal implications as a result of administering and enforcing the regulations as proposed. The effect on state government will be increased fee revenue to the department estimated to be $68,000 for each of the years FY99, FY2000, FY2001, FY2002, and FY2003. It is estimated that the costs to the department to administer and enforce the new provisions will equal the estimated revenue. There will be no impact on local government.

Mr. Branton has also determined that for each year of the first five years the sections are in effect, that the public benefit anticipated as a result of administering and enforcing the sections will be a reduction in the incidence of consumer complaints, illnesses, and burn-related injuries and deaths associated with bedding products. Approximately 440 presently permitted custom upholstery businesses will be exempted from permitting and labeling requirements, whereas, other permittees will incur increased annual fees averaging approximately 18%. Businesses purchasing a low volume permit will incur higher percentage increases but the actual increase in dollar cost will range from $35 to $85 per year. Mattress manufacturers will also incur higher than average increases. For example, fees for a manufacturer of 12,000 mattresses per year would increase from $160 to $300 per year. There will be no effect on local employment. Comments on the proposed regulations may be submitted to Mr. Charles Branton, Director, Product Safety Division, Texas Department of Health, 1100 West 49th Street, Austin , Texas 78756, (512) 834- 6773. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

Subchapter A. Bedding Rules

25 TAC §§205.1–205.6, 205.8–205.17

The amendments and new sections are proposed under Health and Safety Code, Chapter 345, §345.082, which provides the department with the authority to adopt necessary rules to implement and enforce Chapter 345; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendments and new sections affect Health and Safety Code, Chapter 345; Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§205.1. Purpose and Scope.

The purpose of these sections is to designate the requirements and the terms, definitions, nomenclature, and conditions as commonly used and recognized in the manufacture, sale, and distribution of bedding and furniture products and filling materials. Classifications of materials in these [~~rules and~~] regulations are intended to have understandable meaning to regulated businesses and consumers [~~the ultimate consumer~~]. The definitions used are in conformity with those adopted by the majority of [~~the~~] states [~~in the union~~], Canada, the Federal Trade Commission and [~~by~~] the Association of Bedding and Furniture Law Officials.

§205.2. Definitions.

(a) The following words and terms [~~,~~] when used in this chapter [~~,~~] shall have the following meanings [~~,~~] unless the context otherwise specifically requires.

(1) Act - Texas Bedding Act, Health and Safety Code, Chapter 345. [~~Texas Civil Statutes, Article 4476a.~~]

(2) Authorized agent - An employee of the department who is designated by the commissioner of health to enforce the provisions of the Act.

(3) Bedding - A mattress, mattress pad, mattress protector, box spring, sofa bed studio couch, chair bed, convertible bed, convertible lounge, pillow, bolster, quilt, quilted spread, comforter, cot pad, sleeping bag, lounge chair pad, utility or all-purpose pad, crib pad, playpen pad, crib bumper pad, car bed pad, infant carrier pad, convertible stroller pad, bassinet pad, bed rest and lounge-type cushion, or a stuffed or filled article that can be used by a human for sleeping or reclining.

(4) Commissioner - The Commissioner of Health.

(5) [~~(2)~~] Department - Texas Department of Health

(6) Detained or embargoed bedding - Bedding that has been detained or embargoed under the Act.

(7) Distributor - A person located in this state who on his own account sells or distributes in this state bedding, or filling material to be used in bedding. The term does not include an affiliate or subsidiary if the ownership and the name of the affiliate or subsidiary are the same as the manufacturer, and the affiliate or subsidiary is the exclusive sales outlet for the manufacturer.

(8) [~~(3)~~] Filling materials - [–] Materials used as filling in the manufacture, repair, or renovation of bedding and shall include materials used as filling in quilted borders and quilted ticking. Stiffening materials such as fiberboard, corrugated fiberboard, paper, etc., shall be considered to be filling material.

(9) Germicidal Treatment Operator - A person who sanitizes used bedding articles or filling materials by a method or process that has been approved by the department.

(10) Importer - A person who on his own account sells or distributes in this state bedding, or filling material to be used in bedding that was manufactured or processed in a country other than the United States. The term does not include an affiliate or subsidiary if the ownership and name of the affiliate or subsidiary are the same as the manufacturer, and the affiliate or subsidiary is the exclusive sales outlet for the manufacturer.

(11) [~~(4)~~] Label, law label, labeled, tag and tagged - May be used interchangeably and means any label or tag required to be on or affixed to finished bedding products and processed filling material and on which the information required is to appear.

(12) Manufacturer - A person whose principal business is the manufacture of bedding from new materials for the purpose of resale in this state by a distributor, wholesaler, importer, or retail outlet or subsidiary outlet if the ownership and name are the same as the manufacturer, or if it is an exclusive sales outlet for the manufacturer, or both.

(13) Material - An article, substance, or part of an article or substance, used in the manufacturer, repair, or renovation of bedding.

(14) New - Bedding or filling material that has had no previous use for an purpose.

(15) [~~(5)~~] Pillows and cushions - Any bag, case, or covering which has been stuffed or filled and which is not an integral part of another item of bedding or furniture but which can be used by human beings for sleeping, resting, or reclining purposes. The terms do not apply to pillows or cushions which do not exceed 10 inches in their greatest dimension or have [~~to which is~~] permanently affixed figurines, statuettes, dolls, etc.

(16) [~~(6)~~] Processed filling material - Felt, batting, pad, foam product, quilted product, or any other filling material which has been prepared, manufactured, or processed into a form in which it can be used in articles of bedding.

(17) Processor - A person who manufacturers or processes, and sells in this state or for delivery in this state any filling materials, including felt, batting, pads, or foam, to be used or that could be used in bedding, other than frames or metal springs.

(18) Recycled material - Material that:

(A) is composed of recyclable material or that is derived from post consumer waste; and

(B) may be used in place of raw or virgin filling material in manufacturing, repairing, or renovating bedding.

(19) Renovate - To restore to a former condition or to place in a good state of repair.

(20) [~~(7)~~] Secondhand [~~Second-hand~~] - Bedding or filling material with previous use in any manner. [~~Product which has had prior use but does not apply to new materials subjected to manufacturing processes or to new materials which are the by-product of manufacturing processes.~~]

(21) [~~(8)~~] Sell - [~~Sell~~] Offer [~~offer~~], or expose for sale, include in a sale, barter, trade, deliver, consign, lease, possess with intent to sell or dispose of in any [~~other~~] commercial manner. For purposes of these sections, lease shall also include the term "rent" when used for commercial purposes.

(22) Wholesaler - A person located outside this state who on his own account sells, distributes, or jobs into this state to another for the purpose of resale bedding or filling material to be used in bedding. This does not include an affiliate or subsidiary if the ownership and the name of the affiliate or subsidiary are the same as the manufacturer, and the affiliate or subsidiary is the exclusive sales outlet for the manufacturer.

(b) (No change.)

§205.3. General Requirements.

(a) The Act and these sections shall apply to all persons, partnerships, corporations, and associations engaged in the business of manufacturing, renovating, wholesaling, distributing, importing, processing, germicidally treating, and selling items of bedding or processed filling materials. These regulations do not apply to persons who make, renovate, or germicidally treat bedding for their own use.

(b) These regulations shall apply to each separate manufacturing plant facility or business location regardless of name or ownership.

(c) Each item of bedding and processed filling material shall be labeled in conformity with the requirements of the Act and these regulations. This requirement does not apply to a custom upholstery business that does not repair or renovate bedding for resale.

(d) No person shall remove the label or position, arrange or display an article [~~Article~~] of bedding in such a manner as to obstruct the view of the [~~law~~] label from the purchaser and/or department representatives.

(e) To allow for unintentional variations, a tolerance or variation not in excess of 10% by weight from the amount stated on the label shall be allowed. [~~A tolerance not to exceed 20% shall be allowed for feather and down except when the species is stated, in which case the 10% tolerance applies.~~]

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

(h) The presence of a metal spring unit in an article [~~Article~~] of bedding must be stated as the last item in the statement of content section. Stating the number of coils is not required, but if stated it must be true and correct.

(i) - (j) (No change.)

(k) Identification and storage of secondhand [~~second-hand~~] bedding articles and filling materials shall be as follows: [~~.~~]

(1) Persons engaged in the manufacture, distribution, wholesaling, importation, renovation, processing, and/or germicidal treatment shall keep new and secondhand [~~second-hand~~] articles and/or materials segregated. [~~and shall tag or mark all second-hand articles and materials to show name and address of owner and reason for possession.~~]

(2) Persons engaged in the business of selling or storing articles of bedding shall keep new and secondhand [~~second-hand~~] articles segregated prior to germicidal treatment of the secondhand [~~second-hand~~] articles. Secondhand [~~Second-hand~~] articles which have not been germicidally treated and properly labeled, shall not be displayed on the sales floor. [~~unless there has been affixed thereto a tag, label or marking to indicate not for sale.~~]

(3) When new and secondhand [~~second-hand~~] filling materials or new and untreated secondhand [~~second-hand~~] articles of bedding have been mixed, the entire mixture shall be regarded as secondhand [~~second-hand~~] and shall be germicidally treated and properly labeled prior to sale.

(l) Mattresses and mattress pads manufactured, renovated or delivered into or within this state for purposes of sale in this state shall meet the federal standard for flammability of mattresses set forth in 16 Code of Federal Regulations, Part 1632.

§205.4. Labeling Requirements.

(a) It shall be unlawful to make any false or misleading statement on any label or tag required by the Act and these regulations; it shall be unlawful for any person to remove, deface, alter, or position any label or tag or statement thereon for the purpose of defeating the provisions of the Act and these regulations, except that the label or tag may be removed by the consumer.

(b) All labels, tags, or markings required by the [~~this~~] Act and these regulations shall be attached by the permitted [~~registered~~] manufacturer or renovator at the factory or at the location where germicidal treatment is performed.

(c) Labels and tags shall [~~must~~] be printed on substantial [~~white~~] cloth or a material of equal quality. Material shall [~~must~~] be resistant to tear and have prior departmental approval. [~~Paper stock is not allowed except in the tagging of processed materials.~~]

(d) Information required on the label shall [~~must~~] be printed, typed, or stamped in [~~black~~] ink. [~~unless otherwise specified for an individual label.~~] Printing shall [~~must~~] be legible and be resistant to smudging and smearing. Print size shall be of the height specified.

(e) Required printed matter on the label shall not be concealed, in whole or in part, by any other label, tag or printed matter not required by the [~~this~~] Act.

(f) (No change.)

(g) The terms used on the label to describe materials used in filling shall be restricted to those defined in these [~~the~~] regulations or specifically approved by the department. Only generic terms shall be used; trade names, trademarks or registered terms shall not be used in describing filling material. No information or wording other than descriptions of filling material shall appear in the statement of content section.

(h) Any chemical treatment applied to the filling materials shall be described in the statement of contents section. e.g. "blended cotton felt–boric acid treated".

(i) [~~(h)~~] It is permitted, as the last item on the label, to include the name of the manufacturer, importer, distributor and/or retailer, bar code, size, weight, country of origin, [~~or~~] any federal/state requirements relating to flammability or fiber identification information, and other information approved by the department.

(j) The information presented on the label shall be in English and the label shall be clearly visible at all times. Other languages may be used in addition to English, but shall be presented on separate labels.

(k) [~~(i)~~] Labels shall be affixed to the outer covering of bedding articles [~~Articles~~] and shall [~~must~~] be so located as to make the label and the information thereon completely and clearly visible to the purchaser at all times. Germicidal treatment label attachment methods shall [~~must~~] have prior approval by the department. Specific locations for label attachments shall be as follows: [~~.~~]

(1) Mattresses, box springs, pillows, pads, sleeping bags, and most infant bedding articles shall have the label attached on the end/side border or top panel and in proximity of any advertising labels, company logos, streamers, or any other labels not required by the Act. In the absence of any private labels, the law label shall [~~should~~] be attached at the location most likely to be prominently displayed to the purchaser.

(2) Articles such as quilted bedspreads, mattress protectors, quilts, etc., packaged in clear or see through packaging material shall [~~must~~] be folded in such a manner so that the label and printed matter thereon is visible to the purchaser.

(3) Articles of bedding packaged in concealed packaging shall[~~must~~] have a label affixed to both the article and an exact duplicate label attached to the outside of the package.

(4) Processed filling material identification tag location is optional except that it shall be securely attached where clearly visible.

(5) Reclining chairs shall have the label attached to the underside of the foot rest in such a way as to allow the label to be unfolded for easy access. Chairs with detachable cushions may have the label attached to the front part of the platform under the cushion.

(6) Upholstered furniture articles with detachable cushions (e.g., sleeper sofas, sofa beds, chair beds) shall have the label attached to the front part of the platform under the cushions. Upholstered furniture articles without detachable cushions shall have the label attached to the front part of the article in such a way as to make it accessible and visible.

(7) Attaching [~~The practice of attaching~~] the label to the dust cover or bottom of large articles, to the back side of railings or support braces, to the outside back, or in any other location which is not easily accessible to the purchaser, is prohibited. [~~not allowed.~~]

(8) Attaching the label in a location or manner which, while the article of bedding is on display for sale, conceals the label from open view to the purchaser shall be considered as a willful act to intentionally defeat the intent of the [~~Texas Bedding~~] Act and these regulations.

(l) [~~(j)~~]The different types of required labels and illustrations of each are as follows: [~~.~~]

(1) The label attached to bedding wholly manufactured from new materials shall have a minimum size of six square inches and state, plainly stamped or printed in black ink on all white material:

(A) "ALL NEW MATERIAL" in capital letters at least one-eighth inch high;

(B) the kind and grade of each material used in the filling and, if more than one kind or grade of material is used, the percentage, in descending order, by weight of each material;

(C) the manufacturer's permit identification number assigned by the department; and

(D) shall be in the following form:
Figure: 25 TAC §205.4(l)(1)(D)

[~~(1) The all new materials label shall have a minimum size of six square inches and shall be in the following form:~~]
[~~Figure: 25 TAC §205.4(j)(1)~~]

(2) The label attached to bedding any part of which is manufactured or renovated from secondhand or recycled material, other than bedding reworked, repaired, or renovated for the owner for the owner's own use, shall be at least 12 square inches and state, plainly stamped or printed in red ink on all white material:

(A) "SECONDHAND MATERIAL" or "RECYCLED MATERIAL" in capital letters at least one-fourth inch high;

(B) the manufacturer's or renovator's permit identification number assigned by the department; and

(C) shall be in the following form:
Figure: 25 TAC §205.4(l)(2)(C)

[~~(2) The renovate label shall have a minimum size of 12 square inches and shall be in the following form:~~]
[~~Figure: 25 TAC §205.4(j)(2)~~]

(3) The label attached to material or bedding that has been germicidally treated shall be at least 12 square inches and state, plainly stamped or printed in black ink on all yellow material:

(A) "SECONDHAND (USED) ARTICLE - SANITIZED" in capital letters at least one-fourth inch high;

(B) that the article or material has been germicidally treated by a method approved by the department;

(C) the method of germicidal treatment applied;.

(D) the date the article was germicidally treated;

(E) the name and address of the person for whom the article was germicidally treated;

(F) the permit identification number of the person applying the germicidal treatment assigned by the department; and

(G) shall be in the following form:
Figure: 25 TAC §205.4(l)(3)(G)

[~~(3) The second hand material label shall have a minimum size of 12 square inches, the tag shall be printed in red ink on white background, and the label shall be in the following form:~~]
[~~Figure: 25 TAC §205.4(j)(3)~~]

[~~(4) The germicidal treatment label shall have a minimum size of 12 square inches and shall be in the following form:~~]
[~~Figure: 25 TAC §205.4(j)(4)~~]

(4) [~~(5)~~] The processed filling material label is an identification label. The type and material of this label is optional. However, the label shall be visible, the printed matter shall be legible, [~~and~~] generic terms shall be used as the descriptive terminology and the processor's identification number assigned by the department shall be stated. Illustrations of a form for this label [~~are as~~] follow [~~follows~~]:
Figure: 25 TAC §205.4(l)(4)
[~~Figure: 25 TAC §205.4(j)(5)~~]

§205.5. Definitions and Designations of Filling Materials.

(a) (No change.)

(b) Down.

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

[~~(5) The tolerance levels for the labeling of down are as follows:~~]

[~~(A) a minimum of 80% down, plumules, and down fiber;~~]

[~~(i) consisting of down and plumules minimum of 70%;~~]

[~~(ii) consisting of down fiber minimum of 10%;~~]

[~~(B) the remaining 20% may consist of a combination of the following:~~]

[~~(i) natural waterfowl feathers;~~]

[~~(ii) down fiber;~~]

[~~(iii) damaged feathers maximum 3.0%;~~]

[~~(iv) chicken feather and fiber maximum 2.0%;~~]

[~~(v) residue maximum 2.0%;~~]

[~~(vi) waterfowl feather fiber.~~]

[~~(6) Species designation tolerance. If the down product is labeled as to the waterfowl (goose or duck), a minimum of 90% of the waterfowl plumage contained therein must be of that species.~~]

(c) Feathers.

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

(7) Emu feathers are feathers of any kind of emu, which are whole in physical structure.

(8) [~~(7)~~] Damaged feathers, in conjunction with the name of the fowl from which the feathers come, shall mean feathers which have been broken, injured by insects or depreciated from the original value in any manner and which exceeds the 10% allowable tolerance.

(9) [~~(8)~~] Crushed feathers, in conjunction with the name of the fowl from which the feathers come, shall mean feathers which have been processed by a curling, crushing, or chopping machine.

(10) [~~(9)~~] Feather mixtures when from two or more species shall be designated by name, character, and percentage by weight of each constituent in order of predominance, or mixtures may be designated by lowest grade as to species of origin (grades in descending order: goose, duck, turkey, chicken).

(d) Foam.

(1) - (3) (No change.)

(4) Urethane foam high resilience is a permissible term for urethane foam with a minimum density of 2.5 pounds per cubic foot, a minimum resilience of 60%, and a minimum support ratio of 2.4 pounds per cubic foot [~~feet~~].

(5) Polystyrene foam beads are a filling material which has been processed into small round droplets approximately 1/2 inch [~~usually from 0-1/2 inches~~] in diameter, or less.

(6) When [~~If~~] generic terms are used for foam products, they shall [~~must~~] be true and correct.

(e) Hair.

(1) (No change.)

(2) Hair mixtures - The hair of different animal origin used in a blend or mixture. The kind and percentage, by weight of each, shall be stated on the [~~law~~] label. Where materials other than hair are used with hair in a mixture, the kind and percentage by weight of each material shall be stated on the [~~law~~] label.

(f) (No change.)

(g) Miscellaneous fibers.

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

(3) Excelsior - Generic term for shredded wood fibers but does not include waste such as shavings [~~shaving~~], sawdust, or similar wastes.

(4) - (7) (No change.)

(h) - (i) (No change.)

(j) Gel. Generic term for any filling material of a semi-solid form, typically encased in a leak proof fabric cover and consisting of a mixture of water or other liquid base, dissolved chemicals and/or a suspension of other chemicals, which provides special ergonomic and resiliency properties.

(k) Buckwheat hulls. Generic term for the hulls removed from the seed of the buckwheat plant.

(l) [~~(j)~~] Universal definitions. The following terms are common industry definitions for fibers obtained as by-products during the various machine operations necessary in the manufacture of cotton yarn up to but not including the process of spinning. These terms must be preceded by the name of the textile fiber from which it is produced.

(1) Card, strip or stripping - Tangled or matted mass of fibers removed from the carding cloth during the carding process.

(2) Comber or noils - Tangled fibers removed during the combing process of textile fibers.

(3) Fly - Fibers removed from the machines during carding, drawing or similar textile operations.

(4) Napper - Lint removed during the process of raising the face of a cloth.

(5) Picker, picker motes, or motes - Matted or tangled masses of fiber resulting from the opening and cleaning of fibers in opener room of the textile mill.

(6) Sweepings - The fibrous sweepings from the floors of the textile mill.

§205.6. Adjunctive Terms.

(a) The terms in this section are required to be used with definitions when applicable for descriptive terminology.

(b) Batting, blended, felt - Material [~~are materials~~] which has [~~have~~] been carded in layers or sheets [~~sheet~~] by a garnett or felting machine. Shall not be used as an all inclusive term for material of different genera (e.g., blended cotton felt, polyester batting).

(c) Boric acid treated - Must [~~must~~] be used in connection with filling material that has been treated with a boric acid solution as a flame retardant treatment (e.g., blended cotton felt-boric acid treated).

(d) By-products - Vegetable [~~are vegetable~~] and synthetic fibers recovered from various machine operations up to but not including the process of spinning. Term may be used in lieu of generic terms for a mixture of like material (e.g., synthetic fiber by-product).

(e) Garnetted clippings - Materials [~~are materials~~] which have been made into thread, yarn, or fabric and subsequently reduced to a fibrous state (e.g., garnetted polyester clippings, garnetted textile clippings).

(f) Pad - Material [~~is a material~~] which has been interwoven, punched, pressed, formed, shaped or otherwise fabricated into a pad (e.g., sisal pad, coir fiber pad).

(g) Pieces - Urethane [~~are urethane~~] foam and rubber products which have been cut or broken into pieces of indefinite shape, size or form, but not shredded. The term applies to loose as well as cemented or bonded filling material (e.g., urethane foam pieces, latex foam rubber pieces).

(h) Resinated - The term must precede the generic material which has received a resin application (e.g., resinated cotton fiber pad).

(i) Rubberized -The term must precede the generic material which has received a latex application (e.g., rubberized hair pad).

(j) Shredded - Material [~~is material~~] which has been subjected to a shredding process (e.g., shredded urethane foam).

(k) Shredded clippings -Materials [~~are materials~~] which have been made into thread, yarn, or fabric and subsequently cut up, torn up, broken up or ground up (e.g., shredded polyester clippings, shredded textile clippings).

(l) Waste - By-products [~~is by-products~~] or reclaimed materials which have the following characteristics:

(1) cotton waste [~~-Cotton origin~~] containing more than 10% of hull, leaf, stem, and pulp;

(2) material which contains bits of paper, cardboard, string, etc.

(m) (No change.)

§205.8. Germicidal Treatment Requirements; Methods.

(a) General Requirements.

(1) Secondhand bedding articles.

(A) Secondhand bedding articles shall be cleaned and germicidally treated by a method approved by the department in subsection (b) of this section before they may be sold, leased or rented to consumers.

(B) Bedding articles manufactured, repaired, or renovated in whole or in part from secondhand or recycled materials shall be germicidally treated by a method approved by the department in subsection (b) of this section before they may be sold, leased or rented to consumers.

(C) Upholstered sofa beds and studio couches are subject to the requirements set forth in paragraph (1)(A) and (B) of this subsection.

(2) Renovated bedding articles.

(A) Secondhand or recycled materials shall be germicidally treated by a method approved by the department in subsection (b) of this section before they may be used in the manufacture, repair or renovation of bedding articles.

(B) Materials that are filthy, stained, oily, have obnoxious odors, harbor insects or pathogenic organisms, were obtained from dumps or junkyards or have been exposed to the elements shall not be used in the manufacture, repair or renovation of bedding articles.

(C) The outer covers on secondhand mattresses and box springs to be renovated or rebuilt for resale shall be removed to expose the concealed filling materials. Materials described in paragraph (2)(B) of this subsection shall be removed and discarded.

When the chemical method of germicidal treatment is used, the mattresses and box springs shall be treated prior to the installation of new covers. Secondhand covers shall not be reused regardless of the germicidal treatment method.

(b) Treatment methods.

(1) [~~(a)~~] Chemical spray.

(A) [~~(1)~~] Only those products specifically approved by the department may be used as a germicidal treatment method.

(B) [~~(2)~~] Mechanical, compressed air, hand pump, or electric sprayers must be used and they must be of the continuous spray type. No intermittent spray devices are allowed.

(C) [~~(3)~~] Chemicals must be in liquid form. Aerosol sprays shall not be used.

(D) [~~(4)~~] Fluid sprays must include a simple but positive means of detection or verification by means of an ultra-violet lamp unit.

(E) [~~(5)~~] Liquid sprays requiring premixing or dilution shall not be approved.

(F) [~~(6)~~] Spray area must be in such a location as to be protected from wind.

(G) [~~(7)~~] Manufacturers specifications such as amount of coverage, operator safety precautions, and other warning labels must be followed.

(2) [~~(b)~~] Dry heat.

(A) [~~(1)~~] A minimum temperature of 230 degrees Fahrenheit for a period of one hour and 15 minutes, within a closed chamber [~~container~~] is required for proper germicidal treatment. The minimum temperature may be reduced to 205 degrees Fahrenheit for a period of one hour and 30 minutes for foam products which may be damaged at 230 degrees Fahrenheit.

(B) [~~(2)~~] The dry heat chamber shall be equipped with a recording clock to accurately record the time and temperature. The clock shall be attached on the outside of the chamber and the heat bulb sending unit must be installed within the chamber at the furtherest point practical from the entry of the heat.

(C) [~~(3)~~] The chamber and automatic circulating heat devices shall [~~be construed to~~] maintain equal and uniform temperatures in all sections of the chamber.

(D) [~~(4)~~] All articles of bedding shall be spaced within the chamber to allow not less than four inches on all sides of each article for full circulation of heat or air.

(3) [~~(c)~~] Steam.

(A) [~~(1)~~] Treatment by the steam method shall consist of steam under pressure of 15 pounds per square inch maintained for 30 minutes or a pressure of 20 pounds per square inch maintained for 20 minutes.

(B) [~~(2)~~] An alternate method may consist of two applications of streaming steam, maintained for a period of one hour each, to be applied at intervals of not less than six nor more than 24 hours.

(4) [~~(d)~~] Commercial laundry method. Pillows, quilts, quilted spreads, comforters, pads, sleeping bags, and other similar items will be considered as having been germicidally treated when the filling materials and covering material or ticking are kept intact without opening, and cleaned by a commercial laundry method.[~~Washing and drying. Down and feather pillows will be considered as having been germicidally treated when the feathers and ticking are kept intact without opening, and washed by a commercial laundry method and subsequent drying to remove moisture.~~]

(5) [~~(e)~~] Other methods. Any other method of germicidal treatment may be used provided it has first been approved in writing by the department.

(6) [~~(f)~~] Records. All records [~~as may be~~] required by the Act and [~~the department~~] regulations shall be kept as part of the operator's records for a period of not less than two years. The records shall be available to the department on request. [~~The lot numbers and tag numbers as set forth under the Act, §4c, shall apply only to approved germicidal treatment methods which utilize a permanent recording device.~~]

§205.9. Sanitary Premises.

Every person engaged in the business of manufacturing, renovating, or processing bedding and/or bedding materials shall keep each business location [~~his place of business~~] in a sanitary condition by complying with the following minimum requirements: [~~.~~]

(1) Adequate housing and floor space shall be provided to prevent crowding of materials and equipment and to allow for the practice of cleanliness and sanitation. Articles of bedding and/or processed bedding materials shall be securely housed at all times and may not be exposed to the elements.

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

(5) Walls and ceilings of all rooms where materials are stored, processed, or otherwise used in the manufacturing or renovating of bedding, shall be of tight, smooth construction, shall be painted, and kept clean and in good repair. [~~;~~] Cracks [~~cracks~~] or recesses which would tend to harbor vermin and pathogens [~~bacteria~~] shall not be allowed.

(6) - (9) (No change.)

(10) A water supply and drinking fountain acceptable to the department shall be provided. Paper cups with dispenser may be used instead of a fountain. The use of a common drinking cup is prohibited.

§205.10. Adjustments to the Minimum Requirements.

The department shall, through its authorized representatives, have the right to require adjustments to [~~in~~] the minimum requirements [~~as~~] set forth in these [~~the~~] sections when such adjustments are deemed necessary for the protection of the public health and public welfare.

§205.11. Permit Requirements; Types; Application; Conditions; Suspension.

(a) General requirements.

(1) A person may not manufacture, import, wholesale, distribute, or engage in the business of renovating or selling bedding in this state or for delivery in this state unless the person first obtains a permit for that specific purpose from the department. This requirement does not apply to a custom upholstery business that does not repair or renovate bedding for resale.

(2) A processor may not sell filling material in this state or for delivery in this state unless the person first obtains a permit for that purpose from the department.

(3) A person may not apply a germicidal treatment method to bedding unless the method has been registered with and approved in writing by the department and the person has been issued a germicidal treatment permit by the department.

(4) These permit requirements apply to each separate business location regardless of business name or ownership.

(5) All permits expire 12 months from the date of issuance by the department. The department may prorate permit fees as appropriate to provide for a common expiration date for persons holding and/or applying for more than one permit.

(b) Types of permits and permit fees.

(1) Mattress Manufacturer Permit. Required of all manufacturers of mattresses or box springs prior to shipping mattresses and/or box springs into or within this state for the purpose of resale. Permit fees are graduated based on the number of articles the manufacturer is requesting authorization to ship during the permit period. The fees are set out in Schedule A as follows:
Figure: 25 TAC 205.11(b)(1)

(2) Mattress Renovator Permit. Required of all renovators of mattresses or box springs prior to shipping mattresses and/or box springs in or within this state for the purpose of resale. Permit fees are graduated based on the number of mattresses or box springs the renovator is requesting authorization to ship during the permit period. The fees are set out in subsection (b)(1) of this section.

(3) Bedding Product Manufacturer Permit. Required of all manufacturers of bedding products, other than mattresses and box springs, prior to shipping such articles in or within this state for the purpose of resale. Permit fees are graduated based on the number of articles the manufacturer is requesting authorization to ship during the permit period. The fees are set out in Schedule B as follows:
Figure 25 TAC §205.11(b)(3)

(4) Wholesaler/Distributor Permit. Required of all wholesalers and distributors of bedding articles or filling materials prior to shipping such articles or filling materials into this state for the purpose of resale. Permit fees are graduated based on the number of articles or units of filling materials the wholesaler/distributor is requesting authorization to ship during the permit period. The fees are set out in Schedule B, subsection (b)(3) of this section.

(5) Importer Permit. Required of all importers of bedding articles or filling materials prior to shipping such articles or filling materials into this state for the purpose of resale. Permit fees are graduated based on the number of imported articles or units of filling materials the importer is requesting authorization to ship during the permit period. The fees are set out in Schedule B in subsection (b)(3) of this section.

(6) Processor Permit. Required of all manufacturers and/or processors of bulk filling materials prior to selling and shipping such filling materials into this state. The annual permit fee is $50.

(7) Germicidal Treatment Permit. Required of all persons prior to the application of a germicidal treatment process, approved by the department, to articles of bedding and/or filling materials to be shipped into or to be sold in this state. The annual permit fee is $50.

(8) Arts and Crafts Permit. Required of all persons who manufacture bedding articles other than mattresses (such as pillows, quilts, comforters), have no paid employees, and manufacture less than 250 articles per year for sale in this state. The annual permit fee is $25.

(c) Permit application.

(1) Application for an initial permit or to renew an expiring permit must be made through the department on an approved application form which may be obtained from the Product Safety Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

(2) A separate application must be completed and submitted for each specific permit applied for at each specific business location or plant location.

(3) The appropriate permit fee, payable to the department, must accompany each application.

(4) Additional information that may be required by the department includes the following:

(A) copy of current permits or licenses issued by another state, or state;

(B) copy of most recent bedding inspection report if the business or plant is located in a city, county, state or country that has bedding laws and regulations and conducts inspections;

(C) copies of bedding article labels proposed for use in this state;

(D) samples of products to be shipped into this state;

(E) confirmation of compliance with applicable federal flammability standards for mattresses and mattress pads or test results from an independent testing facility acceptable to the department;

(F) explanation of the germicidal treatment method to be applied to second- hand articles of bedding; and

(G) any other information that the department may determine is necessary for the protection of the public health and safety.

(d) Permit conditions.

(1) Each person required to obtain a permit shall keep accurate and up-to-date records of all articles of bedding shipped into or within this state and such records shall be made available to authorized representatives of the department when requested. The department may require, at the expense of the person, that an independent audit of the records of the person be conducted with the results of such audit provided to the department and the person.

(2) Each person required to obtain a Germicidal Treatment Permit shall:

(A) conspicuously post the permit on the premises of the person's business near the treatment device; and

(B) keep accurate records in a bound log book describing all bedding articles or materials treated, date of treatment, method of treatment, and the name and address of the owner of each item.

(3) Each person required to obtain a permit shall provide product samples in sufficient numbers to determine compliance with these regulations when requested by the department and shall reimburse retail business establishments for samples of bedding or materials taken by authorized representatives of the department.

(4) Each person required to obtain a permit shall provide test results acceptable to the department confirming compliance with federal flammability standards for mattresses and mattress pads when requested by the department.

(5) Each person required to obtain a permit shall maintain each business location in a sanitary condition that complies with §205.9 of this title.

(6) Each person required to obtain a permit shall allow, during normal business hours, an authorized representative or repre-

sentatives of the department to conduct an announced or unannounced inspection of their place of business for purposes of determining compliance with the Act and regulations and to take samples of bedding articles or materials for inspection and analysis or to be held as evidence of a violation of these regulations.

(7) Each person required to obtain a permit shall allow an authorized representative or representatives of the department to copy records and take photographs of articles of bedding or materials during inspections.

(e) Permit denial, suspension, revocation

(1) An application for permit issuance or renewal will be denied by the department if the applicant fails or refuses to provide a complete application, pay the appropriate permit fee, provide requested information or product samples or test results, or if the business location or plant location is not in a sanitary condition in violation of the Act and regulations.

(2) An application for permit issuance or renewal may be denied by the department if the applicant has failed to make acceptable progress implementing corrective actions agreed upon by the applicant and the department to remedy previous violations of the Act or these regulations.

(3) A permit may be suspended or revoked by the department if the permit holder fails to maintain the permitted business location or plant location in a sanitary condition, manufactures or renovates and sells mattresses or mattress pads that do not comply with federal flammability standards, fails to germicidally treat articles of used bedding prior to resale, or commits any other or repeated violations of the Act or these regulations.

§205.12. Administrative Penalty.

(a) The department may assess an administrative penalty against a person who violates the Act or a rule adopted by the department under the Act as provided by this section.

(b) The penalty may not exceed $25,000 for each violation. Each day of a continuing violation constitutes a separate violation.

(c) In determining the amount of the administrative penalty, the department shall consider:

(1) the seriousness of the violation;

(2) the history of previous violations;

(3) the amount necessary to deter future violations;

(4) efforts made to correct the violation; and

(5) any other matters that justice may require.

(d) Individual violations may be reduced or increased based on the considerations listed in subsection (c) of this section.

(e) A person is subject to double the initial penalty on second finding of violation of any provision of the Act or regulations. Third and subsequent violations of a provision are subject to five times the initial penalty, not to exceed $25,000 per day, per violation.

(f) Violations shall be placed in one of the following severity levels:

(1) Critical violation. Severity Level III includes the types of violations that are the most significant and present a threat to public health and safety. The base penalty for a first violation will generally not exceed $10,000 per day, per violation. The same violation continuing written after notification by the department constitute separate violations. Examples of Severity Level III violations include but are not limited to:

(A) failure to germicidally treat, or properly treat, bedding by a method approved by the department;

(B) failure to maintain a business location in a sanitary condition;

(C) failure to comply with federal flammability standards for mattresses and mattress pads;

(D) failure to remove old covers from renovated mattresses and/or remove filling materials that are filthy, stained, have obnoxious odors, harbor insects or pathogenic organisms, were obtained from alleys, dumps or junkyards or other sources where the materials were exposed to the elements;

(E) labeling secondhand (used) bedding and/or bedding that was not properly germicidally treated as new or sanitized bedding;

(F) failure to obtain or renew the appropriate permit, or permits, prior to doing business in the state;

(G) falsifying required records or submitting false test results on bedding;

(H) refusal to recall bedding from commerce when so directed by the commissioner or the department;

(I) operating under another person's permit or a permit issued to another location; and

(J) using filling materials in bedding that emit irritating or toxic fumes or vapors.

(2) Serious violation. Severity Level II includes violations that are significant and which, if not corrected, could threaten public health and safety. The base penalty for a first violation will generally not exceed $2,500 per day, per violation. Examples of Level II violations include, but are not limited to:

(A) mixing germicidally treated bedding with untreated bedding;

(B) failure to label or accurately label bedding;

(C) failure to keep accurate and up-to-date records;

(D) selling unlabeled or falsely labeled bedding;

(E) selling used bedding that has not been germicidally treated; and

(F) concealing the label from the view of consumers.

(3) Significant violation. Severity Level I includes violations that are of more than minor significance and, if left uncorrected, could lead to more serious circumstances. The base penalty for Level I violations on first occurrence will generally not exceed $500 per day, per violation. Examples of Level I violations include, but are not limited to:

(A) attaching labels to bedding in unauthorized locations;

(B) failure to identify multiple filling materials on the label in terms of percentage, by weight, in descending order;

(C) failure to notify the department of changes in business location or ownership; and

(D) exceeding the 10 percent variance limit when stating the percentage, by weight, for bedding filling materials.

(g) All proceedings for the assessment of an administrative penalty are subject to Chapter 2001, Government Code.

(h) If, after investigation of a possible violation and the facts surrounding that possible violation the department determines that a violation has occurred, the department shall give written notice of the violation to the person alleged to have committed the violation. The notice must include:

(1) a brief summary of the alleged violation; and

(2) a statement of the amount of the proposed penalty based on the factors set forth in subsection (c) of this section; and a statement of the person's right to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(i) Not later than the 20th day after the date on which the notice is received, the person notified may accept the alleged violation and penalty determined by the department under subsection (c) of this section, or may make a written request for a hearing on that determination.

(j) If the person notified of the violation accepts the determination of the department or if the person fails to respond in a timely manner to the notice, the commissioner or the commissioner's designee shall issue an order approving the determination and ordering that the person pay the proposed penalty.

(k) If the person notified requests a hearing, the department shall:

(1) set a hearing date;

(2) give written notice of the hearing to the person; and

(3) designate a hearings examiner to conduct the hearing.

(l) The hearings examiner shall make findings of fact and conclusions of law and shall promptly issue to the commissioner or the commissioner's designee a proposal for decision as to the occurrence of the violation and a recommendation of the amount of any proposed penalty.

(m) Based on the findings of fact and conclusions of law and the recommendations of the hearings examiner, the commissioner or the commissioner's designee by order may find that a violation has occurred and may assess a penalty or may find that no violation has occurred.

(n) The department shall give notice of the order to the person alleged to have committed the violation. The notice must include:

(1) separate statements of the findings of fact and conclusions of law;

(2) the amount of any penalty assessed; and

(3) a statement of the right of the person to judicial review of the order under Chapter 2001, Government Code.

§205.13. Detained or Embargoed Bedding.

(a) The commissioner or an authorized agent may detain or embargo bedding if the commissioner or authorized agent finds or has probable cause to believe that the bedding violates the Act or these regulations.

(b) The commissioner or an authorized agent shall affix to the detained or embargoed bedding a notice or other appropriate marking indicating that:

(1) the bedding violates or is suspected of violating the Act or these regulations; and

(2) the bedding has been detained or embargoed.

(c) The notice or marking on detained or embargoed bedding must warn all persons not to use the bedding, remove the bedding from the premises, or dispose of the bedding by sale or otherwise until permission for use, removal, or disposal is given by the commissioner, the authorized agent, or a court.

(d) A person may not use detained or embargoed bedding, remove detained or embargoed bedding from the premises, or dispose of detained or embargoed bedding by sale or otherwise without permission of the commissioner, the authorized agent, or a court.

(e) The commissioner or an authorized agent shall remove the notice or other marking from detained or embargoed bedding if the commissioner or authorized agent finds that the bedding does not violate the Act or these regulations.

§205.14. Removal Order for Detained or Embargoed Bedding.

(a) If the claimant of the detained or embargoed bedding or the claimant's agent fails or refuses to transfer the bedding to a secure place after the notice or other appropriate marking has been affixed as provided by §205.12 of this title (relating to Administrative Penalty), the commissioner or an authorized agent may order the transfer of the bedding to one or more secure storage areas to prevent unauthorized use, removal, or disposal.

(b) The commissioner or an authorized agent may provide for the transfer of the bedding if the claimant of the bedding or the claimant's agent does not carry out the transfer in a timely manner.

(c) The claimant of the bedding or the claimant's agent shall pay the costs of the transfer, and the costs of any transfer made under subsection (a) or (b) of this section shall be assessed against the claimant of the bedding or the claimant's agent.

(d) The commissioner may request the attorney general to bring an action in the district court in Travis County to recover the costs of the transfer. In a judgement in favor of the state, the court may award costs, attorney fees, court costs, and interest from the time the expense was incurred through the time the department was reimbursed.

§205.15. Condemnation.

An action for the condemnation of bedding may be brought before a court in whose jurisdiction the bedding is located, detained, or embargoed if the bedding violates the Act or these regulations.

§205.16. Recall Orders.

(a) In conjunction with the detention or embargo of bedding under §205.13 of this title (relative to Detained or Embargoed Bedding), the commissioner may order bedding to be recalled from commerce.

(b) The commissioner's recall order may require the bedding to be removed to one or more secure areas approved by the commissioner or an authorized agent.

(c) The recall order must be in writing and signed by the commissioner.

(d) The recall order may be issued before or in conjunction with the affixing of the notice under §205.13 of this title.

(e) The recall is effective until the order:

(1) expires on its own terms;

(2) is withdrawn by the commissioner; or

(3) is reversed by a court in an order denying condemnation.

(f) The claimant of the bedding or the claimant's agent shall pay the costs of the removal and storage of the bedding removed.

(g) If the claimant or the claimant's agent fails or refuses to carry out the recall order in a timely manner, the commissioner may provide for the recall of the bedding. The costs of the recall shall be assessed against the claimant of the bedding or the claimant's agent.

(h) The commissioner may request the attorney general to bring an action in the district court of Travis County to recover the costs of the recall, attorney's fees, court costs, and interest from the time the expense was incurred through the date the department was reimbursed.

§205.17. Inspection.

(a) To determine compliance with the Act or regulations, an authorized representative, or representatives, may enter a place at which:

(1) bedding is manufactured, repaired, renovated, stored, or sold;

(2) materials are prepared for use in bedding; or

(3) germicidal treatment of bedding is performed.

(b) An authorized representative of the department may take a sample of bedding or materials for inspection or analysis.

(c) An authorized representative of the department may hold for evidence bedding or materials manufactured, repaired, renovated, or sold in violation, or suspected violation, of the Act or regulation.

This 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 March 19, 1999.

TRD-9901671
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 458–7236

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25 TAC §205.11

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

The repeal is proposed under Health and Safety Code, Chapter 345, §345.082, which provides the department with the authority to adopt necessary rules to implement and enforce Chapter 345; and Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeal affects Health and Safety Code, Chapter 345; Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§205.11. Stamp Exemption and Reporting.

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

Filed with the Office of the Secretary of State, on March 19, 1999.

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Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 458–7236

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Chapter 229. Food and Drug

Subchapter L. Licensure of Food Manufacturers and Food Wholesalers - Including Good Manufacturing Practices and Good Warehousing Practices in Manufacturing, Packing, and Holding Human Food

25 TAC §§229.181–229.183

The Texas Department of Health (department) proposes amendments to §§229.181 - 229.183, concerning licensure of food manufacturers and food wholesalers - including good manufacturing practices. Specifically, these sections are basic operating requirements for all manufacturers of food and wholesale distributors of food and concern definitions; licensing fees and procedures; and minimum standards for licensure. The amended regulations will provide an update to existing regulations regarding food safety.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, 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). The sections have been reviewed and the department has determined that reasons for adopting the sections continue to exist.

Proposed amendments to §229.181 include updated clarification of terms and bring definitions into *Texas Register* numerical format in compliance with 1 Texas Administrative Code §91.1 effective February 17, 1998. Section 229.182 is amended to improve licensing procedures as to location, ownership information, and business status. Amended §229.183 references new manufacturing and warehousing standards for licensure. Other minor changes were made for the purpose of clarification of the sections.

The department published a Notice of Intention to Review §§229.181 - 229.184 as required by Rider 167 in the *Texas Register* (24 TexReg 831) on February 5, 1999.

Robert D. Sowards, Jr., Director, Manufactured Foods Division, has determined that for each year of the first five-year period the sections are in effect there will be no fiscal implications to state government or local government.

Mr. Sowards also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of appending the sections will be additional assurance that foods manufactured, packaged, and held by Texas food manufacturers are not adulterated or misbranded. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Robert D. Sowards, Jr., Director, Manufactured Foods Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0243. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed amendments affect the Health and Safety Code, Chapter 431; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature is implemented by this proposal.

§229.181. Definitions.

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

(1) Consumer - Any person, firm, corporation, or other public or private legal entity which utilizes articles of food as supplied to that person, firm, or corporation, or which further processes or packages such articles of food.

(2) Direct seller - An individual:

(A) who is not affiliated with a permanent retail establishment and who engages in the business of:

(i) in-person sales of prepackaged nonperishable foods, including dietary supplements, to a buyer on a buy-sell basis, a deposit-commission basis, or a similar basis for resale in a home; or

(ii) sales of prepackaged nonperishable foods, including dietary supplements, in a home;

(B) who receives substantially all remuneration for a service, whether in cash or other form of payment, which is directly related to sales or other output, including the performance of the service, and not to the number of hours worked; or

(C) who performs services under a written contract between the individual and the person for whom the service is performed, and the contract provides that the individual is not treated as an employee with respect to federal tax purposes.

(3) [~~(2)~~] Food - Any article of food or drink for man; chewing gum; or an article used for components of any such article.

(4) [~~(3)~~] Food manufacturer - A person who combines, purifies, processes, or packages food for sale through a wholesale outlet. The term also includes a retail outlet that packages or labels food before sale and a person that represents itself as responsible for the purity and proper labeling of an article of food by labeling the food with the person's name and address.

(5) [~~(4)~~] Food service establishment - Any place where food is prepared and intended for individual portion service, and includes the site at which individual portions are provided. The term includes any such place regardless of whether consumption is on or off the premises and regardless of whether there is a charge for the food. The term also includes delicatessen-type operations that prepare sandwiches intended for individual portion service. The term does not include private homes where food is prepared or served for individual family consumption, retail food stores, the location of food vending machines, and supply vehicles.

(6) [~~(5)~~] Food wholesaler - A person who distributes food for resale, either through a retail outlet owned by that person or through sales to another person. The term "food wholesaler" shall not include a commissary which distributes food primarily intended for immediate consumption on the premises of a retail outlet under common ownership or an establishment engaged solely in the distribution of nonalcoholic beverages in sealed containers.

(7) [~~(6)~~] Manufacture - The process of combining or purifying food or [~~and~~] packaging food for sale to a person[~~consumer~~] at wholesale or retail, and includes repackaging or labeling of any food.

[~~(7) Packaging - Any covering, wrapper, or container in which a product is placed for retail or wholesale distribution, either before or after sale, to a consumer.~~]

(8) Package - Any container or wrapping in which a consumer commodity is enclosed for use in the delivery or display of that consumer commodity to retail purchasers. The term includes wrapped meats enclosed in papers or other materials as prepared by the manufacturers thereof for sale. The term does not include:

(A) shipping containers or wrappings used solely for the transportation of a consumer commodity in bulk or in quantity to manufacturers, packers, or processors, or to wholesale or retail distributors; or

(B) shipping containers or outer wrappings used by retailers to ship or deliver a commodity to retail customers if the containers and wrappings do not bear printed matter relating to any particular commodity.

(9) [~~(8)~~] Place of business - Each location where a person manufactures food or where food for wholesale is distributed [~~a person holds food for wholesale distribution. The term "place of business" shall not include the location of a food service establishment or a commissary supplying food service establishments unless the business regularly engages in the labeling, combining, and purifying of food which is either sold for resale or packaged for sale in other than individual portions~~].

[~~(9) Public food warehouse (terminal) A food storage facility from which foods owned by others are stored and distributed, and for which services the operator of the facility is paid for the storage and/or distribution of the foods.~~]

(10) Sale - The manufacture, production, processing, packaging, exposure, offer, possession, or holding of any such article for sale; and the sale, dispensing, and giving of any such article, and the supplying or applying of any such articles in the conduct of any food, drug, or device place of business.

§229.182. Licensing Fee and Procedures.

(a) Licensing fee and exemptions.

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

(3) All food wholesalers in Texas shall obtain a license annually with the Texas Department of Health. Except as provided for in paragraph (4) of this subsection, food wholesalers shall pay a license fee as follows:

(A) - (C) (No change.)

(D) $400 for each place of business having gross annual food sales of $1 million-$9,999,999.99; and

(E) $600 for each place of business having gross annual food sales of greater than or equal to $10 million. [; and]

[(F) $100 for each drop ship location, operated by a food manufacturer for temporary storage of foods for the purpose of further distribution.]

(4) (No change.)

(5) For the purpose of collecting licensing fees under this section, a person that distributes both its own manufactured food and food it does not manufacture must obtain only a food manufacturer's license. However, when calculating the amount of the licensing fee, the manufacturer must include the total for all food manufactured and wholesaled [distributed] from the place of business. In addition, food warehousing locations operated by a food manufacturer, including locations from which foods are held for limited periods of time for distribution, and which are totally separate from any manufacturing location, must be individually licensed as food wholesalers.

[(6) For the purpose of collecting licensing fees under this section, a food broker which engages in the storage of food, even for limited periods of time, must obtain a license as a food wholesaler.]

(6) [(7)] A firm that has more than one business location may request a one-time proration of fees when applying for a license for each new location. Upon approval by the department, the expiration date of the license for the new location will be established the same as the firm's previously licensed locations.

(b) (No change.)

(c) License application. All food manufacturers and food wholesalers shall file a license application on a form authorized [furnished] by the department. The application form shall be signed and verified, and shall contain the following information:

(1) (No change.)

(2) the physical address of the place of [each place of] business in the state that is licensed;

(3) the mailing address of the place of business in the state that is licensed;

(4) [(3)] if a sole proprietorship, the name of the proprietor; if a partnership, the names of all partners; if a corporation, the name of the corporation, the date and place of incorporation and name and address of its registered agent in the state; or if any other type of association, the names of the principals of such association;

(5) [(4)] the names [and residences] of those individuals in an actual administrative capacity which, in the case of a sole proprietorship shall be the managing proprietor; in a partnership, the managing partner; in a corporation, the officers and directors; in any other association, those in a managerial capacity; [and the residence address of a person in charge of each place of business;] and

(6) [(5)] a list of categories of gross annual sales which must be marked and adhered to by the licensee in the determination and paying of the license fee.

(d) - (e) (No change.)

(f) Issuance of license. The department may license a manufacturer or wholesaler of foods who meets the requirements of this section and §229.183 of this title (relating to Minimum Standards for Licensure).

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

(3) A current license shall only be issued when all past due fees and late fees are paid.

(g) Renewal of license.

(1) (No change.)

(2) A person who holds a license issued by the department under the Health and Safety Code shall renew the license by filing an application for renewal on a form authorized [prescribed] by the department accompanied by the appropriate licensing fee. A licensee must file for renewal before the expiration date of the current license. A person who files a renewal application after the expiration date must pay an additional $100 as a delinquency fee.

(3) (No change.)

(h) Amendment of license.

(1) (No change.)

(2) Change in name, ownership, status, or location [of place] of business. Not later than the 31st day before the date of the change in the name, status, or location of a licensed place of business, the license holder shall notify in writing the commissioner or the commissioner's designee of the license holder's intended change [intent to change the location of a licensed place of business]. The notice shall include the new name of the business, the address of the new location, or the date the business will close. [address of the new location and the name and residence address of the individual in charge of the place of business.] Not later than the 10th day after the completion of the change of location, the license holder shall forward to the commissioner or the commissioner's designee the name and residence address of the individual in charge of the new place of business. Notice is considered adequate if the license holder provides the intent and verification notices to the commissioner or the commissioner's designee by certified mail, return receipt requested, mailed to the Texas Department of Health, Bureau of Food and Drug Safety, 1100 West 49th Street, Austin, Texas 78756-3182.

(i) This section does not apply to:

(1) a person, firm, or corporation that harvests, packages, washes, or ships raw fruits or vegetables;

(2) a direct seller who is not otherwise engaged in manufacturing;

(3) a person engaged solely in the distribution of alcoholic beverages in sealed containers by holders of licenses or permits issued under the Alcoholic Beverage Code, Chapters 19, 20, 21, 23, 64, or 65; or

(4) a food service establishment or a commissary which distributes food primarily intended for immediate consumption on the premises of a retail outlet under common ownership unless the business regularly engages in the labeling, combining, and purifying of food which is either sold for resale or packaged for sale in other than individual portions.

[(i) Sale of food, drugs, or devices. The provisions of this section regarding the sale of food, drugs, or devices shall be considered to include the manufacture, production, processing, packaging, exposure, offer, possession, and holding of any such article for sale; and the sale, dispensing, and giving of any such article, and the supplying or applying of any such articles in the conduct of any food, drug, or device place of business.]

§229.183. Minimum Standards for Licensure.

[(a)] Food manufacturers and food wholesalers. [Manufacturers of foods.]

(1) All food manufacturers [~~manufacturers of food~~] in Texas shall comply with §§229.211 - 229.221 of this title (relating to Current Good Manufacturing Practice and Good Warehousing Practice in Manufacturing, Packing, or Holding Human Food) [~~the minimum standards specified in paragraph (2) of this subsection~~] in addition to the existing standards contained in the following statutes: Health and Safety Code, Chapters 431, 434, and 438.

(2) All food wholesalers in Texas shall comply with §§229.211 - 229.219 of this title in addition to the existing standards contained in the following statutes: Health and Safety Code, Chapters 431, 434, and 438.

[~~(2) Current good manufacturing practice in manufacturing, processing, packing, or holding human food. The department adopts by reference the Current Good Manufacturing Practice in Manufacturing, Processing, Packing, or Holding Human Food, Code of Federal Regulations, Title 21, Part 110, §§110.3-110.110. Copies are indexed and filed in the office of the Division of Food and Drugs, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3182, and are available for inspection during normal working hours.~~]

(3) Living areas. No manufacturing or holding of foods for distribution shall be conducted in any room used as living or sleeping quarters. All food manufacturing and storage [~~operations~~] shall be separated from any living or sleeping quarters by complete partitioning.

[~~(4) Potentially hazardous foods. The internal product temperature of potentially hazardous food shall be 45 degrees Fahrenheit (7 degrees Centigrade) or below or at an internal temperature of 140 degrees Fahrenheit (60 degrees Centigrade) or above at all times, except during periods of necessary preparation. Potentially hazardous food means any food that consists in whole or in part of milk or milk products, eggs, meat, poultry, fish, shellfish, edible crustacea, or other ingredients including synthetic ingredients, in a form capable of supporting rapid and progressive growth of infectious or toxigenic microorganisms. The term does not include clean, whole, uncracked, odor-free shell eggs or foods which have a pH level of 4.5 or below or a water activity (Aw) value of 0.85 or less. Frozen foods shall be kept frozen and shall be stored at a temperature of 0 degrees Fahrenheit (-18 degrees Centigrade) or below.~~]

(4) [~~(5)~~] Food labeling. If a person, firm, or corporation labels an article of food, the label shall meet the requirements of the Health and Safety Code, Chapter 431.

[~~(b) Food wholesalers.~~]

[~~(1) Food storage facilities shall be properly constructed and maintained. All walls, ceilings, and floors shall be intact to preclude entry of vermin and environmental contaminants.~~]

[~~(2) Doors and loading docks shall be tight-fitting and kept closed at all times when not in use, or adequately screened during normal operating hours to prevent entry of rodents, birds, or other pests.~~]

[~~(3) Outer premises, including trash receptacles, shall be kept clean and free of odors, debris, high weeds, or standing water which could harbor or attract vermin.~~]

[~~(4) Hand-washing and toilet facilities shall be provided and maintained, including hot and cold running water, hand soap, and single-service towels as deemed appropriate by the regulatory authority for the types of food handled by the licensee.~~]

[~~(5) Adequate lighting shall be provided to facilitate cleaning and inspection of stored goods.~~]

[~~(6) Wastewater shall be disposed of in a manner approved by the regulatory authority.~~]

[~~(7) All foods, including refrigerated and frozen foods, shall be stored off the floor and away from walls to help prevent contamination by vermin (rodents and insects for example) and moisture, and to facilitate cleaning and inspection.~~]

[~~(8) Food storage facilities and transportation vehicles shall be kept free of rodents, insects, birds, and other pests which may contaminate food.~~]

[~~(9) Damaged, distressed, and infested foods shall be stored in a "morgue area," adequately separated from undamaged foods and shall be disposed of in a timely manner to preclude further contamination.~~]

[~~(10) The internal temperature of potentially hazardous foods shall be maintained at 45 degrees Fahrenheit (7 degrees Centigrade) or below at all times to preclude temperature abuse during staging, loading, and transporting. Frozen foods shall be kept frozen at all times.~~]

[~~(11) During warehousing and transporting, all chemicals shall be properly stored and physically separated from foods and to preclude contamination.~~]

[~~(12) Foods being warehoused shall be rotated on a "first in, first out" basis.~~]

[~~(13) Packaged foods, including imported foods, shall comply with all applicable food labeling regulations.~~]

[~~(14) Food storage facilities and transportation vehicles operated under the control of the licensee shall be kept clean and free of excessive dust, dirt, spillage, and other debris, including excess moisture.~~]

[~~(15) Food transport vehicles shall be operated in compliance with federal regulations pertaining to back-hauling.~~]

[~~(16) Each incoming lot shall be examined at the time of receipt to preclude acceptance of contaminated or adulterated foods.~~]

[~~(17) Swollen, leaking, and/or severely dented containers of food shall be segregated and promptly placed in the "morgue area" to preclude further contamination, attraction of vermin, or sale prior to reconditioning.~~]

[~~(18) Distressed foods salvaged by the licensee shall be salvaged in accordance with §§229.191-229.202 of this title (relating to Regulation of Food, Drug, Device, and Cosmetic Salvage Establishments and Brokers).~~]

[~~(19) Only pesticides approved by the Environmental Protection Agency (EPA) for use in a food warehouse and/or food processing facility may be used. Pesticides shall be used only according to label directions. Rodenticides shall be placed inside enclosed bait boxes or other approved receptacles. Only a licensed pesticide applicator may apply restricted use pesticides.~~]

[~~(20) Food wholesalers engaged in the receipt and distribution of over-the-counter or prescription drugs shall comply with §229.253 of this title (relating to Minimum Standards for Licensure).~~]

[~~(21) The licensee shall keep accurate distribution records to facilitate the recall of any foods found to be unfit for human consumption.~~]

This 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 March 19, 1999.

TRD-9901667
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 458–7236

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Chapter 229. Food and Drug

The Texas Department of Health (department) proposes the repeal of existing §§229.191 - 229.208, and new §§229.191 - 229.208, concerning the regulation of food, drug, device, and cosmetic salvage establishments and brokers. New §§229.191 - 229.208 cover purpose; applicable federal laws and regulations; definitions; exemptions; licensure requirements; licensure procedures; report of changes; licensure fees; denial, suspension, or revocation of license; personnel; construction and maintenance of physical facilities; sanitary facilities and controls; general provisions for handling distressed merchandise; handling distressed food; handling distressed drugs; handling distressed devices; records; and enforcement and penalties.

The new sections contain new language and incorporate language presently located in existing §§229.191 - 229.208, which are being proposed for repeal. Existing §§229.191 - 229.208 are being repealed for the purpose of reorganization. The new sections establish new licensure fees for salvagers to allow the department to recover the costs associated with inspecting salvage establishments and brokers and administering the program. The new sections contain new language to clarify existing requirements for device salvagers and include language to standardize licensure requirements to improve the timeliness and efficiency of the licensure process. The new sections also clarify the department's inspection authority and enforcement options available under Health and Safety Code, Chapter 432 (Texas Food, Drug, Device, and Cosmetic Salvage Act).

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, requires that each state agency review and consider for readoption each rule adopted by the agency pursuant to the Government Code, Chapter 2001 (Administrative Procedures Act). These sections have been reviewed and the department has determined that the reason for readopting the sections continues to exist; however, the rules need revisions as described in this preamble.

The department published a Notice of Intention to Review for §§229.191 - 229.208 as required by Rider 167 in the *Texas Register* (23 TexReg 9078) on September 4, 1998. No comments were received by the department on these sections.

Cynthia T. Culmo, R.Ph., Director, Drugs and Medical Devices Division, Bureau of Food and Drug Safety, has determined that for the first five-year period the sections are in effect there will be fiscal implications as a result of enforcing or administering these sections as proposed. The effect on state government will be an estimated annual gain of $46,550 in fee-generated revenue. The proposed increase in revenue will recover the department's cost in conducting inspections and processing licensure applications. There are no anticipated fiscal implications for local government.

Ms. Culmo has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing these sections will be the prevention of serious injury to consumers from the use of adulterated and misbranded foods, drugs, devices and cosmetics. The injury prevention will be achieved through the additional clarification and understanding of the salvage requirements provided by this proposal. The anticipated economic cost to persons or small businesses who are required to comply with the sections as proposed will be an additional $100 annually in licensure fees for food, drug, and cosmetic salvagers and an additional $250 annually in licensure fees for device salvagers. There will be no effect on local employment.

Comments on the proposed rule may be submitted to Thomas E. Brinck, Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0237. Comments will be accepted for 30 days from the date of publication of this proposal in the *Texas Register*.

Subchapter M. Regulation of Food, Drug, Device and Cosmetic Salvage Establishments and Brokers

25 TAC §§229.191–229.208

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

The repeals are proposed under the Health and Safety Code, §432.011, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 432; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed repeal affects Health and Safety Code, Chapter 432; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature is implemented by this proposal.

§229.191. Intent and Scope.

§229.192. Definitions.

§229.193. Personnel.

§229.194. Protection of Salvageable and Salvaged Merchandise.

§229.195. Equipment and Utensils Design and Fabrication.

§229.196. Cleaning, Sanitization, and Storage of Equipment and Utensils.

§229.197. Sanitary Facilities and Controls.

§229.198. Construction and Maintenance of Physical Facilities.

§229.199. Handling of Distressed Merchandise.

§229.200. Reconditioning and Labeling of Distressed Merchandise.

§229.201. Handling of Nonsalvageable Merchandise.

§229.202. Record Keeping.

§229.203. License.

§229.204. Denial, Suspension, and Revocation of Licenses.

§229.205. Inspections.

§229.206. Penalties.

§229.207. Salvage Establishments and Brokers Outside Jurisdiction of the Department.

§229.208. Temporary Permits.

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

Filed with the Office of the Secretary of State, on March 19, 1999.

TRD-9901668
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 458–7236

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25 TAC §§229.191–229.208

The new sections are proposed under the Health and Safety Code, §432.011, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 432; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed new sections affect Health and Safety Code, Chapter 432; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature is implemented by this proposal.

§229.191. Purpose.

These sections provide for the licensing and regulation of salvage establishments and brokers to prevent the sale or distribution of adulterated or misbranded food, drugs, devices, or cosmetics to consumers.

§229.192. Applicable Federal Laws and Regulations.

(a) The Texas Department of Health (department) adopts by reference the following federal laws and regulations:

(1) Federal Food, Drug, and Cosmetic Act, 21 United States Code, et seq. as amended;

(2) Fair Packaging and Labeling Act, 15 United States Code 1451 et seq. as amended;

(3) §501(c)(3), Internal Revenue Code of 1986, as amended;

(4) 21 Code of Federal Regulations (CFR), Part 110, Current Good Manufacturing Practice in Manufacturing, Packing, or Holding Human Food, as amended;

(5) 21 CFR, Part 210, Current Good Manufacturing Practice in Manufacturing, Processing, Packing, or Holding of Drugs; General, as amended;

(6) 21 CFR, Part 211, Current Good Manufacturing Practice for Finished Pharmaceuticals, as amended; and

(7) 21 CFR, Part 820, Quality System Regulation, as amended.

(b) Copies of these laws and regulations are indexed and filed in the office of the Bureau of Food and Drug Safety, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, and are available for inspection during normal working hours.

(c) Nothing in these sections shall relieve any person of the responsibility for compliance with other applicable federal laws and regulations.

§229.193. 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 Food, Drug, Device, and Cosmetic Salvage Act, Health and Safety Code, Chapter 432.

(2) Adulterated food - Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.081.

(3) Adulterated cosmetic - Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.141.

(4) Adulterated drug or device - Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.111.

(5) Board - The Texas Board of Health.

(6) Commissioner - The Commissioner of Health.

(7) Cosmetic - Any article or substance intended to be rubbed, poured, sprinkled, or sprayed on or introduced into, or otherwise applied to the human body for cleansing, beautifying, promoting attractiveness, or altering appearances; or an article or substance for use as a component of such an article, except that the term does not include soap.

(8) Department - The Texas Department of Health.

(9) Device - An instrument, apparatus, or contrivance, including any components, parts, and accessories, designed or intended for use in diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or to affect the structure or any function of the body of man or other animals.

(10) Device remanufacturer - A person who processes, conditions, renovates, repackages, restores, or does any other act to a finished device that significantly changes the finished device's performance or safety specifications, or intended use.

(11) Distressed merchandise - Any food, drug, device, or cosmetic that has been subjected to prolonged or improper storage, loss of label or identity, or abnormal environmental conditions such as extremes in temperature, humidity, smoke, water, fumes, pressure, or radiation that are due to natural disasters or otherwise or that may have been rendered unsafe or unsuitable for human consumption or use for any other reason.

(12) Drug -

(A) an article or substance recognized in the official United States Pharmacopoeia, the official Homeopathic Pharmacopoeia of the United States, the official National Formulary, or any supplement of them;

(B) an article or substance designed or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;

(C) an article or substance, other than food, intended to affect the structure or any function of the body of man or other animals; or

(D) an article or substance intended for use as a component of any article or substance specified in this definition.

(E) The term does not include devices or their components, parts, or accessories.

(13) Drug manufacturer - A person who manufactures, prepares, propagates, compounds, processes, packages, or changes the container, wrapper, or labeling of any drug package.

(14) Finished device - A device, or any accessory to a device, which is suitable for use, whether or not packaged or labeled for commercial distribution.

(15) Food-

(A) any article of food or drink for man;

(B) chewing gum; or

(C) an article used for components of any such article.

(16) Food reclamation center - A facility or person that engages in the reconditioning or inventorying, separating, and disposing of distressed food on a fee for service basis. Distressed food may originate from a wholesale distributor, manufacturer, or retail facility, and may be handled within said facility by someone other than the distributor, manufacturer, or retail facility. For the purpose of licensure under these sections, a food reclamation center is a salvage establishment.

(17) Manufacture - The combining, purifying, processing, packing, or repacking of food, drugs, devices, or cosmetics for wholesale or retail sale.

(18) Manufacturer - Includes a person who represents himself as responsible for the purity and proper labeling of a food, drug, device, or cosmetic.

(19) Misbranded food - Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.082.

(20) Misbranded cosmetic - Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.142.

(21) Misbranded drug or device - Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.112.

(22) Nonprofit organization - An organization which has received an exemption from federal taxation under 26 U. S. C. § 501(c)(3).

(23) Nonsalvageable merchandise - Distressed merchandise, as defined in this section, which cannot be safely or practically reconditioned.

(24) Perishable - Capable of spoilage or deterioration due to improper refrigeration or handling.

(25) Person - An individual, corporation, business trust, estate, trust, partnership, association, or any other public or private legal entity.

(26) Personnel - Any person employed by a salvage establishment or salvage broker who does or may in any manner handle or come in contact with the handling, storing, transporting, or selling and distributing of salvageable or salvaged merchandise.

(27) Place of business - Each location from which a salvage establishment or salvage broker operates.

(28) Potentially hazardous food - A food that is natural or synthetic and that requires temperature control because it is in a form capable of supporting the rapid and progressive growth of infectious or toxigenic microorganisms; the growth and toxin production of *Clostridium botulinum*; or in raw shell eggs, the growth of *Salmonella enteritidis*.

(29) Quality audit - An independent examination of a salvage establishment, including the organizational structure and responsibilities, procedures, and processes necessary to ensure that such resources and activities comply with the requirements of these sections and result in the adequate reconditioning of distressed merchandise.

(30) Reconditioning - Any appropriate process or procedure by which distressed merchandise can be brought into compliance with the standards of the department for consumption or use by the public. In addition, all reconditioned merchandise must be in compliance with the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(31) Sale or distribution - The act of selling or distributing, whether for compensation or not, and includes delivery, holding, or offering for sale, transfer, auction, storage, or other means of handling or trafficking.

(32) Salvage broker - A person who engages in the business of selling, distributing, or otherwise trafficking in any distressed or salvaged merchandise who does not operate a salvage establishment.

(33) Salvage establishment - Any place of business engaged in reconditioning or by other means salvaging distressed merchandise or that sells, buys, or distributes for human use any salvaged merchandise. For the purpose of licensure under these sections, a food reclamation center is a salvage establishment.

(34) Salvage operator - A person who is engaged in the business of operating a salvage establishment.

(35) Salvage warehouse - A separate storage facility used by a salvage broker or salvage establishment for the purpose of holding distressed or salvaged merchandise.

(36) Salvageable merchandise - Any distressed merchandise, as defined in this section, which can be reconditioned to the satisfaction of the department.

(37) Salvaged merchandise - Any distressed merchandise that has been reconditioned.

(38) Sanitize - Adequate treatment of surfaces by a process that is effective in destroying vegetative cells of microorganisms of public health significance and in substantially reducing numbers of other microorganisms. Such treatments shall not adversely affect the product and shall be safe to the consumer.

(39) Vehicles - Any truck, car, bus, or other means by which distressed, salvageable, or salvaged merchandise is transported from one location to another.

§229.194. Exemptions.

A person is exempt from licensing under these sections if the person is:

(1) a manufacturer, distributor, or processor of a food, drug, device, or cosmetic who in the normal course of business engages in the activities of reconditioning the items manufactured, distributed, or processed by or for that person and not purchased by that person solely for the purpose of reconditioning and sale;

(2) a common carrier or the common carrier's agent who disposes of or otherwise transfers undamaged or distressed foods, drugs, devices, or cosmetics to a person who is exempt under this section or to a licensed salvage broker or salvage operator;

(3) a person who transfers distressed merchandise to a licensed salvage broker or salvage operator; or

(4) a nonprofit organization that distributes food to the needy under the provisions of the Good Faith Donor Act, Civil Practice and Remedies Code, Chapter 76, but does not recondition such food.

§229.195. Licensure Requirements.

(a) General. Except as provided by §229.194 of this title (relating to Exemptions), it shall be unlawful for any person to operate a salvage establishment or operate as a salvage broker within the State of Texas, who does not possess a current and valid license issued by the department.

(b) Licensure of out of state salvage establishments and brokers. A person who operates a salvage establishment or acts as a salvage broker outside this state may not sell, distribute, or otherwise traffic in distressed or salvaged merchandise within this state unless the person holds a license from the department.

(c) Display of license. The license shall be displayed in an open public area at each place of business and each salvage operator shall have a copy of a valid license in each vehicle used by the salvage operator to transport distressed merchandise.

(d) New place of business. Each person acquiring or establishing a place of business for the purpose of operating a salvage establishment or operating as a salvage broker shall apply for a license of such business prior to beginning operation.

(e) Two or more places of business. If the salvage establishment or salvage broker operates more than one place of business, the salvage establishment or salvage broker shall license each place of business separately.

(f) Issuance of license. The department may license a salvage establishment or salvage broker who meets the requirements of these sections.

(g) Reports from other jurisdictions. The department may accept reports from authorities in other jurisdictions to determine the extent of compliance with these sections and with theprovisions of the Act.

(h) Transfer of license. Licenses shall not be transferable from one person to another or from one place of business to another.

(i) License expiration. Unless the department revokes or suspends a license as provided in §229.199 of this title (relating to Denial, Suspension, or Revocation of License), the initial license shall be valid for one year from the date of issuance which becomes the anniversary date.

(j) Renewal of license.

(1) Each year prior to the anniversary date, the salvage establishment or salvage broker shall renew its license following the requirements of this section and §229.196 of this title (relating to Licensure Procedures).

(2) The renewal license shall be valid for one year from the anniversary date.

(3) The license renewal application and nonrefundable renewal fee for each place of business shall be submitted to the department 30 days prior to the expiration date of the current license in accordance with department procedures in §229.196 of this title (relating to Licensure Procedures). A person who files a renewal application after the expiration date must pay an additional $100 as a delinquency fee.

(4) Failure to submit the renewal application prior to the current licensure expiration date may subject the salvage establishment or salvage broker to the enforcement provisions under the Act and also to the provisions of §229.199 of this title (relating to Denial, Suspension, or Revocation of License).

(5) The department shall renew the license of a licensee who submits a renewal application and pays the renewal fee after finding that the licensee is in compliance with these sections as determined by an inspection of the licensee's place of business or as outlined in subsection (g) of this section.

(k) Amendment of license. A license that is amended, including a change of name, ownership, or a notification of a change in the location of a licensed place of business will require submission of fees as outlined in §229.198 of this title (relating to Licensure Fees).

§229.196. Licensure Procedures.

(a) License application. Any person desiring to operate a salvage establishment or act as a salvage broker shall make written application for a license on forms provided by the department. A separate application is required for each place of business to be licensed. License application forms may be obtained from the Texas Department of Health, Bureau of Food and Drug Safety, 1100 West 49th Street, Austin, Texas, 78756.

(b) Contents of license application. The salvage establishment or salvage broker license application shall be signed and verified, shall be made on a form furnished by the department, and shall contain the following information:

(1) the legal name under which the business is conducted;

(2) the address of the place of business to be licensed and the mailing address if different;

(3) the address of any salvage warehouse used by a salvage establishment or salvage broker;

(4) if a sole proprietorship, the name of the proprietor; if a partnership, the names of all partners; if a corporation, the names and titles of all officers; in any other association, those in a managerial capacity; and

(5) a statement signed and verified by the sole proprietor, managing partner, corporate officer, or person in a managerial capacity for an association that acknowledges the applicant has read, understood, and agrees to abide by the provisions of these sections and those of the Act.

§229.197. Report of Changes.

The license holder shall notify the department in writing within 10 days of any change which would render the information contained in the application for the license, reported pursuant to §229.196 of this title (relating to Licensure Procedures), no longer accurate. Failure to inform the department no later than 10 days of a change in the information required in the application for a license may result in a suspension or revocation of the license.

§229.198. Licensure Fees.

(a) Licensure fee.

(1) All salvage establishments and salvage brokers operating in Texas shall obtain a license annually with the department. Except as provided for in subsection (a)(2) of this section, salvage establishments and salvage brokers shall pay a nonrefundable licensure fee of $400 for each place of business operated.

(2) A salvage establishment or salvage broker that engages in the business of reconditioning, selling, distributing, or otherwise trafficking in distressed or salvaged devices shall pay a nonrefundable licensure fee of $550.

(3) Reinspection fee. A salvage establishment or salvage broker who requests reinstatement of a license that has been denied, suspended, or revoked pursuant to §229.199(g) of this title (relating to Denial, Suspension, or Revocation of License), shall pay a nonrefundable inspection fee of $400.

(b) Exemption from licensure fees. A person is exempt from the licensure fees required by this section if the person is a nonprofit organization, as described in the Internal Revenue Code of 1986, §501(c)(3), or a nonprofit affiliate of the organization, to the extent otherwise permitted by law.

§229.199. Denial, Suspension, or Revocation of License.

(a) General. The department may deny, suspend, or revoke the license of an applicant who fails to comply with the Act or these sections.

(b) Denials.

(1) The department may deny an application for a license if the applicant fails to meet the standards or requirements of the Act or these sections.

(2) The department shall give the applicant written notice of the denial, the reasons for the denial, and opportunity for a hearing.

(c) Emergency suspensions.

(1) The department may suspend a license without notice when there is an imminent threat to the health and safety of the public caused by the licensee.

(2) Within 10 days after the emergency suspension, the licensee may request a hearing on the emergency suspension and the hearing will be held within 20 days of the request.

(d) Nonemergency suspensions.

(1) The department may suspend a license on a nonemergency basis when there is no imminent threat to public health and safety and when the licensee violates any one of the following requirements:

(A) failure to comply with the Act or these sections; or

(B) falsification of the application for a license.

(2) The department shall give the licensee written notice of the proposed suspension, including the reasons and an opportunity for a hearing.

(e) Revocations.

(1) The department may revoke a license when the licensee:

(A) repeatedly violates the provisions of the Act or these sections;

(B) refuses to allow the department to conduct an inspection or collect samples;

(C) interferes with the department in the performance of its duties;

(D) removes or disposes of a detained food, drug, device, or cosmetic in violation of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, §431.021; or

(E) fails to inform the department of any salvage warehouse(s) at the time of an inspection or when requested by the department.

(2) Prior to revoking the license, the department shall give the licensee written notice of the proposed revocation, including the reasons and an opportunity for a hearing.

(f) Hearings.

(1) Any hearings for the denial, suspension, emergency suspension, or revocation of a license are governed by the department's formal hearing procedures in Chapter 1 of this title (relating to the Texas Board of Health) and the Administrative Procedure Act, Government Code, Chapter 2001.

(2) Within 10 days after an emergency suspension or within 20 days after the postmark date of the department's written notice of proposed denial, nonemergency suspension, or revocation, the applicant or licensee may request in writing a hearing from the department's Bureau of Food and Drug Safety. If the applicant or licensee does not request a hearing during the required time period, then the applicant or licensee is deemed to have waived their right to a hearing.

(g) Reinstatement of license.

(1) A person whose application for a license has been denied or whose license has been placed under an emergency suspension may request a reinspection for the purpose of granting or reinstating a license not later than the 30th day after the denial or emergency suspension. Not later than the 10th day after the receipt of a written request from the applicant or licensee, the department shall make a reinspection.

(2) As regards a nonemergency suspension or a revocation, the licensee may request at any time, an inspection for reinstating the license or for issuing a new license.

(3) If, after inspection, the department determines that the applicant or licensee meets the requirements of the Act or these sections, the department shall reinstate the license or issue a new license, as appropriate.

(4) Reinspection fee. Except as provided for in §229.198(b) of this title (relating to Licensure Fees), a salvage establishment or salvage broker who requests reinstatement of a license that has been denied, suspended, or revoked pursuant to this section shall pay a nonrefundable inspection fee of $400.

§229.200. Personnel.

(a) Employee health requirements. No person known to be or suspected of being affected with any disease in a communicable form, or while a carrier of such disease, or while afflicted with boils, infected wounds, sores, or respiratory infection, shall work in an area of a salvage establishment or for a salvage broker in any capacity in which there is any possibility of such person contaminating salvageable or salvaged merchandise with pathogenic organisms, or transmitting disease to other individuals.

(b) Personal cleanliness.

(1) All personnel while working in direct contact with salvageable merchandise or while engaged in reconditioning, repacking, or otherwise handling any ingredients or components of salvagable merchandise shall wear clean outer garments, maintain a high degree of personal cleanliness, and conform to hygienic practices while on duty.

(2) Personnel engaged in reconditioning salvageable merchandise shall wash their hands thoroughly in a department approved hand-washing facility before starting work, and as often as may be necessary to remove soil and contamination.

(3) No person shall resume work after visiting the toilet room without first washing their hands.

§229.201. Construction and Maintenance of Physical Facilities.

(a) Buildings. Buildings used by salvage establishments and salvage brokers shall be of suitable design and contain sufficient space to perform necessary operations, prevent mixups, and assure orderly handling.

(b) Floor construction.

(1) The floor surfaces in all rooms and areas in which salvageable or salvaged merchandise is stored or processed and in which utensils are washed, and walk-in refrigerators, dressing or locker rooms, and toilet rooms, shall be of smooth, nonabsorbent materials, and so constructed as to be easily cleanable. Floors of nonrefrigerated, dry storage areas need not be nonabsorbent.

(2) All floors shall be kept clean and in good repair.

(3) Floor drains shall be provided in all rooms where floors are subjected to flooding-type cleaning or where normal operations release or discharge water or other liquid waste on the floor.

(c) Walls and ceilings. Walls and ceilings of all rooms shall be clean, smooth, and in good repair.

(d) Lighting.

(1) Artificial light sources shall be installed to provide at least 50 footcandles of light on all working surfaces and at least 30 footcandles on all other surfaces and equipment, in reconditioning and storage areas, utensil-washing and hand-washing areas, and toilet rooms. At least 20 footcandles of light at a distance of 30 inches from the floor shall be required in all other areas during cleaning operations.

(2) Sources of artificial light shall be provided and used to the extent necessary to provide the required amounts of light on all surfaces when in use and when being cleaned.

(e) Ventilation.

(1) All rooms, in which salvageable or salvaged merchandise is reconditioned or utensils are washed, dressing or locker rooms, toilet rooms, and garbage and rubbish storage areas shall be well ventilated.

(2) Ventilation hoods and related equipment when used shall be designed to prevent condensation from dripping onto salvageable merchandise or onto work surfaces.

(3) Filters, when used, shall be readily removable for cleaning or replacement.

(4) Ventilation systems shall comply with applicable federal, state, and local fire prevention and air pollution requirements.

(f) Locker area. Adequate facilities shall be provided for the orderly storage of personnel clothing and personal belongings.

(g) Cleanliness of facilities.

(1) All parts of the salvage establishment or salvage warehouse and its premises shall be kept neat, clean, and free of litter and rubbish.

(2) Cleaning operations shall be conducted in such a manner as to prevent contamination of salvageable and salvaged merchandise.

(3) None of the operations connected with a salvage establishment or salvage warehouse shall be conducted in any room used as an employee lounge or toilet facility, or living or sleeping quarters.

(4) Soiled coats and aprons shall be kept in suitable containers until removed for laundering.

(5) No birds or animals shall be allowed in any areas used for the conduct of salvage establishment operations or the storage of salvageable and salvaged merchandise.

(h) Vehicles. Vehicles used to transport distressed, salvageable, or salvaged merchandise shall be maintained in a clean and sanitary condition to protect the product from contamination.

§229.202. Sanitary Facilities and Controls.

(a) Water supply. The water supply shall be adequate, of a safe, sanitary quality, and from a source constructed and operated in accordance with the Minimum Standards of Sanitation and Health Protection, Health and Safety Code, Chapter 341, and rules promulgated under this chapter.

(b) Sewage. All sewage, including liquid waste, shall be disposed of in a public sewerage system or, in the absence thereof, in a manner applicable with the Minimum Standards of Sanitation and Health Protection, Health and Safety Code, Chapter 341, and rules promulgated under this chapter.

(c) Plumbing. Plumbing shall be sized, installed, and maintained in accordance with applicable state and local plumbing codes.

(d) Toilet facilities.

(1) Each salvage establishment shall provide its employees with adequate and conveniently located toilet facilities.

(2) Toilet facilities, including rooms and fixtures, shall be kept in a clean condition and in good repair at all times.

(3) The doors of all toilet rooms shall be self-closing.

(4) Toilet tissue shall be provided.

(5) Easily cleanable receptacles shall be provided for waste materials, and such receptacles in toilet rooms for women shall be covered.

(6) Where the use of non-water-carried sewage disposal facilities are approved by the department they shall be located at least 100 linear feet from the salvage establishment and from any well or stream.

(e) Handwashing facilities. Each salvage establishment shall be provided with adequate, conveniently located hand-washing facilities for its personnel, including a lavatory or lavatories equipped with hot and cold or tempered running water, hand-cleansing soap or detergent, and approved sanitary towels or other approved hand-drying devices. Such facilities shall be kept clean and in good repair.

(f) Garbage and refuse.

(1) All refuse shall, prior to disposal, be kept in leakproof, nonabsorbent containers which shall be kept covered with tight-fitting lids when filled or stored, or not in continuous use; provided that such containers need not be covered when stored in a special vermin-proofed room or enclosure, or in a waste refrigerator. All other refuse shall be stored in containers, rooms, or areas in an approved manner.

(2) Adequate cleaning facilities shall be provided, and each container, room, or area shall be thoroughly cleaned after the emptying or removal of refuse.

(3) All refuse shall be disposed of with sufficient frequency and in such a manner as to prevent contamination.

(g) Insect and rodent control. Effective measures shall be taken to protect against the entrance into the salvage establishment or salvage warehouse and the breeding or presence on the premises of rodents, insects, and other vermin.

§229.203. General Provisions for Handling Distressed Merchandise.

(a) Protection of Salvageable and Salvaged Merchandise.

(1) All salvageable and salvaged merchandise stored by salvage establishments or salvage brokers shall be held at appropriate temperatures and under appropriate conditions in accordance with requirements, if any, in the labeling of such merchandise.

(2) All salvageable and salvaged merchandise, while being stored or processed at a salvage establishment, salvage warehouse, or during transportation, shall be protected from contamination.

(3) Poisonous and toxic materials shall be identified and handled under such conditions as will not contaminate other salvageable or salvaged merchandise, or constitute a hazard to personnel.

(b) Segregation of merchandise. All salvageable merchandise shall be promptly sorted and segregated from nonsalvageable merchandise to prevent further contamination of the distressed merchandise to be salvaged or offered for sale or distribution.

(c) Nonsalvageable merchandise.

(1) Containers, including metal and glass containers with press caps, screw caps, pull rings, or other types of openings which have been in contact with nonpotable water, liquid foam, or other deleterious substances, as a result of fire fighting efforts, flood, sewer backups, or similar mishaps, shall be deemed unfit for sale or distribution, i.e., nonsalvageable merchandise as defined in §229.193(23) of this title (relating to Definitions).

(2) Distressed merchandise which is deemed to be nonsalvageable by a duly authorized agent of the Texas Department of Health shall, at the request of the agent, be destroyed under the supervision of that agent at the expense of the owner.

(d) Transporting of distressed merchandise.

(1) Distressed merchandise shall be moved from the site of a fire, flood, sewer backup, wreck, or other cause as expeditiously as possible after compliance with subsection (a) of this section so as not to become putrid, rodent or insect defiled, or otherwise hazardous to public health.

(2) All distressed and salvageable merchandise of a perishable nature shall, prior to reconditioning, be transported only in vehicles provided with adequate refrigeration, if necessary, for product maintenance.

(3) Distressed or salvageable merchandise shall not be moved out of the State of Texas without the prior approval of the department and the responsible state agency in the state to receive the merchandise. Concurrence shall also be obtained from the U.S. Food and Drug Administration, or U.S. Department of Agriculture, Food Safety and Inspection Service, prior to interstate movement.

(e) Handling of distressed articles other than foods, drugs, devices, or cosmetics. If distressed articles other than foods, drugs, devices, or cosmetics are also salvaged, they shall be handled separately so as to prevent contamination from poisonous and toxic materials or other contaminants.

(f) Cross-contamination protection. Sufficient precautions shall be taken to prevent cross-contamination (animal feed to human food, etc.) among the various types of merchandise which are salvageable or salvaged.

(g) Salvageable merchandise. All salvageable merchandise shall be reconditioned prior to sale or distribution except for such sale or distribution to a person holding a valid license to engage in a salvage operation.

(h) Reconditioned merchandise. All reconditioned merchandise must be in compliance with the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(i) Labeling. All salvaged merchandise must be labeled in accordance with the requirements of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431; the Federal Food, Drug, and Cosmetic Act, 21 United States Code, et seq. as amended; the Fair Packaging and Labeling Act, 15 United States Code 1451 et seq. as amended; and the federal regulations promulgated under those Acts.

(j) Salvage warehouses. A person may not use a salvage warehouse to recondition merchandise or sell to consumers.

§229.204. Handling Distressed Food.

(a) Good manufacturing practices. The requirements of this section are in addition to those described in 21 CFR, Part 110, Current Good Manufacturing Practice in Manufacturing, Packing, or Holding Human Food, as amended; except where this section is more restrictive.

(b) Perishable foods. All perishable foods shall be kept at a temperature that will provide protection against spoilage.

(c) Potentially hazardous foods. All potentially hazardous foods shall be maintained at a safe temperature, 41 degrees Fahrenheit (5 degrees Celsius) or below; 140 degrees Fahrenheit (60 degrees Celsius) or above.

(d) Distressed or nonsalvageable merchandise.

(1) All metal cans of food offered for sale or distribution shall be essentially free from rust (pitting) and dents (especially at rim, end double seams, and/or side seams).

(2) Leakers, springers, flippers, and swells shall be deemed unfit for sale or distribution.

(e) Metal containers of food. All metal containers of food, other than those mentioned in subsection (d) of this section, whose integrity has not been compromised and whose integrity would not be compromised by the reconditioning, and which have been partially or totally submerged in water, liquid foam, or other deleterious substance as the result of flood, sewer backup, or other reasons shall, after thorough cleaning, be subjected to sanitizing rinse of a concentration of 100 ppm available chlorine for a minimum period of one minute,

or shall be sanitized by another method approved by the department. They shall subsequently be treated to inhibit rust formation.

(f) Label removal.

(1) Any cans or tins showing surface rust shall have labels removed, the outer surface cleaned by buffing, a protective coating applied where necessary, and shall be relabeled.

(2) Relabeling of other salvageable nonmetal (glass, plastic, etc.) containers shall be required when original labels are missing or illegible.

(g) Relabeling. All salvaged food in containers shall be provided with labels meeting the requirements in §229.203(i) of this title (relating to General Provisions for Handling Distressed Merchandise). Where original labels are removed from containers which are to be resold or redistributed, the replacement labels must show the name and address of the salvage establishment.

§229.205. Handling Distressed Drugs.

(a) Distressed drugs. Drug products that have been subjected to improper storage conditions including extremes in temperature, humidity, smoke, fumes, pressure, age, or radiation due to natural disasters, fires, accidents, or equipment failures shall not be salvaged and returned to the marketplace. Whenever there is a question whether drug products have been subjected to such conditions, salvaging operations may be conducted only if there is:

(1) evidence from laboratory tests and assays (including animal feeding studies where applicable) that the drug products meet all applicable standards of identity, strength, quality, and purity; and

(2) evidence from inspection of the premises that the drug products and their associated packaging were not subjected to improper storage conditions as a result of the disaster or accident. Organoleptic examinations shall be acceptable only as supplemental evidence that the drug products meet appropriate standards of identity, strength, quality, and purity.

(b) Drug manufacturers. Those salvage establishments who are also drug manufacturers shall comply with the wholesale drug distributor requirements in the Texas Food, Drug, and Cosmetic Act, Health and Safety, Chapter 431, Subchapter I; as well as the requirements in 21 CFR, Part 210, Current Good Manufacturing Practice in Manufacturing, Processing, Packing, or Holding of Drugs - General; and 21 CFR, Part 211, Current Good Manufacturing Practice for Finished Pharmaceuticals.

(c) Department notification. It shall be the duty of any person owning or having possession of distressed drugs to make personal contact with the department within 24 hours after the drugs become distressed and prior to their removal from the place at which they were located when they became distressed. If emergency removal of such distressed drugs is required, such notice to the department shall be made as soon thereafter as possible.

(d) Legend drugs. A salvage broker or salvage operator may not possess, sell or transfer any distressed drugs whose labels bear the legend "CAUTION: Federal law prohibits dispensing without prescription" unless the salvage broker or salvage operator is authorized to possess, sell, or transfer such drugs in compliance with the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, Subchapter I, and the Texas Dangerous Drug Act, Health and Safety Code, Chapter 483.

(e) Controlled substances. A salvage broker or salvage operator may not take possession of distressed drugs which are controlled substances without being licensed as a wholesale drug distributor under §229.252 of this title (relating to Licensing Fee and Procedures) and currently registered with the United States Drug Enforcement Administration and the Texas Department of Public Safety.

§229.206. Handling Distressed Devices.

(a) Internal audits. Each salvage establishment that engages in the reconditioning of devices shall establish written procedures for conducting an internal quality audit and shall conduct such an audit at least annually. The dates and results of the audit shall be documented, including any deficiencies found and the corrective action taken to address the deficiencies.

(b) Personnel. Each salvage establishment that engages in the reconditioning of devices shall have sufficient personnel with the necessary education, background, training, and experience to assure that all reconditioning activities are correctly performed. Training of personnel engaged in reconditioning activities shall be documented.

(c) Identification. Each salvage establishment that engages in the reconditioning of devices shall establish and maintain written procedures for identifying devices during all stages of receipt, reconditioning, distribution, and installation to prevent mixups.

(d) Inspection, measuring, and test equipment.

(1) Each salvage establishment that engages in the reconditioning of devices shall ensure that all inspection, measuring, and test equipment used in the reconditioning of devices is:

(A) suitable for its intended purpose and capable of producing valid results; and

(B) routinely calibrated, inspected, checked, and maintained.

(2) Each salvage establishment that engages in the reconditioning of devices shall establish and maintain calibration records for inspection, measuring, and test equipment to include:

(A) the equipment identification;

(B) dates of calibration;

(C) the individual performing each calibration; and

(D) the next scheduled calibration date.

(e) Corrective and preventative action. Each salvage establishment that engages in the reconditioning of devices shall document any action taken by the salvage establishment to correct or prevent any nonconformities relating to a salvaged device or to the reconditioning of a device.

(f) Labeling. In addition to the general labeling requirements found in §229.203(i) of this title (relating to General Provisions for Handling Distressed Merchandise), all reconditioned devices shall be labeled with the statement "Reconditioned by (name and business address of the salvage establishment responsible for the reconditioning of the device)".

(g) Device history record. Each salvage establishment that engages in the reconditioning of devices shall maintain a device history record for each batch, lot, or unit reconditioned to ensure that devices are reconditioned in accordance with subsection (h) of this section. The device history record shall include the following information:

(1) the dates of reconditioning;

(2) the quantity reconditioned;

(3) the quantity released for distribution;

(4) the acceptance records which demonstrate the device is reconditioned in accordance with the device master record;

(5) copies of any labeling required by these sections; and

(6) any device identification or control number used.

(h) Device master record. Each salvage establishment that engages in the reconditioning of devices shall maintain device master records for each type of device reconditioned. The device master record shall include, or refer to the location of, the following information:

(1) device specifications, including appropriate drawings, composition, formulation, component specifications, and software specifications;

(2) reconditioning process specifications, including the appropriate equipment specifications, reconditioning methods, reconditioning procedures, and reconditioning environment specifications;

(3) final acceptance procedures and specifications, including acceptance criteria and the inspection, measuring, and test equipment to be used;

(4) packaging and labeling specifications, including methods and processes used; and

(5) installation, maintenance, and servicing procedures and methods.

(i) Complaint files. Each salvage establishment and salvage broker that engages in the reconditioning or distribution of distressed or salvaged devices shall maintain complaint files. Any complaint involving the possible failure of a device, labeling, or packaging to meet any of its specifications shall be reviewed, evaluated, and investigated. All records of investigation shall include:

(1) the name of the device;

(2) the date the complaint was received;

(3) any device identification(s) and control number(s) used;

(4) the name, address, and phone number of the complainant;

(5) whether the complaint is associated with any illness or injury involving the device;

(6) the nature and details of the complaint;

(7) the dates and results of the investigation;

(8) any corrective action taken;

(9) any reply to the complainant; and

(10) the name and signature of the person formally designated by the salvage establishment or salvage broker as responsible for investigating all complaints.

(j) A device salvage establishment or device salvage broker must comply with the device distributor requirements of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, Subchapter L, prior to taking possession of devices that are unsafe for self- medication (prescription devices) as referenced in the Texas Dangerous Drug Act, Health and Safety Code, Chapter 483.

(k) Device remanufacturers. Those salvage establishments who are also device remanufacturers shall comply with these sections and with the device manufacturer requirements in the Texas Food, Drug, and Cosmetic Act, Health and Safety, Chapter 431, Subchapter L, including the applicable requirements in 21 CFR, Part 820, Quality System Regulation, as amended.

§229.207. Records.

(a) Inventory Records. A written record or receipt of distressed, salvageable, and salvaged merchandise shall be maintained by the salvage establishment or salvage broker and shall include:

(1) a general description of the distressed merchandise received;

(2) the source of the distressed merchandise;

(3) the date received;

(4) the type of damage (fire, flood, etc.); and

(5) the name of the individual or business that purchases any such merchandise for the purpose of sale or distribution and the date of any such transaction.

(b) Retention of records. All records required in these sections shall be kept at the place of business of the salvage establishment or salvage broker for a period of two years following the completion of transactions involving a lot of merchandise.

§229.208. Enforcement and Penalties.

(a) Inspection. To enforce these sections or the Act, the commissioner, an authorized agent, or a health authority may, on presenting appropriate credentials to the owner, operator, or agent in charge of a place of business:

(1) enter at reasonable times the place of business of a salvage establishment or salvage broker;

(2) enter a salvage warehouse used to store or hold distressed or salvaged merchandise;

(3) enter a vehicle being used to transport or hold distressed or salvaged merchandise; or

(4) inspect at reasonable times, any place of business of a salvage establishment or salvage broker, salvage warehouse, or vehicle and all equipment, finished and unfinished materials, containers, and labeling of any item and obtain samples necessary for the enforcement of these sections or the Act.

(b) Access to records. A person who is required to maintain records referenced in these sections or under the Act or a person who is in charge or custody of those records shall, at the request of an authorized agent or health authority, permit the authorized agent or health authority at all reasonable times access to and to copy and verify the records.

(c) Receipt for samples. An authorized agent or health authority who makes an inspection of a place of business, including any vehicle or salvage warehouse, and obtains a sample during or on completion of the inspection and before leaving the place of business, shall give to the owner, operator, or the owner's or operator's agent a receipt describing the sample.

(d) Emergency order. The commissioner or the commissioner's designee may issue an emergency order relating to the operation of a salvage establishment or salvage broker in the department's jurisdiction if the commissioner or the commissioner's designee determines:

(1) operation of the salvage establishment or salvage broker creates or poses an immediate and serious threat to human life or health; and

(2) other procedures available to the department to remedy or prevent the threat will result in unreasonable delay.

(e) Administrative penalties. Administrative penalties, as provided in Health and Safety Code, §432.021, and in §229.261 of this title (relating to Assessment of Administrative or Civil Penalties), may be assessed for violation of these sections.

(f) Criminal penalty.

(1) A person commits an offense if the person violates the Act or rules adopted under the Act.

(2) An offense under the Act is a Class A misdemeanor.

(g) Civil penalty; Injunction. If it appears that a person has violated or is violating the Act, or an order issued or a rule adopted under authority of the chapter, the commissioner may request the attorney general or the district or county attorney or the municipal attorney of a municipality in the jurisdiction where the violation is alleged to have occurred or may occur to institute a civil suit for:

(1) an order enjoining the violation;

(2) a permanent or temporary injunction, a temporary restraining order, or other appropriate remedy if the department shows that the person has engaged in or is engaging in a violation;

(3) the assessment and recovery of a civil penalty; or

(4) both injunctive relief and a civil penalty.

(h) Venue. Venue for a suit brought under the Act shall be in the county in which the violation or the threat of violation is alleged to have occurred or in Travis County.

This 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 March 19, 1999.

TRD-9901669
Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458–7236

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Subchapter N. Current Good Manufacturing Practice and Good Warehousing Practice in Manufacturing, Packing, or Holding Human Food

25 TAC §§229.211–229.222

The Texas Department of Health (department) proposes new §§229.211 - 229.222 concerning current good manufacturing practice and good warehousing practice in manufacturing, packing or holding human food. Specifically, the criteria and definitions in these sections shall apply in determining whether a food is adulterated within the meaning of Texas Health and Safety Code, Chapter 431, the Texas Food, Drug, and Cosmetic Act.

The good manufacturing practices and good warehousing practices were previously adopted as part of the minimum standards for licensure. The proposed new rules ensure that the good manufacturing practices and good warehousing practices are applicable to all food irrespective of licensure requirements.

Robert D. Sowards, Jr., Director, Manufactured Foods Division, has determined that for each year of the first five-year period the sections are in effect there will be no fiscal implications to state government or local government.

Mr. Sowards has also determined that for each year the sections are in effect, the public benefit will be consistency with federal regulations and assurance of safer foods by applying the sections to all food manufacturers and wholesalers irrespective of licensure requirements. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as adopted, since these requirements were already applicable under other sections and by federal regulation. There is no impact on local employment.

Comments on the proposal may be submitted to Robert D. Sowards, Jr., Director, Manufactured Foods Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0243. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The new sections are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The new sections affect the Health and Safety Code, Chapter 431.

§229.211. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Those definitions and interpretations of terms of the Federal Food, Drug, and Cosmetic Act (the Act), §201, are also applicable when used in this subchapter.

(1) Acid foods or acidified foods - Foods that have an equilibrium pH of 4.6 or below.

(2) Act - Federal Food, Drug, and Cosmetic Act.

(3) Adequate - That which is needed to accomplish the intended purpose in keeping with good public health practice.

(4) Batter - A semifluid substance, usually composed of flour and other ingredients, into which principal components of food are dipped or with which they are coated, or which may be used directly to form bakery foods.

(5) Blanching (except for tree nuts and peanuts) - A prepackaging heat treatment of foodstuffs for a sufficient time and at a sufficient temperature to partially or completely inactivate the naturally occurring enzymes and to effect other physical or biochemical changes in the food.

(6) Control point - Any point, step, or procedure at which biological, physical, or chemical factors can be controlled.

(7) Food - Articles used for food or drink for human consumption; chewing gum; and articles used for components of any such article.

(8) Food-contact surfaces - Those surfaces that contact human food and those surfaces from which drainage onto the food or

onto surfaces that contact the food ordinarily occurs during the normal course of operations. "Food-contact surfaces'' includes utensils and food-contact surfaces of equipment.

(9) Lot - Food produced during a period of time indicated by a specific code.

(10) Microorganisms - Yeasts, molds, bacteria, and viruses which include, but are not limited to, species having public health significance. The term "undesirable microorganisms'' includes those microorganisms that are of public health significance; that subject food to decomposition; that indicate that food is contaminated with filth; or that otherwise may cause food to be adulterated within the meaning of the Act. Occasionally in these regulations, the adjective "microbial'' is used instead of using an adjectival phrase containing the word microorganism.

(11) Pests - Any objectionable animal or insect including, but not limited to, birds, rodents, flies, and larvae.

(12) Plant - The building or facility, or parts thereof, used for or in connection with the manufacturing, packaging, labeling, or holding of human food.

(13) Potentially hazardous food - A food that is natural or synthetic and requires temperature control because it is in a form capable of supporting the rapid and progressive growth of infectious or toxigenic microorganisms; the growth and toxin production of *Clostridium botulinum*; or in raw shell eggs, the growth of *Salmonella enteritidis*.

(A) The term includes a food of animal origin that is raw or heat-treated; a food of plant origin that is heat-treated or consists of raw seed sprouts; cut melons; and garlic and oil mixtures that are not acidified or otherwise modified at a food processing plant in a way that results in mixtures that do not support growth as specified in this definition.

(B) The term does not include an air-cooled hard-boiled egg with shell intact; a food with a water activity (a_w) value of 0.85 or less; a food with a pH level of 4.6 or below when measured at 24 degrees Celsius (75 degrees Fahrenheit); and a food, in an unopened hermetically sealed container, that is commercially processed to achieve and maintain commercial sterility under conditions of nonrefrigerated storage and distribution. The term also does not include a food for which laboratory evidence demonstrates that the rapid and progressive growth of infectious or toxigenic microorganisms or the growth of *S. enteritidis* in eggs or *C. botulinum* cannot occur, such as a food that has an a_w and a pH that are above the levels specified above and that may contain a preservative, other barrier to the growth of microorganisms, or a combination of barriers that inhibit the growth of microorganisms. The term also does not include a food that may contain an infectious or toxigenic microorganism or chemical or physical contaminant at a level sufficient to cause illness, but that does not support the growth of microorganisms as specified in the definition of a potentially hazardous food.

(14) Quality control operation - A planned and systematic procedure for taking all actions necessary to prevent food from being adulterated within the meaning of the Act.

(15) Raw agricultural commodity - Any food in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form prior to marketing.

(16) Rework - Clean, unadulterated food that has been removed from processing for reasons other than insanitary conditions or that has been successfully reconditioned by reprocessing and that is suitable for use as food.

(17) Safe-moisture level - A level of moisture low enough to prevent the growth of undesirable microorganisms in the finished product under the intended conditions of manufacturing, storage, and distribution. The maximum safe moisture level for a food is based on its water activity (a_w). An (a_w) will be considered safe for a food if adequate data are available that demonstrate that the food at or below the given (a_w) will not support the growth of undesirable microorganisms.

(18) Sanitize - Adequately treating food-contact surfaces by a process that is effective in destroying vegetative cells of microorganisms of public health significance, and in substantially reducing numbers of other undesirable microorganisms, but without adversely affecting the product or its safety for the consumer.

(19) Shall - Term to state mandatory requirements.

(20) Should - Term to state recommended or advisory procedures or identify recommended equipment.

(21) Water activity (a_w) - A measure of the free moisture in a food. The quotient of the water vapor pressure of the substance divided by the vapor pressure of pure water at the same temperature.

§229.212. Current Good Manufacturing Practice.

(a) The criteria and definitions in this part shall apply in determining whether a food is adulterated within the meaning of Texas Health and Safety Code, Chapter 431, Texas Food, Drug, and Cosmetic Act, §431.081(a)(3) in that the food has been manufactured under such conditions that it is unfit for food; or within the meaning of §431.081(a)(4) of the Act in that the food has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.

(b) Food subject to the requirements of these sections may also be subject to specific current good manufacturing practice regulation found in the Code of Federal Regulations or in other sections of this title (25 Texas Administrative Code).

§229.213. Personnel.

The plant management shall take all reasonable measures and precautions to ensure the following:

(1) Disease control. Any person who, by medical examination or supervisory observation, is shown to have, or appears to have, an illness; open lesion, including boils, sores, or infected wounds; or any other abnormal source of microbial contamination by which there is a reasonable possibility of food, food-contact surfaces, or food-packaging materials becoming contaminated, shall be excluded from any operations which may be expected to result in such contamination until the condition is corrected. Personnel shall be instructed to report such health conditions to their supervisors.

(2) Cleanliness. All persons working in direct contact with food, food-contact surfaces, and food-packaging materials shall conform to hygienic practices while on duty to the extent necessary to protect against contamination of food. The methods for maintaining cleanliness include, but are not limited to:

(A) wearing outer garments suitable to the operation in a manner that protects against the contamination of food, food-contact surfaces, or food-packaging materials;

(B) maintaining adequate personal cleanliness;

(C) washing hands thoroughly (and sanitizing if necessary to protect against contamination with undesirable microorganisms) in a hand-washing facility that meets the provisions of §229.217(e) of this title (relating to Sanitary Facilities and Control), before starting work, after each absence from the work station, and at any other time when the hands may have become soiled or contaminated;

(D) removing all unsecured jewelry and other objects that might fall into food, equipment, or containers, and removing hand jewelry that cannot be adequately sanitized during periods in which food is manipulated by hand. If such hand jewelry cannot be removed, it may be covered by material which can be maintained in an intact, clean, and sanitary condition and which effectively protects against the contamination by these objects of the food, food-contact surfaces, or food-packaging materials;

(E) maintaining gloves, if they are used in food handling, in an intact, clean, and sanitary condition. The gloves should be of an impermeable material;

(F) wearing, where appropriate and in an effective manner, hair nets, headbands, caps, beard covers, or other effective hair restraints;

(G) storing clothing or other personal belongings in areas other than where food is exposed or where equipment or utensils are washed;

(H) confining the following to areas other than where food may be exposed or where equipment or utensils are washed: eating food, chewing gum, drinking beverages, or using tobacco; and

(I) taking any other necessary precautions to protect against contamination of food, food-contact surfaces, or food-packaging materials with microorganisms or foreign substances including, but not limited to, perspiration, hair, cosmetics, tobacco, chemicals, and medicines applied to the skin.

(3) Education and training. Personnel responsible for identifying sanitation failures or food contamination should have a background of education or experience, or a combination thereof, to provide a level of competency necessary for production of clean and safe food. Food handlers and supervisors should receive appropriate training in proper food handling techniques and food-protection principles and should be informed of the danger of poor personal hygiene and insanitary practices.

(4) Supervision. Responsibility for assuring compliance by all personnel with all requirements of this section shall be clearly assigned to competent supervisory personnel.

§229.214. Exclusions.

The following operations are not subject to this section: Establishments engaged solely in the harvesting, storage, or distribution of one or more raw agricultural commodities which are ordinarily cleaned, prepared, treated, or otherwise processed before being marketed to the consuming public.

§229.215. Plant and Grounds.

(a) Grounds. The grounds around a food plant under the control of the operator shall be kept in a condition that will protect against the contamination of food. The methods for adequate maintenance of grounds include, but are not limited to:

(1) properly storing equipment, removing litter and waste, and cutting weeds or grass within the immediate vicinity of the plant buildings or structures that may constitute an attractant, breeding place, or harborage for pests;

(2) maintaining roads, yards, and parking lots so that they do not constitute a source of contamination in areas where food is exposed;

(3) draining areas that may contribute contamination to food by seepage, foot-borne filth, or providing a breeding place for pests;

(4) operating systems for waste treatment and disposal in a manner so that they do not constitute a source of contamination in areas where food is exposed; and

(5) if the plant grounds are bordered by grounds not under the operator's control and not maintained in the manner described in paragraphs (1) through (4) of this subsection, care shall be exercised in the plant by inspection, extermination, or other means to exclude pests, dirt, and filth that may be a source of food contamination.

(b) Plant construction and design. Plant buildings and structures shall be suitable in size, construction, and design to facilitate maintenance and sanitary operations for food-manufacturing purposes. The plant and facilities shall:

(1) provide sufficient space for such placement of equipment and storage of materials as is necessary for the maintenance of sanitary operations and the production of safe food;

(2) permit the taking of proper precautions to reduce the potential for contamination of food, food-contact surfaces, or food-packaging materials with microorganisms, chemicals, filth, or other extraneous material. The potential for contamination may be reduced by adequate food safety controls and operating practices which may include the design, separation of operations, location, time, partition, air flow, enclosed systems, or other effective means;

(3) permit the taking of proper precautions to protect food in outdoor bulk fermentation vessels by any effective means, including:

(A) using protective coverings;

(B) controlling areas over and around the vessels to eliminate harborages for pests;

(C) checking on a regular basis for pests and pest infestation; and

(D) skimming the fermentation vessels, as necessary;

(4) be constructed in such a manner that floors, walls, and ceilings may be adequately cleaned and kept clean and kept in good repair; that drip or condensate from fixtures, ducts and pipes does not contaminate food, food-contact surfaces, or food-packaging materials; and that aisles or working spaces are provided between equipment and walls and are adequately unobstructed and of adequate width to permit employees to perform their duties and to protect against contaminating food or food-contact surfaces with clothing or personal contact;

(5) provide sufficient lighting in hand-washing areas, dressing and locker rooms, and toilet rooms and in all areas where food is examined, processed, or stored and where equipment or utensils are cleaned; and provide safety-type light bulbs, fixtures, skylights, or other glass suspended over exposed food in any step of preparation or otherwise protect against food contamination in case of glass breakage;

(6) provide ventilation or control equipment to minimize odors and vapors (including steam and noxious fumes) in areas where they may contaminate food; and locate and operate fans and other air-blowing equipment in a manner that minimizes the potential

for contaminating food, food-packaging materials, and food-contact surfaces; and

(7) provide, where necessary, screening or other protection against pests.

§229.216. Sanitary Operations.

(a) General maintenance. Buildings, fixtures, and other physical facilities of the plant shall be maintained in a sanitary condition and shall be kept in repair so that food does not become adulterated within the meaning of the act. Cleaning and sanitizing of utensils and equipment shall be conducted in a manner that protects against contamination of food, food-contact surfaces, or food-packaging materials.

(b) Substances used in cleaning and sanitizing; storage of toxic materials. Cleaning compounds and sanitizing agents used in cleaning and sanitizing procedures shall be free from undesirable microorganisms and shall be safe and adequate under the conditions of use. Compliance with this requirement may be verified by any effective means including purchase of these substances under a supplier's guarantee or certification, or examination of these substances for contamination. Only the following toxic materials may be used or stored in a plant where food is processed or exposed:

(1) those required to maintain clean and sanitary conditions;

(2) those necessary for use in laboratory testing procedures;

(3) those necessary for plant and equipment maintenance and operation; and

(4) those necessary for use in the plant's operations.

(c) Toxic cleaning compounds, sanitizing agents, and pesticide chemicals shall be identified, held, and stored in a manner that protects against contamination of food, food-contact surfaces, or food-packaging materials. All relevant regulations promulgated by other federal, state, and local government agencies for the application, use, or holding of these products should be followed.

(d) Pest control. No pests shall be allowed in any area of a food plant. Guard or guide dogs may be allowed in some areas of a plant if the presence of the dogs is unlikely to result in contamination of food, food-contact surfaces, or food-packaging materials. Effective measures shall be taken to exclude pests from the processing areas and to protect against the contamination of food on the premises by pests. The use of insecticides or rodenticides is permitted only under precautions and restrictions that will protect against the contamination of food, food-contact surfaces, and food-packaging materials.

(e) Sanitation of food-contact surfaces. All food-contact surfaces, including utensils and food-contact surfaces of equipment, shall be cleaned as frequently as necessary to protect against contamination of food.

(1) Food-contact surfaces used for manufacturing or holding low-moisture food shall be in a dry, sanitary condition at the time of use. When the surfaces are wet-cleaned, they shall, when necessary, be sanitized and thoroughly dried before subsequent use.

(2) In wet processing, when cleaning is necessary to protect against the introduction of microorganisms into food, all food-contact surfaces shall be cleaned and sanitized before use and after any interruption during which the food-contact surfaces may have become contaminated. Where equipment and utensils are used in a continuous production operation, the utensils and food-contact surfaces of the equipment shall be cleaned and sanitized as necessary.

(3) Non-food-contact surfaces of equipment used in the operation of food plants should be cleaned as frequently as necessary to protect against contamination of food.

(4) Single-service articles (such as utensils intended for one-time use, paper cups, and paper towels) should be stored in appropriate containers and shall be handled, dispensed, used, and disposed of in a manner that protects against contamination of food or food-contact surfaces.

(5) Sanitizing agents shall be adequate for sanitization and safe under conditions of use. Any facility, procedure, or machine is acceptable for cleaning and sanitizing equipment and utensils if the facility, procedure, or machine will routinely render equipment and utensils clean and provide adequate cleaning and sanitizing treatment.

(f) Storage and handling of cleaned portable equipment and utensils. Cleaned and sanitized portable equipment with food-contact surfaces and utensils should be stored in a location and manner that protects food-contact surfaces from contamination.

§229.217. Sanitary Facilities and Controls.

Each plant shall be equipped with adequate sanitary facilities and accommodations including, but not limited to:

(1) Water supply. The water supply shall be sufficient for the operations intended and shall be derived from an adequate source. Any water that contacts food or food-contact surfaces shall be safe and of sanitary quality for its intended use. Running water at a suitable temperature, and under pressure as needed, shall be provided in all areas where required for the processing of food, for the cleaning of equipment, utensils, and food-packaging materials, or for employee sanitary facilities.

(2) Plumbing. Plumbing shall be of adequate size and design and adequately installed and maintained to:

(A) carry sufficient quantities of water to required locations throughout the plant;

(B) properly convey sewage and liquid disposable waste from the plant;

(C) avoid constituting a source of contamination to food, water supplies, equipment, or utensils or creating an unsanitary condition;

(D) provide floor drainage in all areas where floors are subject to flooding-type cleaning or where normal operations release or discharge water or other liquid waste on the floor; and

(E) provide that there is no backflow from, or cross-connection between, piping systems that discharge waste water or sewage and piping systems that carry water for food or food manufacturing.

(3) Sewage disposal. Sewage disposal shall be made into an approved sewerage system or disposed of through other adequate means.

(4) Toilet facilities. Each plant shall provide its employees with readily accessible toilet facilities adequate in number and location. Compliance with this requirement may be accomplished by:

(A) maintaining the toilet facilities in a sanitary condition;

(B) keeping the toilet facilities in good repair at all times;

(C) providing self-closing doors on toilet facilities; and

(D) providing doors on toilet facilities that do not open into areas where food is exposed to airborne contamination, except where alternate means have been taken to protect against such contamination (such as double doors or positive air-flow systems).

(5) Hand-washing facilities. Hand-washing facilities shall be adequate in number and location and be furnished with running water at a suitable temperature. Compliance with this requirement may be accomplished by providing:

(A) hand-washing and, where appropriate, hand-sanitizing facilities at each location in the plant where good sanitary practices require employees to wash and/or sanitize their hands;

(B) effective hand-cleaning and sanitizing preparations;

(C) sanitary towel service or suitable drying devices;

(D) devices or fixtures, such as water control valves, so designed and constructed to protect against recontamination of clean, sanitized hands;

(E) readily understandable signs directing employees handling unprotected food, unprotected food-packaging materials, or food-contact surfaces to wash and, where appropriate, sanitize their hands before they start work, after each absence from post of duty, and when their hands may have become soiled or contaminated. These signs may be posted in the processing room(s) and in all other areas where employees may handle such food, materials, or surfaces; and

(F) refuse receptacles that are constructed and maintained in a manner that protects against contamination of food.

(6) Rubbish and offal disposal. Rubbish and any offal shall be so conveyed, stored, and disposed of as to minimize the development of odor; minimize the potential for the waste becoming an attractant and harborage or breeding place for pests; and protect against contamination of food, food-contact surfaces, water supplies, and ground surfaces.

§229.218. Equipment and Utensils.

(a) All plant equipment and utensils shall be so designed and of such material and workmanship as to be cleanable, and shall be properly maintained. The design, construction, and use of equipment and utensils shall preclude the adulteration of food with lubricants, fuel, metal fragments, contaminated water, or any other contaminants. All equipment should be so installed and maintained as to facilitate the cleaning of the equipment and of all adjacent spaces. Food-contact surfaces shall be corrosion-resistant when in contact with food. They shall be made of nontoxic materials and designed to withstand the environment of their intended use and the action of food, and, if applicable, cleaning compounds and sanitizing agents. Food-contact surfaces shall be maintained to protect food from being contaminated by any source, including unlawful indirect food additives.

(b) Seams on food-contact surfaces shall be smoothly bonded or maintained so as to minimize accumulation of food particles, dirt, and organic matter and thus minimize the opportunity for growth of microorganisms.

(c) Equipment that is in the manufacturing or food-handling area and that does not come into contact with food shall be constructed so that it can be kept in a clean condition.

(d) Holding, conveying, and manufacturing systems, including gravimetric, pneumatic, closed, and automated systems, shall be designed and constructed so as to be maintained in an appropriate sanitary condition.

(e) Each freezer and cold storage compartment used to store and hold food capable of supporting growth of microorganisms shall be fitted with an indicating thermometer, temperature- measuring device, or temperature-recording device installed to accurately show the temperature within the compartment, and should be fitted with an automatic control for regulating temperature or with an automatic alarm system to indicate a significant temperature change in a manual operation.

(f) Instruments and controls used for measuring, regulating, or recording temperatures, pH, acidity, water activity, or other conditions that control or prevent the growth of undesirable microorganisms in food shall be accurate and properly maintained, and in sufficient quantity for their designated uses.

(g) Compressed air or other gases mechanically introduced into food or used to clean food-contact surfaces or equipment shall be treated in such a way that food is not contaminated with unlawful food additives.

§229.219. Production and Process Controls.

All operations in the receiving, inspecting, transporting, segregating, preparing, manufacturing, packaging, and storing of food shall be conducted in accordance with good public health and sanitation principles. Appropriate quality control operations shall be employed to ensure that food is suitable for human consumption and that food-packaging materials are safe and suitable. Overall sanitation of the plant shall be under the supervision of one or more competent individuals assigned responsibility for this function. All reasonable precautions shall be taken to ensure that production procedures do not contribute contamination from any source. Testing procedures shall be used where necessary to identify sanitation failures or possible food contamination by chemicals, microbes, or extraneous materials. All food that has become contaminated to the extent that it is adulterated within the meaning of the Act shall be rejected, or if permissible, treated or processed to eliminate the contamination.

(1) Raw materials and other ingredients.

(A) Raw materials and other ingredients shall be inspected and segregated or otherwise handled as necessary to ascertain that they are clean and suitable for processing into food and shall be stored under conditions that will protect against contamination and minimize deterioration. Raw materials shall be washed or cleaned as necessary to remove soil or other contamination. Water used for washing, rinsing, or conveying food shall be safe and of sanitary quality for its intended use. Water may be reused for washing, rinsing, or conveying food if it does not increase the level of contamination of the food. Containers and carriers of raw materials should be inspected on receipt to ensure that their condition has not contributed to contamination or deterioration of food.

(B) Raw materials and other ingredients shall either: not contain levels of microorganisms that may produce food poisoning or other disease in humans; or they shall be pasteurized or otherwise treated during manufacturing operations so that they no longer contain levels that would cause the product to be adulterated within the meaning of the Act. Compliance with this requirement may be verified by any effective means, including purchasing raw materials and other ingredients under a supplier's guarantee or certification.

(C) Raw materials and other ingredients susceptible to contamination with aflatoxin or other natural toxins shall comply with current Food and Drug Administration regulations, guidelines, and action levels for poisonous or deleterious substances before these materials or ingredients are incorporated into finished food. Compliance with this requirement may be accomplished by purchasing

raw materials and other ingredients under a supplier's guarantee or certification, or may be verified by analyzing these materials and ingredients for aflatoxins and other natural toxins.

(D) Raw materials, other ingredients, and rework susceptible to contamination with pests, undesirable microorganisms, or material shall comply with applicable Food and Drug Administration regulations, guidelines, and defect action levels for natural or unavoidable defects if a manufacturer wishes to use the materials in manufacturing food. Compliance with this requirement may be verified by any effective means, including purchasing the materials under a supplier's guarantee or certification, or examination of these materials for contamination.

(E) Raw materials, other ingredients, and rework shall be held in bulk, or in containers designed and constructed so as to protect against contamination and shall be held at a temperature and relative humidity and in a manner to prevent the food from becoming adulterated within the meaning of the Act. Material scheduled for rework shall be identified as such.

(F) Frozen raw materials and other frozen ingredients shall be kept frozen. If thawing is required prior to use, it shall be done in a manner that prevents the raw materials and other ingredients from becoming adulterated within the meaning of the Act.

(G) Liquid or dry raw materials and other ingredients received and stored in bulk form shall be held in a manner that protects against contamination.

(2) Manufacturing operations.

(A) Equipment and utensils and finished food containers shall be maintained in an acceptable condition through appropriate cleaning and sanitizing. As necessary, equipment shall be taken apart for thorough cleaning.

(B) All food manufacturing, including packaging and storage, shall be conducted under such conditions and controls as are necessary to minimize the potential for the growth of microorganisms, or for the contamination of food. Compliance with this requirement may be accomplished by careful monitoring of physical factors such as time, temperature, humidity, a_w, pH, pressure, flow rate, and manufacturing operations such as freezing, dehydration, heat processing, acidification, and refrigeration to ensure that mechanical breakdowns, time delays, temperature fluctuations, and other factors do not contribute to the decomposition or contamination of food.

(C) The internal temperature of potentially hazardous foods during transport and storage shall be maintained at 45 degrees Fahrenheit or lower as appropriate for the food.

(i) After October 5, 2003, the internal temperature of potentially hazardous foods shall be maintained at 41 degrees Fahrenheit or lower as appropriate for the food.

(ii) Frozen foods shall be kept frozen at all times.

(iii) Shell eggs, after initial packing, must be transported and stored at a temperature of 45 degrees Fahrenheit or less. If the United States Department of Agriculture and the U.S. Food and Drug Administration determine by law that a lower temperature must be maintained, the lower temperature shall prevail.

(iv) Molluscan shellstock shall:

(I) be iced; or

(II) be placed in a storage area or conveyance maintained at 45 degrees Fahrenheit or less unless the U.S. Food and Drug Administration determines by law that a lower temperature must be maintained, in which case the lower temperature shall prevail; and

(III) not be permitted to remain without ice, mechanical refrigeration, or other approved means of refrigeration for more than two hours at points of transfer such as loading docks.

(v) Hot foods shall be maintained at 140 degrees Fahrenheit (60 degrees Celsius) or above.

(vi) Acid or acidified foods shall be heat treated to destroy mesophilic microorganisms when those foods are to be held in hermetically sealed containers at ambient temperatures.

(D) Measures such as sterilizing, irradiating, pasteurizing, freezing, refrigerating, controlling pH or controlling a_w that are taken to destroy or prevent the growth of undesirable microorganisms, particularly those of public health significance, must be adequate under the conditions of manufacture, handling, and distribution to prevent food from being adulterated within the meaning of the Act.

(E) Work-in-process shall be handled in a manner that protects against contamination.

(F) Effective measures shall be taken to protect finished food from contamination by raw materials, other ingredients, or refuse. When raw materials, other ingredients, or refuse are unprotected, they shall not be handled simultaneously in a receiving, loading, or shipping area if that handling could result in contaminated food. Food transported by conveyor shall be protected against contamination as necessary.

(G) Equipment, containers, and utensils used to convey, hold, or store raw materials, work-in-process, rework, or food shall be constructed, handled, and maintained during manufacturing or storage in a manner that protects against contamination.

(H) Effective measures shall be taken to protect against the inclusion of metal or other extraneous material in food. Compliance with this requirement may be accomplished by using sieves, traps, magnets, electronic metal detectors, or other suitable effective means.

(I) Food, raw materials, and other ingredients that are adulterated within the meaning of the act shall be disposed of in a manner that protects against the contamination of other food. If the adulterated food is capable of being reconditioned, it shall be reconditioned using a method that has been proven to be effective or it shall be reexamined and confirmed to be safe within the meaning of the Act before being incorporated into other food.

(J) Mechanical manufacturing steps such as washing, peeling, trimming, cutting, sorting and inspecting, mashing, dewatering, cooling, shredding, extruding, drying, whipping, defatting, and forming shall be performed so as to protect food against contamination. Compliance with this requirement may be accomplished by providing adequate physical protection of food from contaminants that may drip, drain, or be drawn into the food. Protection may be provided by cleaning and sanitizing all food-contact surfaces, and by using time and temperature controls at and between each manufacturing step.

(K) Heat blanching, when required in the preparation of food, should be effected by heating the food to the required temperature, holding it at this temperature for the required time, and then either rapidly cooling the food or passing it to subsequent manufacturing without delay. Thermophilic growth and contamination in blanchers should be minimized by the use of sufficient operating temperatures and by periodic cleaning. Where the blanched food is

washed prior to filling, water used shall be safe and of sanitary quality for its intended use.

(L) Batters, breading, sauces, gravies, dressings, and other similar preparations shall be treated or maintained in such a manner that they are protected against contamination. Compliance with this requirement may be accomplished by any effective means, including one or more of the following:

(i) using ingredients free of contamination;

(ii) employing adequate heat processes where applicable;

(iii) using proper time and temperature controls;

(iv) providing adequate physical protection of components from contaminants that may drip, drain, or be drawn into them;

(v) cooling to a sufficient temperature during manufacturing; or

(vi) disposing of batters at appropriate intervals to protect against the growth of microorganisms.

(M) Filling, assembling, packaging, and other operations shall be performed in such a way that the food is protected against contamination. Compliance with this requirement may be accomplished by any effective means, including:

(i) use of a quality control operation in which the control points are identified and controlled during manufacturing;

(ii) proper cleaning and sanitizing of all food-contact surfaces and food containers;

(iii) using materials for food containers and food-packaging materials that are safe and suitable for their intended use;

(iv) providing physical protection from contamination, particularly airborne contamination; and

(v) using sanitary handling procedures.

(N) Food such as, but not limited to, dry mixes, nuts, intermediate moisture food, and dehydrated food, that relies on the control of a_w for preventing the growth of undesirable microorganisms shall be processed to and maintained at a safe moisture level. Compliance with this requirement may be accomplished by any effective means, including employment of one or more of the following practices:

(i) monitoring the a_w of food;

(ii) controlling the soluble solids-water ratio in finished food; and

(iii) protecting finished food from moisture pickup, by use of a moisture barrier or by other means, so that the a_w of the food does not increase to an unsafe level.

(O) Acid food, acidified food, and similar food that relies principally on the control of pH for preventing the growth of undesirable microorganisms shall be monitored and maintained at a pH of 4.6 or below. Compliance with this requirement may be accomplished by any effective means, including employment of one or both of the following practices:

(i) monitoring the pH of raw materials, food in process, and finished food; and

(ii) controlling the amount of acid or acidified food added to low-acid food.

(P) When ice is used in contact with food, it shall be made from water that is safe and of adequate sanitary quality, and shall be used only if it has been manufactured in accordance with current good manufacturing practice as outlined in this part.

(Q) Food-manufacturing areas and equipment used for manufacturing human food should not be used to manufacture nonhuman food-grade animal feed or inedible products, unless there is no reasonable possibility for the contamination of the human food.

§229.220. Natural or Unavoidable Defects in Food for Human Use That Present No Health Hazard.

(a) Some foods, even when produced under current good manufacturing practice, contain natural or unavoidable defects that at low levels are not hazardous to health. The United States Food and Drug Administration establishes maximum levels for these defects in foods produced under current good manufacturing practice and uses these levels in deciding whether to recommend regulatory action.

(b) Compliance with defect action levels does not excuse violation of the requirement in the Health and Safety Code, Chapter 431, §431.081(a)(3) that food not be prepared, packed, or held under unsanitary conditions or the requirements in this section that food manufacturers, distributors, and holders shall observe current good manufacturing practice. Evidence indicating that such a violation exists causes the food to be adulterated within the meaning of the act, even though the amounts of natural or unavoidable defects are lower than the currently established defect action levels. The manufacturer, distributor, and holder of food shall at all times utilize quality control operations that reduce natural or unavoidable defects to the lowest level currently feasible.

(c) The mixing of a food containing defects above the current defect action level with another lot of food is not permitted and renders the final food adulterated within the meaning of the act, regardless of the defect level of the final food.

(d) A compilation of the current defect action levels for natural or unavoidable defects in food for human use that present no health hazard may be obtained upon request from the Texas Department of Health, Manufactured Foods Division, 1100 West 49th Street, Austin, Texas, 78756.

§229.221. Good Warehousing Practice.

(a) Plant and grounds.

(1) Storage and transportation of food shall be under conditions that will protect food against physical, chemical, and microbial contamination as well as against deterioration of the food and the container.

(2) Food storage facilities shall be properly constructed and maintained. All walls, ceilings, and floors shall be intact to preclude entry of vermin and environmental contaminants.

(3) Doors and loading docks shall be tight-fitting and kept closed at all times when not in use, or adequately screened during normal operating hours to prevent entry of rodents, birds, or other pests.

(4) Outer premises, including trash receptacles, shall be kept clean and free of odors, debris, high weeds, or standing water which could harbor or attract vermin.

(5) Adequate lighting shall be provided to facilitate cleaning and inspection of stored goods.

(b) Sanitary facilities.

(1) Hand-washing and toilet facilities shall be provided and maintained, including hot and cold running water, hand soap, and single-service towels as deemed appropriate by the regulatory authority for the types of foods handled by the licensee.

(2) Wastewater shall be disposed of in a manner approved by the regulatory authority.

(c) Sanitary operations.

(1) All foods, including refrigerated and frozen foods, shall be stored off the floor and away from walls to help prevent contamination by vermin (rodents and insects for example) and moisture, and to facilitate cleaning and inspection.

(2) Food storage facilities and transportation vehicles shall be kept free of rodents, insects, birds, and other pests which may contaminate food.

(3) Damaged, distressed, and infested foods shall be stored in a "morgue area," adequately separated from undamaged foods and shall be disposed of in a timely manner to preclude further contamination.

(4) The internal temperature of potentially hazardous foods during transport and storage shall be maintained at 45 degrees Fahrenheit or lower as appropriate for the food.

(A) After October 5, 2003, the internal temperature of potentially hazardous foods shall be maintained at 41 degrees Fahrenheit or lower as appropriate for the food.

(B) Frozen foods shall be kept frozen at all times.

(C) Shell eggs after initial packing, must be transported and stored at a temperature of 45 degrees Fahrenheit or less. If the United States Department of Agriculture and the U.S. Food and Drug Administration determine by law that a lower temperature must be maintained, the lower temperature shall prevail.

(D) Molluscan shellstock shall:

(i) be iced; or

(ii) be placed in a storage area or conveyance maintained at 45 degrees Fahrenheit or less unless the U.S. Food and Drug Administration determines by law that a lower temperature must be maintained, in which case the lower temperature shall prevail; and

(iii) not be permitted to remain without ice, mechanical refrigeration, or other approved means of refrigeration for more than two hours at points of transfer such as loading docks.

(5) During warehousing and transporting, all chemicals shall be properly stored and physically separated from foods to preclude contamination.

(6) Foods being warehoused shall be rotated on a "first in, first out" basis or by oldest date of pack.

(7) Food storage facilities and transportation vehicles operated under the control of the licensee shall be kept clean and free of excessive dust, dirt, spillage, and other debris, including excess moisture.

(8) Food transport vehicles shall be operated in compliance with federal regulations pertaining to back-hauling.

(9) Each incoming lot shall be examined at the time of receipt and contaminated or adulterated foods shall not be accepted.

(10) Swollen, leaking, and/or severely dented containers of food shall be segregated and promptly placed in the "morgue area" and further contamination, attraction of vermin, or sale prior to reconditioning shall be prevented.

(11) Only pesticides approved by the Environmental Protection Agency (EPA) for use in a food warehouse and/or food processing facility may be used. Pesticides shall be used only according to label directions. Rodenticides shall be placed inside enclosed bait boxes or other approved receptacles. Only a licensed pesticide applicator may apply restricted use pesticides.

(d) Other provisions.

(1) Distressed foods salvaged by the licensee shall be salvaged in accordance with §§229.191-229.202 of this title (relating to Regulation of Food, Drug, Device, and Cosmetic Salvage Establishments and Brokers).

(2) Food wholesalers engaged in the receipt and distribution of over-the-counter or prescription drugs shall comply with §229.253 of this title (relating to Minimum Standards for Licensure).

(3) The licensee shall keep accurate distribution records so that any foods found to be unfit for human consumption may be recalled expeditiously.

§229.222. Penalties.

(a) Criminal penalties as provided in Health and Safety Code §431.059 may be assessed for violations of these sections.

(b) Civil penalties as provided in Health and Safety Code §431.0585 may be assessed for violations of these sections.

(c) Administrative penalties as provided in Health and Safety Code §431.054 and in §229.261 of this title (relating to Assessment of Administrative or Civil Penalties), may be assessed for violation of these sections.

This 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 March 19, 1999.

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Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 458–7236

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Subchapter N. Chemical and Pesticide Tolerance Levels in Food

25 TAC §229.221, §229.222

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

The Texas Department of Health (department) proposes repeal of §229.221 and §229.222, concerning chemical and pesticide tolerance levels in food. Specifically, these sections establish tolerance levels for ethylene dibromide in food and the effective date for tolerance levels of ethylene dibromide in food. The repeal of these rules is necessary because any tolerance for the pesticide in food was revoked in 1984 by federal regulations.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, enacted by the 75th Texas Legislature, 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). The sections have been reviewed and the department has determined that reasons for adopting the sections no longer exist.

The department published a Notice of Intention to Review §229.221 and §229.222 as required by Rider 167 in the *Texas Register* (24 TexReg 831) on February 5, 1999.

Robert D. Sowards, Jr., Director, Manufactured Foods Division, has determined that for each year of the first five-year period the sections are no longer in effect there will be no fiscal implications to state government or local government.

Mr. Sowards also has determined that for each year of the first five years the sections are repealed, the public benefit anticipated as a result of repealing the sections will be consistent with federal regulations. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as repealed. There is no impact on local employment.

Comments on the proposal may be submitted to Robert D. Sowards, Jr., Director, Manufactured Foods Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0243. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The repeals are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 431; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed repeals affect the Health and Safety Code, Chapter 4; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, is implemented by the proposal.

§229.221. Tolerance Levels for Ethylene Dibromide (EDB) in Food.
§229.222. Effective Date for the Tolerance Levels for Ethylene Dibromide (EDB) in Food Being Less Than One Part Per Billion.

This 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 March 19, 1999.

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Susan K. Steeg
General Counsel
Texas Department of Health
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Chapter 295. Occupational Health

Subchapter C. Texas Asbestos Health Protection

25 TAC §295.32, §295.61

The Texas Department of Health (department) proposes amendments to §295.32 and §295.61, concerning the reduction of asbestos project notification fees for schools.

Section 295.32 adds new definitions for Public school, School, and School building. These definitions were added to define the entities which will be affected by this change.

Section 295.61 reduces the maximum notification fee for schools to $300 per notification. This reduction is proposed to relieve the burden on schools which are required by the Environmental Protection Agency (EPA) Asbestos Hazard Emergency Response Act (AHERA) to take additional steps beyond those required of a public or commercial building owner to address the asbestos in their buildings.

Claren J. Kotrla, Director, Toxic Substances Control Division has determined that for the first five-year period the sections are in effect, there will be fiscal implications as a result of administering the rules as proposed. The effect on state government will be decreased revenue to the department. Fee revenues are estimated to decrease by $250,000 for each year of the fiscal years 1999 through 2003. It is estimated that the costs to the department to administer the provisions of the rule will not be significantly impacted by the decrease in the estimated revenue. There will be no impact on local government.

Mr. Kotrla has also determined that for each year of the first five years the sections are in effect, the public benefits will include a reduction in the prevalence of asbestos containing material related diseases in the both the regulated community and the general public because schools will be more able to afford to conduct abatement projects properly. The fiscal impact will be a decrease of $250,000 per year in notification costs for schools. There will be no impact on small businesses. There will be no impact on individuals or local employment.

Comments regarding the proposed changes may be submitted to Claren Kotrla, Director, Toxic Substances Control Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6600. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public hearing will be held at 1:00 p.m. - 3:00 p.m., Friday, April 9, 1999, in Room G-107, at the Texas Department of Health, 1100 West 49th Street, Austin, Texas. Individuals needing special assistance should contact Todd Wingler, Chief, Asbestos Programs Branch, at (512) 834-6610, at least three working days prior to the meeting so that appropriate arrangements can be made. The hearing impaired may call T.D.D. at (512) 458-7708.

The amendments are proposed under Texas Civil Statutes, Article 4477-3a, which provides the Board of Health (board) with the authority to adopt rules regarding asbestos removal, encapsulation or enclosure, including licensing and regulation; Senate Bill 1341 and House Bill 79, 72nd Legislature, 1991, House Bill 1680 and House Bill 1826, 73rd Legislature, 1993, which amended Article 4477-3a; and by Health and Safety Code, §12.001 which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health.

These amendments implement Texas Civil Statutes, Article 4477-3a.

§295.32. Definitions.

The following words and terms, when used with these sections, shall have the following meaning, unless the context clearly indicates otherwise.

(1) - (73) (No change.)

(74) Public school - Any elementary or secondary school operated by publicly elected or appointed school officials in which the program and activities are under the control of these officials and which is supported primarily by public funds.

(75) [~~(74)~~] Regulated area - The demarcated area in which asbestos abatement activity takes place, and in which the possibility of exceeding the permissible exposure limits (PEL) for the concentrations of airborne asbestos exists.

(76) [~~(75)~~] Renovation - Additions to or alterations of the building for purposes of restoration by removal, repairing, and rebuilding.

(77) [~~(76)~~] Response action - A method, including removal, encapsulation, enclosure, repair, and operation and maintenance, that protects human health and the environment from friable ACBM.

(78) [~~(77)~~] Responsible person - The individual that is designated by the licensed Asbestos Abatement Contractor, Asbestos Operations and Maintenance Contractor, Asbestos Laboratory, Asbestos Consultant Agency, or Asbestos Management Planner Agency, as responsible for their operations and compliance with these rules.

(79) School - Any public or private, non-profit, elementary or secondary (kindergarten through grade 12) school as defined in the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801).

(80) School building - Any structure suitable for use as a classroom, including a school facility such as a laboratory, library, school eating facility, or facility used for the preparation of food. Any gymnasium of other facility which is specially designed for athletic or recreational activities for an academic course in physical education. Any other facility used for the instruction or housing of students or for the administration of educational or research programs. Any maintenance, storage, or utility facility, including any hallway, essential to the operation of any facility described in this definition of "school building". Any portico or covered exterior hallway or walkway. Any exterior portion of a mechanical system used to condition interior space.

(81) [~~(78)~~] Small-scale, short-duration activities (SSSD) - Are tasks such as, but not limited to removal of asbestos-containing insulation on pipes; removal of small quantities of asbestos-containing insulation on beams or above ceilings; replacement of an asbestos-containing gasket on a valve; installation or removal of a small section of drywall; installation of electrical conduits through or proximate to asbestos-containing materials. These tasks, when performed in a commercial building, do not require accreditation. SSSD can be further defined by the following considerations.

(A) Removal of small quantities of ACM only if required in the performance of another maintenance activity not intended as asbestos abatement.

(B) Removal of asbestos-containing thermal system insulation not to exceed amounts greater than those which can be contained in a single glove bag.

(C) Minor repairs to damaged thermal system insulation which do not require removal.

(D) Repairs to a piece of asbestos-containing wallboard.

(E) Repairs, involving encapsulation, enclosure, or removal, to small amounts of friable ACBM only if required in the performance of emergency or routine maintenance activity and not intended solely as asbestos abatement. Such work may not exceed amounts greater than those which can be contained in a single prefabricated mini-enclosure. Such an enclosure shall conform spatially and geometrically to the localized work areas, in order to perform its intended containment function.

(82) [~~(79)~~] Start date - The dates defined as:

(A) asbestos abatement start date - The date on which the disturbance of asbestos begins;

(B) demolition/renovation start date - The date on which the demolition or renovation process begins.

(83) [~~(80)~~] Stop date - The dates defined as:

(A) asbestos abatement stop date (completion date) - The date upon which air monitoring clearance of asbestos abatement has been achieved. Where air clearance is not required, such as roofing removal, the date upon which the removal of asbestos-containing material is completed.

(B) demolition/renovation stop date - The date on which the demolition or renovation is complete.

(84) [~~(81)~~] Survey - An activity undertaken in a school building, or a public and ommercial building to determine the presence or location, or to assess the condition of, friable or non-friable asbestos-containing building material (ACBM) or suspected ACBM, whether by visual or physical examination, or by collecting samples of such material. This term includes re- inspections of friable and non-friable known or assumed ACBM which has been previously identified. The term does not include the following:

(A) periodic surveillance of the type described in 40 CFR §763.92(b) solely for the purpose of recording or reporting a change in the condition of known or assumed ACBM;

(B) inspections performed by employees or agents of federal, state, or local government solely for the purpose of determining compliance with applicable statutes or regulations; or

(C) visual inspections of the type described in 40 CFR §763.90(i) solely for the purpose of determining completion of response actions.

(85) [~~(82)~~] TEM - Transmission Electron Microscopy.

(86) [~~(83)~~] Transportation of asbestos containing material (ACM) - Moving asbestos materials from one site to another.

(87) [~~(84)~~] Working days- Monday through Friday including holidays which fall on those days.

§295.61. Operations: Notifications.

(a)-(i) (No change.)

(j) Asbestos notification fees.

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

(3) Basis for fees. The fees shall be based on the total amount of the regulated asbestos-containing material (RACM) reported to be removed as defined in 40 CFR §61.141 or asbestos-containing building material (ACBM) to be removed as defined in §295.31(c) of this title (relating to General Provisions) and notified in accordance with §295.34(f) of this title (relating to Asbestos

Management in Facilities and Public Buildings), and subsection (a) of this section. The fee shall be calculated at the rate of $25 per asbestos reporting unit (ARU). The number of ARUs associated with the removal activity is determined by dividing the number of linear feet by 260, the number of square feet reported by 160, and the number of cubic feet by 35 and adding these individual results. The sum of this addition, minus any fraction, shall then be multiplied by the $25 rate to calculate the notification fee. The minimum fee shall be $50 administration fee per original notification. [~~and the maximum~~] The maximum fee shall be $3,000 per notification, except for schools, which shall be $300 per notification. The fee shall be assessed only for the amount of asbestos to be removed. If no asbestos is removed or if the amount of asbestos removed is less than two ARUs, only the minimum administrative fee shall be assessed. Annual notifications of maintenance activities subject to 40 CFR, Part 61, Subpart M and subsection (g) of this section, are included in the fee requirement. If less than the reported amount will be removed, a notification amendment should be provided to the department no later than five working days following the completion of the project. A refund request must be sent with the amended notification. A new invoice will be sent to the building owner which will reflect a new fee based upon the actual amount of asbestos that was removed. If the fee has been paid, refunds will be made, when appropriate, minus a $50 administrative fee. Revision of the form will require an additional fee only if the amount of reportable asbestos to be removed is increased.

(4) (No change.)

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

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Susan K. Steeg
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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part I. Texas Department of Public Safety

Chapter 15. Drivers License Rules

Subchapter B. Application Requirements-Original, Renewal, Duplicate and Identification Certificates

37 TAC §15.30

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

The Texas Department of Public Safety proposes the repeal of §15.30, concerning Identification Certificates. The repeal is necessary due to substantial changes being made. This action is being filed simultaneously with a proposal for new §15.30 which provides for better, more positive identification of applicants for Texas identification certificates.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications as a result of enforcing or administering the repeal.

Mr. Haas also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be more positive identification of license and certificate holders. There is no anticipated economic cost to small or large businesses. The anticipated cost to persons who are required to comply with the section as proposed will be the cost of obtaining an identification certificate.

Comments on the proposal may be submitted to Mary Ann Courter, Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0140, (512) 424-2890.

The repeal is proposed pursuant to Texas Government Code, §411.006(4), which authorizes the director of the Texas Department of Public Safety to adopt rules, subject to commission approval, considered necessary for the control of the department and Texas Transportation Code, §521.005.

Texas Government Code, §411.006(4), and Texas Transportation Code, §521.005, are affected by this proposal.

§15.30. Identification Certificates.

This 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 March 16, 1999.

TRD-9901617
Dudley M. Thomas
Director
Texas Department of Public Safety
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 424–2135

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The Texas Department of Public Safety proposes new §15.30, concerning Identification Certificates. The proposed new section which will be compatible with §15.23 (relating to Names) and §15.24 (relating to Identification of Applicants) provides for better, more positive identification of applicants for Texas driver's licenses and identification certificates. The new section is proposed simultaneously with the repeal of current §15.30.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Mr. Haas 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 more positive identification of license and certificate holders. There is no anticipated economic cost to small or large businesses. The anticipated cost to persons who are required to comply with the section as proposed will be the cost of obtaining a driver's license or identification certificate.

Comments on the proposal may be submitted to Mary Ann Courter, Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0140, (512) 424-2890.

The new section is proposed pursuant to Texas Government Code, §411.006(4), which authorizes the director of the Texas Department of Public Safety to adopt rules, subject to commission approval, considered necessary for the control of the department and Texas Transportation Code, §521.005.

Texas Government Code, §411.006(4) and Texas Transportation Code, §521.005 are affected by this proposal.

§15.30. Identification Certificates.

(a) Identification certificates are dated to expire on the next birth date of the holder occurring six years after date of application, except that a certificate that is issued to a person 60 years of age or older does not expire.

(b) All original applicants for identification certificate must present proof of identity satisfactory to the department. There are three categories of documents that may be presented to establish that acceptable proof of identity.

(1) Standalone identification. These items are complete within themselves and require no supporting instruments:

(A) valid or expired Texas driver's license (DL) or identification (ID) with photo;

(B) United States passport;

(C) United States citizenship (naturalization) certificate with identifiable photo;

(D) United States Immigration and Naturalization Service document with verified data and identifiable photo. This would include a valid passport issued by a foreign country with a valid United States visa;

(E) valid photo DL or photo ID issued by another (United States) state, Puerto Rico, or the District of Columbia; or,

(F) United States military ID card with identifiable photo.

(2) Documented identification. These items are recorded governmental documents (United States, 1 of the 50 states, a United States territory, District of Columbia) whose authenticity can be verified (traceable to an original source for confirmation or refutation):

(A) original or certified copy of a birth certificate issued by the appropriate State Bureau of Vital Statistics or equivalent agency;

(B) original or certified copy of United States Department of State Certification of Birth (issued to United States citizens born abroad); or

(C) original or certified copy of court order with name and date of birth (DOB).

(D) For applicants born before 1961, the following items would be acceptable in this category:

(i) original or certified copy of Form DD-214;

(ii) original or certified copy of other state or federal governmental record that states name and DOB (such as United States census records or Social Security records).

(3) Supporting identification. These items consist of other records or documents that aid examining personnel in establishing the identity of the applicant. The following items are listed as examples only and should not be construed as an absolute list of "must have" items:

(A) public school records;

(B) infant baptismal records;

(C) insurance policy (at least two (2) years old);

(D) vehicle title;

(E) home mortgage records;

(F) marriage license;

(G) two years of utility bills;

(H) children's birth certificates;

(I) library card;

(J) military records;

(K) award or certificate from educational institution;

(L) original or certified copy of marriage license or divorce decree;

(M) voter registration card;

(N) Social Security card;

(O) pilot's license;

(P) concealed handgun license; or

(Q) Texas driver's license temporary receipt.

(4) Every original applicant must present:

(A) one piece of standalone identification, or

(B) one piece of documented identification plus one or more pieces of support identification.

(c) Basic requirements are as follows:

(1) age: no limits;

(2) fee: $15.00; except for applicants 60 years of age or older, the fee is $5.00;

(3) expiration: next birth date of applicant occurring six years after date of application; except that a certificate that is issued to a person 60 years of age or older does not expire.

(4) tests: none required.

This 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 March 16, 1999.

TRD-9901618
Dudley M. Thomas
Director
Texas Department of Public Safety
Earliest possible date of adoption: May 2, 1999
For further information, please call: (512) 424–2135

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WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part VI. Texas Department of Criminal Justice

Chapter 159. Special Programs

37 TAC §159.1

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed amended section, submitted by the Texas Department of Criminal Justice has been automatically withdrawn. The amended section as proposed appeared in the September 25, 1998, issue of the *Texas Register* (23 TexReg 9709).

Filed with the Office of the Secretary of State on March 26, 1999.

TRD-9901784

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ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 1. ADMINISTRATION

Part V. General Services Commission

Chapter 113. Central Purchasing Division

Subchapter A. Purchasing

1 TAC §113.20

The General Services Commission adopts amendments to §113.20 concerning Group Purchasing Programs. The amendments are adopted without changes to the proposed text as published in the February 5, 1999, issue of the *Texas Register* (24 TexReg 648) and the text will not be republished.

The amendments to §113.20 are adopted to bring the rule into compliance with the Act of the 75 Legislature, Chapter 1204, §8, 1997, Tex. Gen. Laws, 4632 (Senate Bill 1752) Section 2155.134, Texas Government Code. The amendments add state agencies to the list of institutions which may participate in group purchasing programs.

The amendments add state agencies to the existing §113.20 that governs group purchasing programs. Section 2155.134, Texas Government Code, stipulates that for purchases in excess of $100,000 the purchasing entity must notify the commission of its intent to make the purchase. The entity may proceed with the purchase in 10 working days of the notice if the commission does not identify a better value available through the General Services Commission.

No comments were received regarding the adoption of amendments to §113.20.

The amendments to §113.20 are adopted under the Texas Government Code, Title 10, Subtitle D, Suchapter C., Chapter 2155, Section 2155.134, which provides the commission with the authority to promulgate rules to allow institutions of higher education or state agencies to make purchases through the group purchasing programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 16, 1999.

TRD-9901627
Judy Ponder
General Counsel
General Services Commission
Effective date: April 5, 1999
Proposal publication date: February 5, 1999
For further information, please call: (512) 463–3960

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TITLE 22. EXAMINING BOARDS

Part XI. Board of Nurse Examiners

Chapter 223. Fees

22 TAC §223.1

The Board of Nurse Examiners adopts amendments to §223.1, concerning Fees without changes to the proposed text as published in the February 12, 1999 issue of the *Texas Register* (24 TexReg 902). Therefore §223.1 will not be republished.

The board met January 21-22, 1999 and approved the increase of fees to fund the Board's appropriation, rider 1, object code 3560 and to add that all fees are non-refundable. The increase was assessed to cover the new budget items approved by the 75th Legislative Session.

The rule will affect all applicants applying for initial licensure by examination or endorsement; all currently licensed registered nurses who renew their license, request a duplicate or substitute license, request a duplicate or substitute permanent certificate, or a verification of records. The rule will also effect renewal fees for Advanced Practice Nurses. All fees will be non-refundable.

There were no comments received regarding the increase in fees.

The amendments are adopted under the Nursing Practice Act, (Texas Civil Statutes), Article 4514, §1, which provides the Board of Nurse Examiners with the authority and power to make and enforce all rules and regulations necessary for the performance of its duties and conducting of proceedings before it and Article 4527, §1, which permits the Board to establish reasonable and necessary fees so that the fees, in the aggregate, produce sufficient revenue to cover the cost of administering this chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 15, 1999.

TRD-9901608
Katherine A. Thomas, MN, RN
Executive Director

Board of Nurse Examiners
Effective date: April 4, 1999
Proposal publication date: February 12, 1999
For further information, please call: (512) 305–6816

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TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 13. Health Planning and Resource Development

Subchapter E. Advisory Committee

25 TAC §13.51

The Texas Department of Health (department) adopts an amendment to §13.51 concerning the Hospital Data Advisory Committee (committee) with changes to the proposed text as published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12082). The committee provides advice to the Texas Board of Health (board) and the department on hospital reporting requirements and on interpretation and evaluation of data received.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules to establish advisory committees. The rules must state the purpose of each committee, describe the tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 1995, the board established a rule relating to the Hospital Data Advisory Committee. The rule states that the committee will automatically be abolished on May 1, 1999. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until May 1, 2003.

This section amends provisions relating to the operation of the committee. Specifically, language is revised to reference the Government Code; to continue the committee until May 1, 2003; to address changes to the composition of the committee; to clarify that members holdover until their replacement is appointed; to require that the presiding officer and the assistant presiding officer of the committee will be selected by the chairman of the board for a term of two years; to allow a temporary vacancy in the office of assistant presiding officer to be filled by vote of the committee until appointment by the chairman of the board occurs; to clarify that the committee is prohibited from holding an executive session (closed meeting) for any reason; to clarify that the committee and its members may not participate in legislative activity in the name of the board, the department, or the committee except with certain approval; and to reference reimbursement of a member's expenses if authorized by the General Appropriations Act or budget execution process. These changes will clarify procedures for the committee and emphasize the advisory nature of the committee.

The department is making the following minor changes due to staff comments to clarify the intent and improve the accuracy of the section.

Change: Concerning §13.51(f)(1)(D), the language was revised to delete the reference to consumer organizations so that consumers need not be connected with any specific organization.

Change: Concerning §13.51(f)(2), the language was revised to clarify that existing members who no longer qualify under the new committee composition shall be removed from the committee when the two new consumer members are appointed.

Change: Concerning §13.51(g), the language was revised to clarify that members holdover past the expiration of their term until their successor is appointed.

The amendment is adopted under the Health and Safety Code, §11.016, which allows the board to establish advisory committees; the Government Code, Chapter 2110, which sets standards for the evaluation of advisory committees by the agencies for which they function; and the Health and Safety Code, §12.001, which provides the board with authority to adopt rules for the performance of every duty imposed by law upon the board, the department, and the commissioner of health.

§13.51. Hospital Data Advisory Committee.

(a) (No change.)

(b) Applicable law. The committee is subject to the Government Code, Chapter 2110, concerning state agency advisory committees.

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

(e) Review and duration. By May 1, 2003, the board will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

(f) Composition.

(1) The committee shall be composed of 12 members appointed by the board as follows:

(A) four members from the hospital industry;

(B) two members from the insurance industry;

(C) two members from state agencies as follows:

(i) Texas Department of Mental Health and Mental Retardation; and

(ii) Texas Commission on Alcohol and Drug Abuse;

(D) four consumer members.

(2) Since the composition of the committee as it existed on March 1, 1999, is changed under this section, existing members shall continue to serve until the board appoints the two new consumer members under the new composition. At that time, existing members who no longer qualify under paragraph (1) of this subsection shall be removed from the committee.

(g) Terms of office. The term of office of each member shall be six years. Members shall serve after expiration of their term until their successor is appointed.

(1) Members shall be appointed for staggered terms so that the terms of a substantially equivalent number of members will expire on December 31 of each even-numbered year.

(2) (No change.)

(h) Officers. The chairman of the board shall appoint a presiding officer and an assistant presiding officer to begin serving on May 1 of each odd-numbered year.

(1) Each officer shall serve until April 30th of each odd-numbered year. Each officer may holdover until his or her replacement is appointed by the chairman of the board.

(2) (No change.)

(3) The assistant presiding officer shall perform the duties of the presiding officer in case of the absence or disability of the presiding officer. If the office of presiding officer becomes vacant, the assistant presiding officer will serve until a successor is appointed to complete the unexpired portion of the term of the office of presiding officer.

(4) If the office of assistant presiding officer becomes vacant, it may be filled temporarily by vote of the committee until a successor is appointed by the chairman of the board.

(5)-(6) (No change.)

(7) The presiding officer and assistant presiding officer serving on January 1, 1999, will continue to serve until the chairman of the board appoints their successors.

(i) Meetings. The committee shall meet only as necessary to conduct committee business.

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

(3) The committee is not a "governmental body" as defined in the Open Meetings Act. However, in order to promote public participation, each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551, with the exception that the provisions allowing executive sessions shall not apply.

(4)-(7) (No change.)

(j) Attendance. Members shall attend committee meetings as scheduled. Members shall attend meetings of subcommittees to which the member is assigned.

(1)-(3) (No change.)

(k)-(m) (No change.)

(n) Statement by members.

(1) The board, the department, and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the board, department, or committee.

(2) The committee and its members may not participate in legislative activity in the name of the board, the department, or the committee except with approval through the department's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(o) Reports to board. The committee shall file an annual written report with the board.

(1) The report shall list the meeting dates of the committee and any subcommittees, the attendance records of its members, a brief description of actions taken by the committee, a description of how the committee has accomplished the tasks given to the committee by the board, the status of any rules which were recommended by the committee to the board, and anticipated activities of the committee for the next year.

(2)-(3) (No change.)

(p) Reimbursement for expenses. In accordance with the requirements set forth in the Government Code, Chapter 2110, a committee member may receive reimbursement for the member's expenses incurred for each day the member engages in official committee business if authorized by the General Appropriations Act or budget execution process.

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

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 March 19, 1999.

TRD-9901674
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: April 8, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 458–7236

Chapter 117. End Stage Renal Disease Facilities

The Texas Department of Health (department) adopts amendments to §§117.1 - 117.3, 117.32 - 117.34, 117.41, 117.43 - 117.45, 117.65, and 117.81; the repeal of §§117.11 - 117.16 and 117.82 - 117.85; and new §§117.11 - 117.17, 117.46, and 117.82-117.86 concerning the licensing of end stage renal disease (ESRD) facilities. Amended §§117.2, 117.34, 117.43 - 117.44, and 117.65, and new §§117.12 - 117.14, 117.16, 117.84 - 117.86 are adopted with changes to the text as proposed in the October 30, 1998, issue of the *Texas Register* (23 TexReg, 11043). Repealed §§117.11 - 117.16 and §§117.82 - 117.85, amended §§117.1, 117.3, 117.32 - 117.33, 117.41, 117.45, 117.81, and new §§117.11, 117.15, 117.17, 117.46, and 117.82 - 117.83 are adopted without change and will not be republished.

The sections cover the general provisions; application and issuance of a license; minimum standards for design and space, equipment, water treatment, reuse, and sanitary and hygienic conditions; minimum standards for patient care and treatment; provisions for dialysis technicians; and corrective action plan and enforcement provisions.

The sections represent the development of new language to address problems and areas of concern identified by the ESRD Task Force which was established in accordance with the General Appropriations Act, Rider 53, 1997. Rider 53 mandated the 12-member task force to review the implementation of ESRD facility licensing rules in order to identify problems and recommend changes; review survey outcomes and costs associated with administering the ESRD licensing program; and clarify the function of a licensed vocational nurse in an ESRD facility. Serving on the ESRD Task Force are two patient representatives and one representative from each of the following constituencies: ESRD Network of Texas, Inc.; renal dietitians; registered nurses; physicians; social workers; licensed vocational nurses;

ESRD facility administrators; mechanical technicians; patient care technicians; and the department.

Subchapter A, §§117.1 - 117.3, establishes the general provisions for ESRD facilities. Section 117.1 states the purpose of the rules. The amendment to §117.1 adds subsection (d) to clarify that a license is required for an ESRD facility which is not exempt from licensure under the Health and Safety Code, §251.012. Section 117.2 defines words and terms used throughout the rules. The definitions are numbered in compliance with *Texas Register* format requirements (1 TAC §91.1, effective February 17, 1998). New definitions are added for "administrator," "affiliate," "change of ownership," "corrective action plan," "health care facility," "hospital," "manager," "monitor," "notarized copy(ies)," "patient," "quality," "quality assurance," "quality management," and "working day." The definition of "applicant" was amended to clarify that this is the person in whose name the license is issued. The definitions of "licensed vocational nurse" and "registered nurse" were amended to specify the statutes under which these nurses are licensed. In response to a comment and to conform with the Board of Nurse Examiners rules (22 TAC §217.12(d)), the definition of "charge nurse" was deleted. Section 117.3 clarifies the calculation of a renewal license fee and increases the change of ownership license fee for some facilities from $1,000 to $1,500 and decreases the fee from $2,000 to $1,500 for other facilities. Currently, a new facility owner is required to pay a $1,000 license fee if the survey is waived prior to issuing a license to the new owner or a $2,000 license fee if a survey is not waived. The amendment to the rule eliminates the $1,000 and $2,000 license fees and requires a flat $1,500 fee for all applications for a change of ownership regardless of whether a survey is done. In 1997 and 1998, approximately 16 facilities per year filed for a change of ownership. Approximately one-half of these facilities were surveyed prior to receiving a new license in the new owner's name.

New Subchapter B, §§117.11 - 117.17, replaces existing §§117.11 - 117.16, and establishes the application procedures and provisions for issuance of a license. The sections were rewritten to provide clarity and consistency with requirements for other facilities licensed by the department, and to remove language applicable only to the first year of this licensing program. The following is a summary of changes to these sections.

New §117.11 contains language in existing §§117.11 and 117.12 while defining requirements for the various types of licenses issued by the department. This section contains provisions applicable to any applicant for any type of license.

New §117.12 concerning application and issuance of temporary initial license and first annual license contains language currently in §§117.11 and 117.12 to describe the requirements for applications for a temporary initial license and the first annual license. The new section requires additional information to be included on the license application to be consistent with requirements for other facilities licensed by the department and reorganizes the application requirements to clarify the steps of the review process.

New §117.13 concerning application and issuance of annual renewal license replaces existing §117.12 and retains much of the requirements in existing §117.12. Some of these requirements were reorganized to provide the reader with a better understanding of the renewal process and the department's expectations.

New §117.14 concerning change of ownership or services replaces existing §117.13 and was expanded to include requirements for a change in services provided by a facility. For the purpose of this section, a change in service includes a facility closure; construction, renovation, or modification of a facility's physical plant; a change in a facility's telephone number or mailing address; an increase in the number of dialysis stations in a facility; and the provision of a new service (e.g., peritoneal dialysis). In addition, the new section contains requirements for the department in responding to a facility's request for an increase in dialysis stations or services.

New §117.15 concerning time periods for processing and issuing a license replaces existing §117.14. The text in the new section is unchanged from current §117.14.

New §117.16 concerning inspections replaces existing §117.15. The new section reorganizes existing inspection provisions; describes in more detail the department's expectations from a facility before and during an inspection; outlines the different types of inspections by the department; outlines in detail the inspection procedure and the department's evaluation of compliance; and provides a facility with procedures for challenging a deficiency cited by the department, including time frames imposed upon the department in responding to such a challenge.

New §117.17 covers optional plan review and inspection and replaces existing 117.16. The text in the new section is unchanged from existing §117.16, except that the text in subsection (b) was changed for better readability.

Subchapter C, §§117.32 - 117.34, establishes the minimum standards for equipment, water treatment, reuse, and sanitary and hygienic conditions. The sections were amended as follows.

Section 117.32 covers the minimum standards for equipment. The amendment adds a requirement that all equipment be operated in conformance to manufacturer's specifications and a requirement that at least one back-up dialysis machine be completely operational during a facility's hours of treatment.

Section 117.33 covers the minimum standards for water treatment and reuse. The amendment clarifies that water treatment components that could affect the quality of the product water must not be located after the quality monitor sensing cell, and requires the appointment of a medical director for a centralized reprocessing facility.

Section 117.34 covers the minimum standards for sanitary conditions and hygienic practices. The amendment clarifies provisions relating to the hepatitis B screening of patients. The amendments include new language applicable to a patient new to dialysis or returning to a facility after extended hospitalization or absence of 30 days or longer. Currently, the department requires patients to be screened for hepatitis B surface antigen (HBsAg) one month prior to or at the time of admission. New language in subsection (d)(2)(B)(i) allows the facility to admit a patient who has a known anti-HBs status of at least 10 milli-international units per milliliter within the previous 12 months, without requiring current HBsAg screening. New language in subsection (d)(2)(C)(iv) conforms to the new language in subsection (d)(2)(B)(i). This language recognizes the increase in provision of the hepatitis vaccine to dialysis patients and the resultant reduced need for hepatitis screening and is consistent with current federal Centers for Disease Control guidelines.

Subchapter D, §§117.41 and 117.43 - 117.46, establishes the minimum standards for patient care and treatment. The sections were amended as follows.

Section 117.41 covers minimum standards for quality assurance for patient care by establishing specific quality assurance system requirements for facilities. Currently, the department requires a facility to adopt, implement, and enforce a quality assurance program based on the May 8, 1996, edition of the Criteria and Standards, Dialysis Facility Quality Management Program as published by the ESRD Network of Texas, Inc. The ESRD Task Force and the department chose to incorporate these criteria and standards in the rules for the convenience of the renal community. The criteria and standards text in the rule was modified from the ESRD Network of Texas, Inc. document to conform to *Texas Register* form and style and to integrate with current rule requirements not included in the ESRD Network of Texas, Inc. document and with the organization of the section. Subsections (e) and (f) were deleted and the language from these subsections was moved to new §117.46.

Section 117.43 covers minimum standards for the provision and coordination of treatment and services. The amendments add new language relating to patient rights; emergency preparedness; medication storage and administration; nursing services; medical services; temporary admissions; audits of billing; student health care professionals; and complaint resolution. The amendments to subsection (a) relating to patient rights imposes a 30 calendar day advance notice for patient discharge or transfer except in cases where the patient presents an immediate risk to others; provides for a patient's protection from abuse, neglect, or exploitation; and excepts correctional institutions from including the 1-800 number in information provided to patients in these facilities. The amendment to subsection (c) relating to emergency preparedness adds a requirement that each facility staff member be able to demonstrate their role or responsibility to implement the facility's disaster preparedness plan. The amendment to subsection (c) also requires each facility to have an emergency lighting system which provides enough lighting to safely discontinue treatments and allow safe evacuation; to maintain and test battery pack systems quarterly; to post a phone number listing specific to the facility equipment and locale to assist staff in contacting mechanical and technical support in the event of an emergency; and to install, test, and maintain back-up generators (if used by a facility) in accordance with the National Fire Protection Association 110, Standard for Emergency Standby Power Systems. The amendment to subsection (d) relating to medication storage and administration allows a health care professional to receive a physician's verbal or telephone orders for the care or treatment provided by that health care professional (e.g., the dietitian may receive verbal orders for dietary services). The amendment to subsection (e) prohibits the nurse functioning in the charge role from being included in the staff to patient ratio during treatment of eight or more patients; reorganizes the subsection; and allows a registered nurse who is not the charge nurse to initiate the initial nursing assessment. The amendment to subsection (j) clarifies that physician visits must occur at the facility during a patient's treatment time; requires that home patients be seen by the physician at least every three months; and defines what the record for these visits must reflect; and specifies the information which must be included in orders for peritoneal dialysis treatment. New subsection (l) provides requirements admissions of transient patients and patients who are normally treated in another local facility, and describes the exchange of treatment information between the referring and receiving facilities. Current subsections (l) - (n) are renumbered as new subsections (m)-(o). New subsection (p) requires facilities to develop, implement, and enforce a compliance policy for monitoring state or federal funds. New subsection (q) provides conditions under which student health care professionals may provide care in a facility. New subsection (r) requires a facility to adopt, implement, and enforce procedures for resolving complaints relevant to quality of care or services.

Section 117.44 covers minimum standards for qualifications of staff. The amendment adds new language to subsection (c) relating to nursing staff and to subsection (e) relating to social services staff, and adds new subsection (f) relating to technical staff. The amendment to subsection (c) adds language to paragraph (3) to list qualifications which would allow an LVN to function in the charge role and delineates differences between an LVN and an RN functioning in this role. The amendment also deletes paragraph (3)(D) relating to the expiration of the paragraph. New subsection (f) describes the required qualifications for all technical staff (technical supervisory staff, water treatment staff, equipment maintenance and repair staff, and reprocessing staff).

Section 117.45 covers minimum standards for clinical records. The amendment reorganizes subsection (e) into paragraphs (1) - (6); clarifies that a facility must obtain and include the information listed in paragraphs (1) - (6) prior to dialyzing a transient patient; adds a requirement for a list of medications and allergies; clarifies that laboratory reports must include screening for hepatitis status; and clarifies that the treatment records provided must be the most current.

New §117.46 concerning reports to the director contains the deleted language in §117.41(e) and (f); changes the time frame for reporting certain occurrences from three working days to ten working days; and requires the use of a department form to report such occurrences.

Subchapter E, §§117.61- 117.65, establishes the minimum standards for dialysis technicians. Section 117.65(b)(1) was amended to prohibit a dialysis technician from discontinuing dialysis via a central catheter, manipulating a central catheter, or performing dressing changes for a central catheter. The prohibition in §117.65(b)(4) was deleted to allow a dialysis technician to perform non-access site venipuncture. The prohibition in §117.65(b)(5) was amended to include "non-access site" before "arterial" to be clear that arterial puncture of a vascular access to perform dialysis is an accepted act for all qualified dialysis technicians.

Subchapter F, §§117.81 - 117.86 establishes enforcement provisions. Section 117.81 concerning corrective action plans was amended to add language to conform to new §§117.82 and 117.83.

New §117.82 - 117.86 is a reorganization of existing §§117.82 - 117.85. New §117.82 concerning voluntary appointment of a temporary manager contains the provisions in existing §117.82(a). New §117.83 concerning involuntary appointment of a temporary manager contains the provisions in existing §117.82(b). New §117.84 concerning disciplinary action contains the provisions in existing §117.83. New §117.85 concerning administrative penalties contains the provisions in existing §117.84. New §117.86 concerning recovery of costs contains the provisions in current §117.85.

The department received written comments and additional comments at the public hearing which the department held in Austin, Texas, on November 18, 1998. The comment period ended on November 30, 1998. The following is a summary of comments received on the proposed rules, the department's responses, and any resulting change(s).

1. COMMENT: Concerning the rules in general, one commenter suggested that the department require that pediatric dialysis patients receive care in a pediatric facility when that option is logistically feasible. The commenter expressed concern that a pediatric patient receiving treatment in an adult facility will be evaluated by adult outcome measures.

1. RESPONSE: While the department would agree that ideally pediatric patients would be treated in pediatric facilities, it is important that care be available for these patients as near to their homes as possible. Requiring all pediatric patients to be cared for in a pediatric facility as a minimum standard would be unduly restrictive. Further, the rules currently contain requirements specific to the care and treatment of the pediatric dialysis patient, without regard to the scope of the treatment facility, to assure minimal safe care for these patients is provided. (see §117.43(e)(6), §117.43(e)(7)(B), and §117.43(j)(2)(B)). In response to the second portion of the comment, the treating facility would have the responsibility to utilize pediatric outcome measures when appropriate and available. No change was made.

2. COMMENT: Concerning the rules in general, one commenter expressed an inability to locate a provision in the rules which clearly defines the scope of the department's licensing authority. The commenter described a scenario in which a hospital provides inpatient acute hemodialysis services to patients admitted to the hospital's skilled nursing facility (SNF) which is designated as an outpatient facility for Medicare certification and reimbursement. The commenter expressed concern that the rules do not clearly define the department's authority to regulate such a scenario.

2. RESPONSE: The department understands the commenter's concern. The state law which provides the department with the authority to adopt licensing rules governing end stage renal disease facilities is located in the Health and Safety Code (HSC), Chapter 251. Language was added to clarify that the licensing rules cover facilities providing routine, repetitive, outpatient dialysis at §117.1(a). The HSC, §251.012 contains specific exemptions from licensure and includes a hospital licensed under HSC, Chapter 241 that provides dialysis only to individuals receiving inpatient services from the hospital. A hospital-based SNF unit is considered an inpatient unit of the hospital regardless of its Medicare reimbursement classification. If a hospital's dialysis services are limited to inpatients of the hospital and its SNF patients, no ESRD facility license is required. No change to the rules was made as a result of the comment.

3. COMMENT: In reference to proposed §117.2(16), renumbered as §117.2(15), concerning dialysis technicians, a commenter stated that the definition for "technician" doesn't address LVNs and assumes LVNs are equivalent to dialysis technicians, without recognizing their additional education and skills.

3. RESPONSE: The department regrets the statutory language did not differentiate unlicensed patient care technicians from LVNs, and recognizes the skills and abilities of the LVNs working in ESRD facilities. These rules include sections which acknowledge these skills and abilities by delineating tasks and functions for the LVN that are beyond the practice of the unlicensed dialysis technician. No change was made.

4. COMMENT: In reference to proposed §117.2(44), renumbered as §117.2(43), concerning definitions, one commenter stated the definition of "progress note" should be sufficiently broad to allow and encourage the use of computer systems.

4. RESPONSE: The department believes that the definition is sufficiently broad to allow the use of electronic formats to maintain progress notes. The definition does not preclude the use of such formats. Electronic signature of clinical records, including progress notes are not prohibited so long as the entries meet the requirement in §117.45(e)(5). No change was made.

5. COMMENT: In reference to proposed §117.2(54), renumbered as §117.2(53), concerning definitions, the Medical Review Board of the ESRD Network of Texas, Inc., suggested that the definition of "working day" be referenced or included wherever the words, "days" or "working days" are included in the document.

5. RESPONSE: The department understands the commenter's concern for clarity. Where practical, the department has defined each reference to "day" as being either "calendar" or "working" throughout the document.

6. COMMENT: In reference to §117.11(c)(3)(A), concerning general requirements for a license, a commenter asked whether the relocation of a facility housed in a modular building (e.g. the building itself would be moved to a different address) would be treated differently than a relocation of a facility to a different building.

6. RESPONSE: The department responds that the license is not transferrable to a different address; the license is issued to a facility at the physical location listed on the license application. In the event the situation described by the commenter occurs, the department would consider waiving the design and space survey of the relocated modular building. No change was made.

7. COMMENT: In reference to §117.13, concerning application and issuance of annual renewal license, one commenter stated "recognizing that both parties have an obligation, it seems to be a burden to make the facility responsible for problems of the department." The commenter did not reference specific provisions of §117.13.

7. RESPONSE: Since the commenter did not reference specific provisions of §117.13, the department can not be sure what problems the commenter is referring to, and therefore cannot respond appropriately. No change was made.

8. COMMENT: In reference to §117.13(f)(2), concerning application and issuance of annual renewal license, one commenter stated that a facility has no mechanism to monitor who has student loans and stated that denying license renewal because of a defaulted student loan is excessive and puts a large number of patients at risk to find alternative care. The commenter added that the requirement jeopardizes the employment of many individuals.

8. RESPONSE: The department understands the commenter's concern, but disagrees that the rule is excessive. The Texas Education Code, §57.491 prohibits the department from renewing a license to a person who is in default on a student loan. The law does not affect any individual employed by a facility unless the individual is the person to whom the ESRD license

is issued. Including the student loan provision in the licensing rules serves as a notice regarding the student loan requirement. Deletion of the provision from the rules does not negate the responsibility of the department or the licensee's obligation to comply with the law. Other state licensing authorities (e.g. Texas State Board of Medical Examiners, Texas State Board of Nurse Examiners, Texas State Board of Licensed Vocational Nurse Examiners) are also required to comply with the Texas Education Code's requirements. No change was made.

9. COMMENT: In reference to §117.14(b)(2), concerning change in services, one commenter stated that the provision is too broad and should be restricted to patient care areas and instances where the renovation or modification is not urgent due to safety considerations.

9. RESPONSE: The department disagrees that the provision is overly broad. The rule is not a new requirement and is intended to identify construction projects that must comply with the design and space requirements in §117.31. Notification concerning the project will expedite the department's scheduling of a design and space inspection (if deemed necessary by the department). For clarification purposes, the rule was amended to state the notification time frame is measured in calendar days. No changes were made as a result of the comment.

10. COMMENT: In reference to §117.17(b), optional plan review and inspection, one commenter stated that when a facility is ready to open, the state inspection should be done quickly, that the state can be kept appraised of the construction progress and be prepared to act, and that delay in opening the facility could cause continued hardship to patients and a financial hardship to the facility due to delay in being able to generate income.

10. RESPONSE: The department agrees that an inspection for the purposes of verifying compliance with the design and space requirements in §117.31 should be expeditious. The rule is a current requirement and is presently implemented as suggested by the commenter. No change was made.

11. COMMENT: In reference to §117.32(a), concerning equipment, one commenter stated that it is not always reasonable to operate equipment according to manufacturer's specifications. The commenter stated that when a manufacturer's manual identifies such specifications as "recommendations," it is interpreted that the user may make modifications. The commenter added that discussion with the manufacturer of some equipment indicated that some recommendations are for the manufacturer's protection and not necessarily for patient safety. The commenter suggested flexibility be allowed.

11. RESPONSE: The department agrees that flexibility should be allowed whenever possible. This language was developed by the technical sub-committee of ESRD Network of Texas, Inc. and was endorsed by the ESRD Task Force. The department believes operating equipment in accordance with the manufacturer's specifications provides a minimum level of safety for patients. No change was made.

12. COMMENT: In reference to §117.32(c), concerning equipment, two commenters stated the requirement was confusing. One commenter described a scenario in which there are 44 machines which requires five backup machines. Of these five backup machines, only one would need to be operational. The commenter asked "If one machine fails and the backup is put in use, are we then out of compliance." The commenter stated that a patient's treatment could be delayed several hours safely. The commenter did not state whether all 44 machines are being used during all treatment times. Another commenter requested clarification with regard to the requirement of one operational back-up machine for every eight (8) patients that are dialyzing. The commenter stated that there are some units that have 17 or 18 chairs, and asked if this means that the unit would have to round up on the number of back-up machines.

12. RESPONSE: The department understands the commenters concerns. The department explains that the requirement at §117.32(c) is intended to provide one backup machine for every 10 machines (or portion thereof) in use. Surveyors have found facilities to have the required number of backup machines, but none were ready for use. The intention of this requirement is to assure that at least one functional backup machine is available during patient treatment times. A facility with 44 machines would require five backup machines to be available; and a facility that had 17 machines will be required to have two backup machines available. Machines on the treatment floor not currently in use are considered back-up machines as well as machines stored elsewhere in the facility. Not having an available operational machine should rarely occur; rare occurrences do not routinely constitute a deficient practice unless there are negative patient outcomes. No change was made.

13. COMMENT: Regarding §117.32(c), concerning backup machines, a commenter asked if facilities owned by the same corporate group and located near each other could share backup machines, transporting them between two or more facilities.

13. RESPONSE: The department has set minimum requirements for back up machines to prevent patients missing or having shortened treatments due to equipment failure. The department and the task force agreed that the minimum of one backup machine in each facility for every 10 in use was necessary to assure safety. The minimum number of backup machines must be maintained in each facility. Corporations may provide access to more back up equipment through sharing if desired.

14. COMMENT: In reference to §117.34(d)(2)(B)(i) and (C)(iv), concerning hepatitis B prevention, a commenter asked the definition of "extended hospitalization."

14. RESPONSE: The department intends the "30 days or longer" to apply to both "extended hospitalization" and "absence." No change was made.

15. COMMENT: In reference to §117.34(d)(2)(C)(iv), concerning hepatitis B prevention, one commenter stated that all the commenter's patients are treated as if they are potentially HBsAg positive and that the staff wears protective equipment and uses standard precautions.

15. RESPONSE: The department recognizes the efforts of the commenter in practicing standard precautions. Treatment of HBsAg positive patients requires specific hemodialysis precautions to include barrier garments and discard of dialyzers after single use. This is in addition to standard precautions. No change was made.

16. COMMENT: In reference to §117.41(c)(5), concerning responsibilities of the governing body, one commenter asked how a governing body is defined by these rules, stating that his facility was part of a multi-specialty clinic which has a central governing body, with no specific knowledge related to ESRD. The commenter suggested changing the frequency for the governing

body's review and monitoring of quality management activities from "quarterly" to "annually." The commenter stated that the "quarterly details" are better left to individuals knowledgeable in the area of nephrology and dialysis.

16. RESPONSE: The department believes setting a definition of governing body may be restrictive. The facility may establish a local governing body to be responsible for the quality management activities and the day-to-day functioning of the facility. This is frequently the case in large, multi-state corporations which have a national governing body as well as local governing body for each facility; the local governing body would be responsible to report and respond to the central governing body. This arrangement is also seen in some hospital based units, where a unit- based committee is responsible for the required actions, and reports to the hospital's governing body. No change was made.

17. COMMENT: In reference to §117.41(g)(4)(F), concerning quality control and quality improvement mechanisms, a commenter from a hospital-based dialysis facility stated that monitoring mortality by the quality management team and review of individual deaths would better be done by the medical staff and suggested that this activity would easily duplicate the activities of the hospital medical committees or the hospice committees.

17. RESPONSE: The department agrees that a facility's medical staff should be involved in monitoring mortality. The rule does not preclude the monitoring of mortality as suggested by the commenter. However, it is important that such data be shared with core staff members as active participants in quality management activities. The requirements relating to quality management in §117.41 are consistent with the criteria and standards set out by the ESRD Network of Texas, Inc. No change was made.

18. COMMENT: In reference to §117.43(d)(3), relating to receipt of telephone and verbal order, one commenter agreed with the change to allow dietitians to take verbal orders. A second commenter stated that licensed personnel (e.g., nurses and physicians) should be able to take dietary orders and that this provides more timely interventions as the dietitian may not be present in the facility at all times.

18. RESPONSE: The department appreciates the support and agrees that clarification is needed. The rule is not intended to preclude acceptance of dietary orders by nurses or physician assistants. The department has rewritten the language to make this clear which was included in the proposed rule. No change was made.

19. COMMENT: In reference to §117.43(e)(7)(A), one commenter questioned the 4:1 ratio described in the proposal. The commenter stated that facilities with less than eight patients are unlikely to be economically attractive; the rule will "essentially mandate a ratio of two and two-thirds patients per nurse;" and this high level of staffing decreases the attractiveness of providing satellite services.

19. RESPONSE: The department does not agree with the commenter. Patients treated in "satellite" facilities should be provided the same level of care as patients treated in "non-satellite" facilities. The task force unanimously supported the need to make a licensed nurse available at all times during treatment of eight or more patients to coordinate the care of all the patients being treated. When that nurse has her own patient assignment, she is not available to evaluate the patients of the unlicensed staff members or to take indicated action. Staffing for eight patients could be one licensed nurse and two unlicensed dialysis technicians, maintaining the current rations of one licensed nurse to 12 patients (or portion thereof), and one direct care staff to each four patients. No change was made.

20. COMMENT: In reference to §117.43(e)(7)(A), twelve commenters expressed agreement with the exclusion of the charge nurse from the ratio of four patients per licensed nurse or patient care technician per patient shift during the treatment of eight or more patients. The commenters stated that the amendment promotes a safer environment for dialysis patients.

20. RESPONSE: The department appreciates the support and agrees that when eight or more patients are being treated, requiring the "charge nurse" to provide direct patient care places these patients at risk to receive treatment below the minimum standard for safe dialysis.

21. COMMENT: In reference to §117.43(e)(7)(A), nursing services, one commenter from a pediatric facility suggested that the rule be changed to require facilities to base staffing needs on a statistically validated patient dependency classification system. The commenter expressed concern with regard to the adequacy of care the current 4:1 ratio would provide a pediatric patient. The commenter added that staffing requirements for pediatric care comprise a complex matrix that is most easily implemented with a staffing and scheduling system to staff by skill level according to the dependency level of the patient.

21. RESPONSE: The department agrees that a universally accepted dependency or acuity- based system for determining staffing levels in the dialysis setting would be the optimum approach to meet the intent of the requirement. However, based upon current information obtained from the dialysis community at large, no such universally-accepted system has been established for the out-patient dialysis setting. The rules do not preclude the use of such a system if its use meets the minimum rule requirement of a 4:1 ratio for patients weighing more than 20 kilograms. This requirement does not prohibit a facility from using a lower ratio for pediatric patients whose levels of acuity demand more individual care, and these rules specify higher ratios for certain pediatric patients at §117.43(e)(7). No change was made.

22. COMMENT: In reference to §117.43(e)(7)(A), nursing services, two commenters recommended, in the interest of improved patient care and safety, a reduction of the ratio to three patients per licensed nurse or patient care technician. Another commenter stated that the 4:1 ratio described in the rule encourages administrative staff to pressure nursing supervisors to use 4:1 staffing regardless of patient acuity levels. The commenter suggested that staffing levels should be based on either a 3:1 patient to patient care staff ratio or patient acuity.

22. RESPONSE: The department understands the commenter's concern for patient health and safety and recognizes the minimum ratio of four patients per licensed nurse or patient care technician required by these rules may not be adequate in some situations. Facilities are expected to evaluate the needs of the individual patients being treated and adjust staffing to meet these needs. This expectation is reflected at §117.43(e)(7), which requires sufficient staff be on-site to meet the needs of the patients. The Task Force discussed reducing the 4:1 ratio at length and concluded a 3:1 ratio would be overly restrictive and cost prohibitive. The Task Force is committed to evaluating acuity based staffing methods with the possibility of amending

this requirement to address staffing based on patient acuity at a later date. The rule does not preclude the use of a 3:1 ratio or patient acuity staffing formulas which meet or exceed the 4:1 rule. No change was made.

23. COMMENT: In reference to §117.43(e)(7)(A), nursing services, one commenter expressed disagreement with taking the charge nurse out of the 4:1 ratio during treatment of eight or more patients. While recognizing that taking the charge nurse out of this ratio might provide additional staff and benefit patients, the commenter wants the freedom to design work teams to improve continuity of care for patients by pairing each RN with a couple of patient care technicians. Each work team would be responsible for a group of patients for up to six months. The commenter implied that no single RN would be designated "charge", and all RN's would participate in staffing at some level while directing the care of their team's patients. Taking the charge nurse out of the ratio when eight or more patients are receiving treatment might limit the financial resources available to implement this system, and would lock nurses into a "dated position." The commenter was concerned that the rule terminology would "stifle innovation and creativity" related to changes which could improve staffing and better meet patient needs.

23. RESPONSE: The department appreciates the commenter's desire to implement innovative and creative ideas to improve staffing, and would encourage the commenter to use this creativity to identify ways to meet this minimum standard and design work teams to provide the desired outcome. The intent of excluding the nurse functioning in the charge role from the 4:1 ratio when eight or more patients are being treated is to provide a greater level of safety by assuring the availability of a licensed nurse to oversee the care of all patients, rather than having this individual absorbed in direct care responsibilities. No change was made.

24. COMMENT: In reference to §117.43(e)(7)(A), nursing services, two commenters supported this rule, but stated there are situations where a nurse does not report to work requiring the charge nurse to care for up to four patients in order to prevent delay or cancellation of patient treatments. The commenter suggested adding provisions for flexibility so that patients can receive timely care. A second commenter requested an exception for emergency situations.

24. RESPONSE: The department agrees that in the scenario described by the first commenter it is important to avoid delay or cancellation of treatment to patients. There should be some backup system to allow for coverage in the event of personnel absenteeism or emergencies, so that such events described by the commenters would be rare. Rare events do not routinely constitute a deficient practice unless there are negative patient outcomes. No change was made.

25. COMMENT: In reference to §117.43(j)(2)(C), medical services for home patients, the Medical Review Board of the ESRD Network of Texas, Inc. suggested deleting the words, "at the facility," in that the delivery of the service rather than the place of delivery is the key element in providing medical services to these patients. Another commenter stated that requiring home patients to be seen at the facility is unduly restrictive, adding that requiring the physician go from his/her office to a facility to see a patient can waste time; that the facility location provides no advantages; and that occasionally, patients make an appointment in the physician's office due to a preference for more privacy.

25. RESPONSE: The department agrees that where medical services are delivered to home patients is not as important as the actual delivery of these services. The department reminds the commenters that home patients will also need to receive the required support services, (nursing, social, and dietary services) and that Medicare certification requirements limit reimbursement for home services to facilities certified to provide these services. The language was amended to delete the specification of location for the physician to see home patients.

26. COMMENT: In reference to §117.43(j)(2)(C), medical services, one commenter requested that the department consider allowing the use of nurse practitioners and physician extenders to substitute for the physician in writing progress notes and in seeing patients in the dialysis facility every two weeks.

26. RESPONSE: The department agrees that nurse practitioners and physician extenders may be very useful in providing care to dialysis patients. The suggestion that these individuals substitute for the physician in seeing patients every two weeks was considered and rejected by the Task Force and by the Medical Review Board of the ESRD Network of Texas. Other than the minimum requirement for the physician to record a progress note at least every six months, the nurse practitioner or physician extender could certainly document the medical progress of the patient. No change was made.

27. COMMENT: In reference to 117.43(j)(2)(C), medical services, one commenter stated that physicians being able to see patients in satellite facilities every two weeks is problematical: patients on the early shift may have already completed their treatment and left the facility before the physician arrives. The commenter suggested the rules allow such patients to be seen in the physician's office, or for the physician to simply review the patient record in the facility every two weeks and see the patient only if there are issues.

27. RESPONSE: The department recognizes providing medical care to facilities distant from the physician's office may be challenging. Each facility is seen as a distinct entity, and every patient must be provided the minimum level of care required in these rules. The physician member and alternate for the task force supported the requirement that each patient be seen by a physician every two weeks as the minimum for safe medical care. No change was made to the rule.

28. COMMENT: In reference to §117.43(j)(2)(E)(i), orders for hemodialysis treatment, one commenter stated the requirement should be for length of treatment rather than for treatment time and the dialysate bath should also be specified in the requirement.

28. RESPONSE: The department agrees and has changed the language as suggested.

29. COMMENT: In reference to §117.43(l)(1), temporary admissions, one commenter stated the rule was confusing. The commenter asked how a physician becomes a member of the staff of the referring and the receiving facilities, stating that dozens of patients from distant parts of the country are cared for each year and that some of these patients just show up at the facility for treatment. The commenter also asked if care to these patients is to be denied.

29. RESPONSE: The department understands the commenter's concern and denial of care is not suggested by the rule. The rule applies to situations in which a patient is dialyzed in another local facility. A "local facility" is one which is in the same geographical area as the patient's "home" facility. The intent of the rule is to facilitate treatment of patients in an associated facility which is open longer hours than the patient's "home" facility. Language was added at §117.43(l)(2) to describe requirements for a facility to treat transient patients (those from distant facilities), the situation described by the commenter.

30. COMMENT: In reference to §117.43(l)(4), renumbered as §117.43(l)(1)(D), temporary admissions, one commenter stated that it takes one to two days for a laboratory to report hepatitis B status, so the commenter's facility treats these patients using appropriate precautions. The commenter stated that not treating these patients could be hazardous to their health and since the commenter's facility is hospital-based, not providing treatment could be construed as denial of emergency care.

30. RESPONSE: The department understands the commenter's concern. The rule is not intended to deny treatment to patients, and is not meant to preclude treatment if a patient's hepatitis B status cannot be established. Language was added at §117.43(l)(1)(E) to clarify that, if the patient's hepatitis status is unknown, the patient must be undergo treatment as if the HBsAg test results were potentially positive, except that such a patient shall not be treated in the HBsAg isolation room, area, or machine.

31. COMMENT: Regarding §117.43(p), relating to audits of billing, a commenter reported billing is not done in their facility, as all billing is done by a central office, and asked if the facility could be exempt from this requirement.

31. RESPONSE: The department recognizes that many corporate owned facilities will have billing performed at a central location, however, a central system does not relieve the individual facility from the responsibility of assuring that this process is done accurately and not fraudulently. Because the health care community is familiar with the requirements of a compliance policy, the department has added the word "compliance" to describe the policy required by this rule.

32. COMMENT: In reference to proposed §117.43(q)(2), student health care professionals, one commenter stated that his hospital-based facility frequently provides orientation for nursing students (RNs and LVNs) which includes teaching about dialysis, dialysis machines, and health and safety issues. The commenter stated that this information cannot be provided by the students' instructors since they are not familiar with dialysis. The commenter added that the proposed rule is overly restrictive and could lead to less understanding of dialysis by students rather than more.

32. RESPONSE: The department agrees this rule could be interpreted too stringently, and has deleted the requirement and renumbered the remaining paragraphs.

33. COMMENT: In reference to §117.43(r), complaint resolution, a commenter inquired what constitutes a complaint, stating that some patients complain that they need to run a longer time in order to achieve their target clearance, and in some cases, a patient's comments may be dismissed as "insignificant," or "general expressions of unhappiness which should fall below the threshold of formal response."

33. RESPONSE: The department agrees that it may be difficult to identify true complaints. The rule is specific to a complaint resolution system that addresses quality of care or services or staff and intends to relate to complaints describing conditions (clinical or sociological) which may be detrimental to achieving quality. Facilities may need to develop guidelines to direct staff in evaluating the significance of patient comments. A single comment regarding delays in treatment, for example, may not need to be documented, while repeated comments alleging unfair treatment would need to be recorded and addressed. The department has clarified the language in an attempt to assist facilities in this task.

34. COMMENT: In reference to §117.44(c)(3)(A), nursing staff qualifications, one commenter stated that the rule is in conflict with the requirement in the rules and regulations governing professional nurse education, licensure, and practice, Title 22, Texas Administrative Code (TAC), §217.12(d) relating to designations for registered nurse/titles deemed misleading. The commenter added that the rules and regulations governing vocational nursing practice do not contain provisions allowing a licensed vocational nurse (LVN) to practice as a charge nurse. The commenter concluded that if an RN assigned charge nurse duties to an LVN, the RN would be in violation of Title 22, Texas Administrative Code (TAC), §217.13(10) relating to unprofessional conduct.

34. RESPONSE: The department agrees that the rule conflicts with 22 TAC §217.12(d) and has changed the language to conform to the regulations adopted by the State Board of Nurse Examiners. The department consulted with the Board of Nurse Examiners and has changed the language used to describe the licensed nurse who is the primary person responsible for coordinating the care for a shift of patients from "charge nurse" to "the licensed nurse functioning in the charge role" throughout the rules. The department does not agree that the RN would be in violation of 22 TAC §217.13(10) by assigning a qualified LVN to function in the charge role as specified in these rules, but has added language at §117.44(c)(3) to clearly delineate requirements which would allow an LVN to function in the charge role, and to differentiate the responsibilities for an RN versus an LVN functioning in this role.

35. COMMENT: In reference to §117.44(c), qualifications of nursing staff, one commenter stated that licensed vocational nurses (LVNs) should not be allowed to continue to perform charge nurse responsibilities.

35. RESPONSE: The department does not agree that qualified LVNs should not be allowed to continue to perform charge responsibilities. After consulting with the Board of Nurse Examiners, language was added at §117.44(c)(3) to detail the conditions under which an LVN may function in the charge role.

36. COMMENT: In reference to §117.44(c), qualifications of nursing staff, a commenter stated that LVNs do not possess the depth of knowledge necessary for the decision making required of a charge nurse and expressed no knowledge of a certification examination which ensures this knowledge has been gained. Another commenter stated that the certification exams available to LVNs do not qualify an LVN to perform charge duties.

36. RESPONSE: The department recognizes the differences in the scope of practice of an RN versus an LVN and has addressed these differences at §177.44(c). The department has determined that information provided the task force regarding a specific certification exam to confirm the proficiency of an LVN

in the charge role was incorrect and has deleted that proposed language. The department consulted with the Board of Nephrology Nurses and Technician Exam and determined LVN's are being allowed to take the Certified Hemodialysis Nurse exam effective January 1, 1999. On the request and with the input of the ESRD task force, language was added to allow licensed vocational nurses with two years hemodialysis experience to obtain certification as a hemodialysis nurse by a nationally recognized board, complete a facility based competency program and demonstrate competency in the charge role as a substitute for the two years experience as a charge nurse prior to September 1, 1996.

37. COMMENT: In reference to §117.44(e)(1), qualifications for social work staff, the Medical Review Board of the ESRD Network of Texas, Inc. and another commenter suggested deleting the words, "and have one year experience in social services." The commenters expressed concern that such a requirement would overly restrict the availability of master's prepared social workers and added that since the requirement does not provide for clinical or nephrology expertise, the potential risk of losing social workers from the available pool outweighs any perceived benefit.

37. RESPONSE: The department agrees that the requirement is overly restrictive and has deleted the words as suggested.

38. COMMENT: In reference to §117.44(e)(1), social services staff, one commenter expressed concern about the requirement that social workers be degreed at the master's level and suggested that services of a bachelor level social worker under the supervision of a master's degree social worker could perform many tasks which do not require a master's degree (e.g., arranging transient treatments, competing drug and travel requests).

38. RESPONSE: The department agrees that many social services do not require the expertise of a master's prepared social worker. The rule provision, which is currently in effect, does not preclude a bachelor's level social worker from providing discrete social services, such as those listed by the commenter, under the supervision of a master's prepared social worker. No change was made.

39. COMMENT: In reference to §117.44(f), technical staff, one commenter applauded the addition of minimum qualification standards for all technical staff, including water treatment, equipment, maintenance, and reprocessing staff.

39. RESPONSE: The department appreciates the support and agrees that establishing minimum qualifications for technical staff is important to patient safety. No change was made.

40. COMMENT: In reference to §117.44(f), technical staff training, a commenter inquired whether there will be a minimum number of hours required for technical training.

40. RESPONSE: The department has not specified a minimum number of hours for the training outlined for technical staff. Each facility would be expected to tailor this training to the individual's learning needs to assure minimum competency at the completion of the training program. No change was made.

41. COMMENT: Concerning §117.44(f)(1), relating to education requirements for technical staff, one commenter asked if these requirements applied to staff who perform reprocessing of hemodialyzers.

41. RESPONSE: The department has specified the education requirements apply to all technical staff to include staff who perform reprocessing of hemodialyzers. The language was amended to clarify this requirement.

42. COMMENT: In reference to §117.44(f)(1)(A)(i), relating to education requirements for technical staff, a commenter asked if there would be a "grandfather" clause to allow individuals with years of experience to continue working in the technical area of dialysis even though they do not have a high school diploma.

42. RESPONSE: The department appreciates the comment's question, agrees that a "grandfather clause" should be included, and has added language which waives the requirement for a high school diploma or equivalent for technical staff employed by the facility for two or more years prior to the effective date of these rules.

43. COMMENT: In reference to §117.44(f)(1)(A)(ii)(II), relating to training or experience for technical staff, one commenter stated that the curriculum components listed in §117.62 (relating to training curricula and instructors for dialysis technicians) contain an "unnecessary level of medical detail for persons who do not have direct patient care responsibility." Another commenter asked whether candidates for technical positions must have two years experience.

43. RESPONSE: The department agrees that the language at §117.44(f)(1)(A)(ii)(I)-(IV) was confusing. Completion of the dialysis technician training program is one option to fulfill the training or education requirements for technical staff, two years experience is another option. The department has modified the language to clarify this as a list of options for training and experience.

44. COMMENT: In reference to §117.44(f)(1)(C), technical staff, one commenter stated that a technician's skill is best known by observing work performance. The commenter added that trying to develop a test and determine its reliability and validity is beyond the capability of most facilities.

44. RESPONSE: The department understands resources are available in the renal community to include prepared tests in the areas of water, reuse, and mechanical support for dialysis. Just as facilities utilized commercial curricula (available without charge) for their dialysis technician training programs, they may use such available curricula, which include prepared tests, for this requirement. No change was made.

45. COMMENT: In reference to §117.44(f)(2), training required for the technical staff, one commenter indicated that the requirements for "chief technician" (technical supervisor) may conflict with the commenter's hospital-based organizational hierarchy. The commenter stated that the chief technician for the ESRD facility is responsible for the facility's mechanical and water treatment systems, while significant preventive maintenance and repair of dialysis machines are performed by the hospital's biomedical engineering department staff, who report to their own supervisor.

45. RESPONSE: The department understands the commenter's concern but believes there is sufficient flexibility in the language of this requirement to allow it to "fit" his hospital-based program. Facilities may arrange for some services, such as preventative maintenance, to be provided by an outside source or by a department in a hospital. The work done by that outside entity would be reported to the facility; the chief technician would be responsible for reviewing those reports and bringing

any problem identified to the attention of the facility's quality assurance committee. No change was made.

46. COMMENT: In reference to §117.44(f)(3)(B)(iii), technical staff, confirmation of the ability to distinguish all primary colors, a commenter asked why the person responsible for water testing needs to distinguish all primary colors.

46. RESPONSE: The department is aware that several of the tests required to assure safety in the treatment water and in reuse procedures are based on color changes when reagents are added. A person who could not distinguish all primary colors would not be capable of accurately performing and reading these tests. No change was made.

47. COMMENT: In reference to §117.44(f)(4)(B)(iii), equipment maintenance and repair staff, one commenter from a hospital-based facility stated that the facility's technical supervisor is not responsible for building maintenance and suggested provisions for these situations.

47. RESPONSE: The department recognizes facilities may meet these requirements in various ways. Facility staff responsibilities for building maintenance may be as minimal as knowing whom (from the hospital building maintenance personnel) to call for building maintenance issues, or as complex as having the capability to effect maintenance and repair of the physical plant. The department believes that the rule is sufficiently flexible and made no change.

48. COMMENT: In reference to §117.45(e), clinical records for transient patients, one commenter expressed agreement that most transient visits are scheduled and the facility has received all the information specified in the rule. The commenter stated that the rule should accommodate situations when patients present to the facility requiring emergency services. The commenter added that the nephrologist is capable of evaluating a patient and developing a plan of treatment, including dialysis orders.

48. RESPONSE: The department agrees that the nephrologist is capable of evaluating a transient patient and developing a plan of treatment, including dialysis orders, when the patient presents unannounced. Language was added at §117.43(l)(2) to clarify and to allow for treatment of transient patients who present unannounced. No change was made to §117.45(e).

49. COMMENT: In reference to §117.46, report to the director, one commenter stated that clotted vascular access is a frequent occurrence and that the facility handles this by hospitalizing the patient (sometimes on an outpatient basis). The commenter asked if the department really wanted a formal report on every patient who was hospitalized for a clotted vascular access.

49. RESPONSE: The rule requiring reports to the director is currently in effect at §117.41(e) and (f), except that the proposed language in §117.46 relaxes the reporting time from three working days to ten working days. In response to the commenter's question, if the clotting occurred as a result of treatment and required hospital care, it should be reported. If the access was clotted when the patient was presented to the dialysis facility for treatment, this occurrence would not need to be reported. No change was made.

50. COMMENT: In reference to §117.65(b)(1), prohibited acts for dialysis technicians who are not licensed vocational nurses, a commenter asked why dressing changes for central catheters are now prohibited.

50. RESPONSE: The department and the task force are aware of the high infection rate for central catheters and determined restricting the performance of dressing changes to licensed nurses would provide a definite time to assess the catheter insertion site, increasing the potential an infection would be recognized early to allow treatment. No change was made.

51. COMMENT: In reference to §117.65(b)(1), prohibited acts, a commenter stated that the language regarding the prohibited acts for unlicensed dialysis technicians was not clear as to whether the technician could return the patient's blood, and expressed concern that unlicensed technicians would not be allowed to do this task for patients who were unstable.

51. RESPONSE: The department does not agree that the language is unclear. No reference is made to the interdialysis care; the acts prohibited are the connection, manipulation, and disconnection of the catheter, not the administration of fluid (e.g. to return the patient's blood) through the catheter. No change was made.

The commenters included representatives from the following: W.W. Wise Memorial Dialysis Center, Harlingen; Collom and Carney Clinic Association, Texarkana; the Medical Review Board of the ESRD Network of Texas, Inc., Dallas; Scott and White Hospital, Temple; Total Renal Care, San Antonio; Texas Children's Hospital Renal Dialysis Center, Houston; University of Texas Medical Branch at Galveston; Austin Diagnostic Clinic, Austin; and several registered nurses working in dialysis. The commenters were generally in favor of the rules as proposed, but expressed concerns, asked questions, and made recommendations for change.

In addition to the changes the department made as a result of comments received, the department is making the following changes due to staff comments to clarify the intent and improve the accuracy of the sections.

1. CHANGE: Concerning §117.12(a), the department corrected the cross reference to requirements relating to the application and issuance of an annual renewal license. The cross reference was erroneously listed as §117.13; it was changed to refer to subsection (h).

2. CHANGE: Concerning §117.12(c)(1), the department deleted the extraneous words, "to the," between the phrases "...of this subsection..." and "...within six months from the mailing date...."

3. CHANGE: Concerning §117.13(b)(2) and §117.13(g), sentence structure was modified for clarification purposes.

4. CHANGE: Concerning §117.13(f), the department deleted the words "propose to" for clarity.

5. CHANGE: Concerning §117.13(f)(3), the department added language to clarify that the department may deny the issuance of an annual renewal license if information in §117.12(c)(3)(S) and (T) is discovered by the department.

6. CHANGE: Concerning §117.16(c)(4)(C)(vi)(IV), the reference to "clause (ii) or (iii) of this subparagraph" was corrected to read "subclause (II) or (III) of this clause."

7. CHANGE: Concerning §117.43(a)(15), patient's rights in respect to a complaint mechanism, the department made a change as a result of conversations with the management of the dialysis facilities located in correctional institutions and research by the legal staff of the department. This requirement

was amended to exempt correctional institutions from including the 1-800 number in information provided to patients in these facilities as inmates have limited phone access and other grievance mechanisms exist within the Texas Department of Criminal Justice.

8. CHANGE: Concerning §117.43(e)(10), the term "nursing assessment" was changed to "patient evaluation" for clarification.

9. CHANGE: Concerning §117.65(b)(4), this requirement was amended to include "non-access site" before "arterial" to be clear that arterial puncture of a vascular access to perform dialysis is an accepted act for all qualified dialysis technicians.

Subchapter A. General Provisions

25 TAC §§117.1-117.3

The amendments are adopted under the Health and Safety Code, §251.002, which provides the Board of Health (board) with the authority to adopt fees in amounts reasonable and necessary to defray the cost of administering the Health and Safety Code, Chapter 251; §251.003 which provides the board with the authority to adopt rules to implement the statute, including requirements for the issuance, renewal, denial, suspension, and revocation of a license to operate an ESRD facility; §251.014 which provides the board with the authority to adopt rules to contain minimum standards to protect the health and safety of a patient in an ESRD facility; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

§117.2. Definitions.

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

(1) Advanced practice nurse - A registered nurse approved by the Board of Nurse Examiners for the State of Texas to practice as an advanced practice nurse on the basis of completion of an advanced educational program. The term includes a nurse practitioner, nurse midwife, nurse anesthetist, and clinical nurse specialist.

(2) Administrator - A person who is delegated the responsibility for the implementation and proper application of policies, programs, and services established for the end stage renal disease facility.

(3) Affiliate - An applicant or owner which is:

(A) a corporation - includes each officer, consultant, stockholder with a direct ownership of at least 5.0%, subsidiary, and parent company;

(B) a limited liability company - includes each officer, member, and parent company;

(C) an individual - includes:

(i) the individual's spouse;

(ii) each partnership and each partner thereof of which the individual or any affiliate of the individual is a partner; and

(iii) each corporation in which the individual is an officer, consultant, or stockholder with a direct ownership of at least 5.0%;

(D) a partnership - includes each partner and any parent company; and

(E) a group of co-owners under any other business arrangement - includes each officer, consultant, or the equivalent under the specific business arrangement and each parent company.

(4) Applicant - The owner of an end stage renal disease facility which is applying for a license under the statute. This is the person in whose name the license is issued.

(5) Board - The Texas Board of Health.

(6) Change of ownership - A sole proprietor who transfers all or part of the facility's ownership to another person or persons; the removal, addition, or substitution of a person or persons as a partner in a facility owned by a partnership; or a corporate sale, transfer, reorganization, or merger of the corporation which owns the facility if sale, transfer, reorganization, or merger causes a change in the facility's ownership to another person or persons.

(7) Chief technician - The facility-based supervisor of the facility's mechanical, reuse and water treatment systems.

(8) Commissioner - The commissioner of health.

(9) Competency - The demonstrated ability to carry out specified tasks or activities with reasonable skill and safety that adheres to the prevailing standard of practice.

(10) Core staff members - The facility's medical director, supervising nurse, dietitian, social worker, administrator, and chief technician.

(11) Corrective action plan - A written strategy for correcting a licensing violation. The corrective action plan is developed by the facility and addresses the system(s) operation(s) of the facility as the system(s) operation(s) applies to the deficiency.

(12) Delegation - The transfer to a qualified and properly trained individual of the authority to perform a selected task or activity in a selected situation.

(13) Department - The Texas Department of Health.

(14) Dialysis - A process by which dissolved substances are removed from a patient's body by diffusion, osmosis and convection (ultrafiltration) from one fluid compartment to another across a semipermeable membrane.

(15) Dialysis technician - An individual who is not a registered nurse or physician and who provides dialysis care under the direct supervision of a registered nurse or physician. If unlicensed, this individual may also be known as a patient care technician.

(16) Dietitian - A person who is currently licensed under the laws of this state to use the title of licensed dietitian, is eligible to be a registered dietitian, and has one year of experience in clinical dietetics after becoming eligible to be a registered dietitian.

(17) Director - The director of the Health Facility Licensing Division of the department or his or her designee.

(18) End stage renal disease - That stage of renal impairment that appears irreversible and permanent and that requires a regular course of dialysis or kidney transplantation to maintain life.

(19) End stage renal disease facility - A facility that provides dialysis treatment or dialysis training to individuals with end stage renal disease.

(20) Full-time - The time period established by a facility as a full working week, as defined and specified in the facility's policies and procedures.

(21) Full-time equivalent - Work time equivalent to 2,080 hours per 12 consecutive months.

(22) Health care facility - Any type of facility or home and community support services agency licensed to provide health care in any state or is certified for Medicare (Title XVIII) or Medicaid (Title XIX) participation in any state.

(23) Hospital - A facility that is licensed under the Texas Hospital Licensing Law, Health and Safety Code, Chapter 241, or if exempt from licensure, certified by the United States Department of Health and Human Services as in compliance with conditions of participation for hospitals in Title XVIII, Social Security Act (42 United States Code, §1395 et. seq.).

(24) Interdisciplinary team - A group composed of the patient and the primary physician, the registered nurse, the dietitian and the social worker who are responsible for planning care for the patient.

(25) Intermediate level disinfection - A surface treatment using chemical germicides or disinfectants which are capable of inactivating various classes of microorganisms including, but not limited to, viruses (primarily medium to large viruses and lipid-containing viruses), fungi, and actively growing bacteria (including tubercle bacteria) when such chemical germicides or disinfectants are used in accordance with the manufacturer's instructions or per established guidelines. Intermediate level disinfection is generally not effective in inactivating or eliminating bacterial endospores. Examples of intermediate level disinfectants include bleach, 70-90% ethanol or isopropanol, and certain phenolic or iodophor preparations.

(26) Inspection - An investigation or survey conducted by a representative of the department to determine if an applicant or licensee is in compliance with this chapter.

(27) Licensed nurse - A registered nurse or licensed vocational nurse.

(28) Licensed vocational nurse (LVN) - A person who is currently licensed under Texas Civil Statutes, Article 4528c to use the title licensed vocational nurse and who may provide dialysis treatment after meeting the competency requirements specified for dialysis technicians.

(29) Manager - An individual approved or selected by the department who assumes overall management of an end stage renal disease facility to ensure adequate and safe services are provided to patients.

(30) Medical director - A physician who:

(A) is board eligible or board certified in nephrology or pediatric nephrology by a professional board; or

(B) during the five-year period prior to September 1, 1996, has served for at least 12 months as director of a dialysis program.

(31) Medical review board - A medical review board that is appointed by a renal disease network organization which includes this state, with the network having a contract with the Health Care Financing Administration of the United States Department of Health and Human Services under 42 United States Code §1395rr.

(32) Monitor - An individual approved or selected by the department who observes, supervises, consults, and educates a facility to correct identified violations of the statute or this chapter.

(33) Notarized copy(ies) - A sworn affidavit stating that attached copy(ies) is a true and correct copy(ies) of the original documents.

(34) Owner - One of the following which holds or will hold a license issued under the statute in the person's name or the person's assumed name:

(A) a corporation;

(B) a limited liability company;

(C) an individual;

(D) a partnership if a partnership name is stated in a written partnership agreement or an assumed name certificate;

(E) all partners in a partnership if a partnership name is not stated in a written partnership agreement or an assumed name certificate; or

(F) all co-owners under any other business arrangement.

(35) Patient - An individual receiving dialysis treatment or training from an end stage renal disease facility.

(36) Patient care plan - A written document prepared by the interdisciplinary team for a patient receiving end stage renal disease services.

(37) Pediatric patient - An individual 18 years of age or younger under the care of a facility.

(38) Person - An individual, corporation, or other legal entity.

(39) Physician - An individual who is licensed to practice medicine under the Medical Practice Act, Texas Civil Statutes, Article 4495b.

(40) Physician assistant - A person who is licensed as a physician assistant under the Physician Assistant Licensing Act, Texas Civil Statutes, Article 4495b-1.

(41) Presurvey conference - A conference held with department staff and the applicant or his or her representatives to review licensure standards and survey documents and provide consultation prior to the on-site licensure inspection. The applicant's representatives shall include an individual who will be responsible for the day-to-day supervision of care by the facility.

(42) Product water - The effluent water from the last component of the facility's water treatment system.

(43) Progress note - A dated and signed written notation by a facility staff member summarizing facts about care and a patient's response during a given period of time.

(44) Quality - The degree to which health services for individuals and populations increase the likelihood of desired outcomes that are consistent with current professional knowledge.

(45) Quality assurance - An ongoing, objective, and systematic process of monitoring, evaluating, and improving the quality, appropriateness, and effectiveness of care. The term includes the quality management and quality improvement processes.

(46) Quality management - A management philosophy used to plan and achieve desired processes and outcomes based upon a quality plan, which establishes quality objectives and the means to achieve; quality control, which is a process to evaluate actual performance against expected performance; and quality improvement,

which is a process to identify, plan, and implement change for improvement.

(47) Registered nurse (RN) - A person who is currently licensed under the Nursing Practice Act, Texas Civil Statutes, Article 4513 et seq. as a registered nurse.

(48) Social worker - A person who:

(A) is currently licensed as a social worker under the Human Resources Code, Chapter 50, and holds a masters degree from a graduate school of social work accredited by the Council on Social Work Education; or

(B) has worked for at least two years as a social worker, one year of which was in a dialysis facility or transplantation program prior to September 1, 1976, and has established a consultative relationship with a social worker who has a masters degree from a graduate school of social work accredited by the Council on Social Work Education.

(49) Supervising nurse (also may be known as the director of nursing) - An RN who:

(A) has at least 18 months experience as an RN, which includes at least 12 months experience in dialysis which has been obtained within the last 24 months; or

(B) has at least 18 months experience as an RN and holds a current certification from a nationally recognized board in nephrology nursing or hemodialysis.

(50) Supervision - Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity with initial direction and periodic inspection of the actual act of accomplishing the function or activity. Immediate supervision means the supervisor is actually observing the task or activity as it is performed. Direct supervision means the supervisor is on the premises but not necessarily immediately physically present where the task or activity is being performed. Indirect supervision means the supervisor is not on the premises but is accessible by two-way communication and able to respond to an inquiry when made, and is readily available for consultation.

(51) Statute - The Health and Safety Code, Chapter 251.

(52) Training - The learning of tasks through on-the-job experience or instruction by an individual who has the capacity through education or experience to perform the task or activity to be delegated.

(53) Working day - Any day of the calendar week excluding Saturday or Sunday.

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 March 22, 1999.

TRD-9901699
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: April 11, 1999
Proposal publication date: October 30, 1998
For further information, please call: (512) 458-7236

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Subchapter B. Application and Issuance of a License

25 TAC §§117.11-117.16

The repeal is adopted under the Health and Safety Code, §251.002, which provides the Board of Health (board) with the authority to adopt fees in amounts reasonable and necessary to defray the cost of administering the Health and Safety Code, Chapter 251; §251.003 which provides the board with the authority to adopt rules to implement the statute, including requirements for the issuance, renewal, denial, suspension, and revocation of a license to operate an ESRD facility; §251.014 which provides the board with the authority to adopt rules to contain minimum standards to protect the health and safety of a patient in an ESRD facility; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

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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Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: April 11, 1999
Proposal publication date: October 30, 1998
For further information, please call: (512) 458-7236

♦ ♦ ♦

25 TAC §§117.11-117.17

The new sections are adopted under the Health and Safety Code, §251.002, which provides the Board of Health (board) with the authority to adopt fees in amounts reasonable and necessary to defray the cost of administering the Health and Safety Code, Chapter 251; §251.003 which provides the board with the authority to adopt rules to implement the statute, including requirements for the issuance, renewal, denial, suspension, and revocation of a license to operate an ESRD facility; §251.014 which provides the board with the authority to adopt rules to contain minimum standards to protect the health and safety of a patient in an ESRD facility; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

§117.12. Application and Issuance of Temporary Initial License and First Annual License.

(a) Application procedures. This section establishes the application procedures for obtaining a temporary initial license. All first-time applications for a license are applications for a temporary initial license. The application for a temporary initial license is also an application for the first annual license issued under the requirements in subsection (h) of this section .

(b) Request for an application. Upon written request, the Texas Department of Health (department) shall furnish a person with an application packet and a copy of the statute and this chapter.

(c) Application requirements. The applicant shall submit the information listed in paragraph (3) of this subsection to the department within six months from the date the department mails the application packet to the applicant.

(1) If the department does not receive the information listed in paragraph (3) of this subsection within six months from the mailing date, the applicant must request a new application packet.

(2) An applicant shall not misstate a material fact on any documents required to be submitted under this section.

(3) The following items shall be submitted with the original application form and shall be originals or notarized copies:

(A) an accurate and complete application which contains original signatures;

(B) the initial license fee;

(C) information on the applicant including name, street address, mailing address, social security number or franchise tax identification number, date of birth, and driver's license number;

(D) the name, mailing address, and street address of the facility. The address provided on the application must be the address from which the facility will be operating and providing services;

(E) the telephone number of the facility, the telephone number where the administrator can usually be reached when the facility is closed, and if the facility has a fax machine, the fax number;

(F) a list of names and business addresses of all persons who own any percentage interest in the applicant including:

(i) each limited partner and general partner if the applicant is a partnership; and

(ii) each shareholder, member, director, and officer if the applicant is a corporation, limited liability company or other business entity;

(G) a list of any businesses with which the applicant subcontracts and in which the persons listed under subparagraph (F) of this paragraph hold any percentage of the ownership;

(H) if the applicant has held or holds a facility license or has been or is an affiliate of another licensed facility, the relationship, including the name and current or last address of the other facility and the date such relationship commenced and, if applicable, the date it was terminated;

(I) if the facility is operated by or proposed to be operated under a management contract, the names and addresses of any person and organization having an ownership interest of any percentage in the management company;

(J) a list of management and supervisory personnel, and a job description for each administrative and supervisory position;

(K) a notarized statement attesting that the applicant is capable of meeting the requirements of this chapter;

(L) a notarized attestation that each dialysis technician on staff has completed the training and competency evaluation programs. This attestation may be consolidated with the attestation described in subparagraph (K) of this paragraph;

(M) a written plan for the orderly transfer of care of the applicant's patients and clinical records if the applicant is unable to maintain services under the license;

(N) a copy of an approved fire safety inspection report from the local fire authority in whose jurisdiction the facility is based that is dated no earlier than 12 months prior to the date of the application;

(O) an organizational structure of the staffing for the facility;

(P) if an applicant is a corporation, a current letter from the state comptroller's office stating the corporation is in good standing or a notarized certification that the tax owed to the state under the Tax Code, Chapter 171, is not delinquent or that the corporation is exempt from the payment of the tax and is not subject to the Tax Code, Chapter 171;

(Q) the organizational structure of the applicant which includes written full disclosure of the names and addresses of all owners and persons controlling any ownership interest in the facility. In the case of corporations, holding companies, partnerships, and similar organizations, the names and addresses of officers, directors, and stockholders, both beneficial and of record, when holding any percent, shall be disclosed;

(R) the name(s) and credentials of:

(i) the medical director or at least one physician on staff at the facility who is qualified to serve as the medical director;

(ii) the license number(s) of the physician(s); and

(iii) if applicable, all physician assistants and advanced practice nurses who will provide services at the facility;

(S) the following data concerning the applicant, the applicant's affiliates, and the managers of the applicant:

(i) denial, suspension, or revocation of an end stage renal disease facility license in any state; a license for any health care facility or a license for a home and community support services agency (agency) in any state; or any other enforcement action, such as (but not limited to) civil or criminal court action in any state;

(ii) denial, suspension, or revocation of or other enforcement action against a facility license in any state, a license for any health care facility in any state, or a license for an agency in any state which is or was proposed by the licensing agency and the status of the proposal;

(iii) surrender of a license before expiration of the license or allowing a license to expire in lieu of the department proceeding with enforcement action;

(iv) federal or state (any state) criminal felony arrests or convictions;

(v) federal or state Medicaid or Medicare sanctions or penalties relating to the operation of a health care facility or agency;

(vi) operation of a health care facility or agency that has been decertified or terminated from participation in any state under Medicare or Medicaid; or

(vii) debarment, exclusion, or contract cancellation in any state from Medicare or Medicaid; and

(T) for the two-year period preceding the application date, the following data concerning the applicant, the applicant's affiliates, and the managers of the applicant:

(i) federal or state (any state) criminal misdemeanor arrests or convictions;

(ii) federal or state (any state) tax liens;

(iii) unsatisfied final judgement(s);

(iv) eviction involving any property or space used as a facility or health care facility in any state;

(v) injunctive orders from any court; or

(vi) unresolved final federal or state (any state) Medicare or Medicaid audit exceptions.

(4) The applicant shall retain a copy of all documentation that is submitted to the department.

(d) Application processing. Upon receipt of the application, including the required documentation described in paragraph (2) of this subsection and the initial license fee from the applicant, the department shall review the material to determine whether it is complete and correct.

(1) The time periods for processing an application shall be in accordance with §117.15 of this title (relating to Time Periods for Processing and Issuing a License).

(2) If a facility receives a notice from the department that some or all of the information required under subsection (c)(3) of this section is deficient, the facility shall submit the required information no later than six months from the date of the notice.

(A) A facility which fails to submit the required information within six months from the notice date is considered to have withdrawn its application for a temporary initial license. The license fee will not be refunded.

(B) A facility which has withdrawn its application must reapply for a license in accordance with this section, if it wishes to continue the application process. A new license fee is required.

(e) Issuance of a temporary initial license.

(1) Presurvey conference. Once the department has determined that the application form, the information required to accompany the application form, and the initial license fee are complete and correct, the department shall schedule a presurvey conference with the applicant in order to inform the applicant or his or her designee of the licensing standards for the facility. The presurvey conference will be held at the office designated by the department. All applicants are required to attend a presurvey conference unless the designated survey office waives the requirement.

(2) Design and space inspection. The department shall conduct the design and space inspection described in §117.16(b)(1) of this title (relating to Inspections) prior to issuance of the temporary initial license, unless the department waives the requirement.

(3) Issuance of license. After completion of the presurvey conference and the design and space inspection described in paragraph (2) of this subsection, the department:

(A) will issue a temporary initial license; or

(B) may deny the temporary initial license if the facility does not meet the requirements described in this section. The procedures for denying a temporary initial license shall be in accordance with §117.84 of this title (relating to Disciplinary Action).

(f) Compliance required. Continuing compliance with the statute and this chapter is required during the temporary initial license period in order for a first annual license to be issued.

(g) Withdrawal from the application process. An applicant may withdraw its application for a temporary initial license at any time.

(1) An applicant who decides to withdraw its application for a temporary initial license during the application review process, shall submit to the department its written request to withdraw. The department shall acknowledge receipt of the request to withdraw. The license fee will not be refunded.

(2) An applicant who decides to withdraw its application after the department issues the temporary initial license shall return the license certificate to the department with a written request to withdraw. The department shall acknowledge receipt of the request to withdraw. The license fee will not be refunded.

(h) Issuance of first annual license. The department shall issue a first annual license to a facility if, after inspection and investigation during the temporary initial license period, it finds the applicant meets the requirements of this chapter. An inspection for the purposes of issuing a first annual license shall be completed in accordance with §117.16(c) of this title. The first annual license supersedes the temporary initial license and shall expire one year from the date of issuance of the temporary initial license.

(1) If the temporary initial license is issued on the first day of a month, the first annual license expires on the last day of the preceding month of the next year.

(2) If the temporary initial license is issued on the second or any subsequent day of a month, the first annual license expires on the last day of the month of issuance of the next year.

(i) Noncompliance. The department may propose to deny the first annual license if, after inspection and investigation during the temporary license period, the department determines that the facility does not comply with the requirements of the statute or this chapter. Denial of a first annual license shall be in accordance with §117.84 of this title.

§117.13. Application and Issuance of Annual Renewal License.

(a) The Texas Department of Health (department) shall send notice of expiration to an end stage renal disease facility (facility) 60 working days before the expiration date of a first annual or an annual renewal license. If the facility has not received notice of expiration from the department 45 calendar days prior to the expiration date, it is the duty of the facility to notify the department and request a renewal application for a license.

(b) A licensee shall make timely and sufficient application for annual renewal of a license.

(1) The licensee shall submit the following items to the department postmarked no later than 30 calendar days prior to the expiration date of the license:

(A) an accurate and complete renewal application form which contains original signatures;

(B) current, updated documents containing all the information required in §117.12(c)(3) of this title (relating to Application and Issuance of Temporary Initial License and First Annual License);

(C) the renewal license fee; and

(D) verification that the facility submitted the annual report required by §117.42 of this title (relating to Indicators of Quality of Care).

(2) A facility is considered to have made timely and sufficient application for annual renewal of a license if the department receives the information required in this subsection prior to the expiration date of the license. If a facility makes timely and sufficient

application for annual renewal of a license, the license does not expire until the application has been finally determined by the department.

(c) A facility shall not misstate a material fact on any documents required to be submitted to the department or required to be maintained by the facility.

(d) At the discretion of the department, an on-site inspection may be conducted for renewal of a license in accordance with §117.16(c) of this title (relating to Inspections).

(e) The department shall issue an annual renewal license to a licensee who meets the minimum standards for a license in accordance with the provisions of the statute and this chapter.

(f) The department may deny the issuance of an annual renewal license if:

(1) based on the inspection report, the department determines that the facility does not meet or is in violation of any provision of the statute or this chapter;

(2) renewal is prohibited by the Texas Education Code, §57.491 relating to defaults on guaranteed student loans; or

(3) a facility discloses or the department discovers any of the information in §117.12(c)(3)(S) and (T) of this title.

(g) If a licensee makes a timely application for renewal of a license, and action to revoke, suspend, or deny renewal of the license is pending, a renewal license will not be issued unless the department has determined the reason for the proposed action no longer exists.

(h) A facility that fails to make timely and sufficient application for annual renewal of a license must cease operation upon expiration of the facility's license.

(1) The department will notify a licensee that fails to timely renew a license that the facility must cease operation upon expiration of the license.

(2) In order to resume operations, the facility must apply for a new temporary initial license in accordance with §117.12 of this title.

(3) If a licensee fails to timely renew his or her license on or after August 1, 1990, because the licensee is or was on active duty with the armed forces of the United States of America serving outside the State of Texas, the licensee may renew the license pursuant to this paragraph.

(A) Renewal of the license may be requested by the licensee, the licensee's spouse, or an individual having power of attorney from the licensee. The renewal form shall include a current address and telephone number for the individual requesting the renewal.

(B) Renewal may be requested before or after the expiration of the license.

(C) A copy of the official orders or other official military documentation showing that the licensee is or was on active military duty serving outside the State of Texas shall be filed with the department along with the renewal form.

(D) A copy of the power of attorney from the licensee shall be filed with the department along with the renewal form if the individual having the power of attorney executes any of the documents required in this section.

(E) A licensee renewing under this paragraph shall pay the applicable renewal fee.

(F) A licensee is not authorized to operate the facility for which the license was obtained after the expiration of the license unless and until the licensee actually renews the license.

(G) This paragraph applies to a licensee who is a sole practitioner or a partnership with only individuals as partners where all of the partners were on active duty with the armed forces of the United States serving outside the State of Texas.

(i) If a suspension of a license overlaps a renewal date, the suspended license holder shall comply with the renewal procedures in this section; however, the department may not renew the license until the department determines that the reason for suspension no longer exists.

(j) If the department revokes or does not renew a license, a person may apply for a temporary initial license by complying with the requirements of the statute and this chapter at the time of reapplication. The department may refuse to issue a license if the reason for revocation or nonrenewal continues to exist.

(k) Upon revocation or nonrenewal, a license holder shall return the original license certificate to the department.

(l) The procedures for revocation, suspension, or denial of a license shall be in accordance with §117.84 of this title (relating to Disciplinary Action).

§117.14. Change of Ownership or Services.

(a) Change of ownership. The following provisions apply to change of ownership of an end stage renal disease facility (facility) and affect the condition of a license.

(1) A licensee shall not transfer or assign its license from one person to another person.

(2) The sale of stock of a corporate licensee does not cause this section to apply.

(3) The provisions of this section are in addition to applicable federal law or regulation relating to change of ownership or control.

(4) A person who desires to receive a license in its name for a facility licensed under the name of another person or to change the ownership of any facility shall submit a license application and the change of ownership license fee at least 60 calendar days prior to the desired date of the change of ownership.

(A) The application shall be in accordance with §117.12 of this title (relating to Application and Issuance of Temporary Initial License and First Annual License).

(B) In addition to the documents required in §117.12(c)(3) of this title, a person desiring a license under this subsection shall submit an affidavit signed by the previous owner acknowledging agreement with the change of ownership.

(C) If the applicant is a corporation, an application submitted under this subsection shall include a copy of the applicant's articles of incorporation. If the applicant is a business entity other than a corporation, an application submitted under this subsection shall include a copy of the sales agreement.

(5) The department shall issue a temporary initial license effective the date of the change of ownership when the person has complied with the provisions of §117.12 of this title.

(6) If the presurvey conference and design and space inspection described in §117.12(e)(1) and (2) of this title, and the inspection described in §117.12(h) of this title are waived by the

department, the department shall issue a first annual license in lieu of the temporary initial license to the new owner of the facility. The new owner's license is effective the date of the change of ownership and expires as described in §117.12(h) of this title.

(7) The previous owner's license shall be void on the effective date of the change of ownership.

(b) Change in services.

(1) A person shall notify the department in writing no later than 30 calendar days prior to ceasing operation of a facility. The person shall return the original license certificate to the department by mailing or returning the original license certificate to the Health Facility Licensing Division, End Stage Renal Disease Facility Licensing Program, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756-3199.

(2) A facility shall notify the department in writing 30 calendar days prior to construction, renovation or modification of the facility's physical plant.

(3) A facility shall notify the department in writing of any change in the facility's main telephone number or mailing address (if different from the physical address) no later than 15 calendar days after the change is effective.

(4) A facility shall obtain written approval by the department in order to add a service or increase the number of stations which appear on the facility license.

(A) A facility shall submit a written request for approval 30 calendar days prior to the anticipated date of the change.

(i) For a change in service, the written request shall be accompanied by evidence that the facility has reviewed staffing availability and added staff positions if indicated to accommodate the change.

(ii) For an increase in stations, the written request shall be accompanied by the evidence required in clause (i) of this subparagraph and evidence that the water treatment system is of sufficient size to produce safe water to accommodate the increase.

(B) The department may conduct an on-site inspection prior to taking action on the requested change.

(C) The department shall send the facility notice of approval or disapproval of the change. If the requested increase is disapproved, the department shall state the reasons for disapproval and the information needed in order to approve the request.

(D) No later than three weeks after initiating use of new stations, the facility shall submit to the department laboratory reports of chemical analysis and bacteriologic cultures of the product water demonstrating compliance with §§3.2.1 (relating to Water Bacteriology) and 3.2.2 (relating to Level of Chemical Contaminants) of the American National Standard, Hemodialysis Systems, March 1992 Edition, published by the Association for the Advancement of Medical Instrumentation, 3330 Washington Boulevard, Suite 400, Arlington, Virginia 22201, 1-800-703-525- 4890.

§117.16. Inspections.

(a) General. The Texas Department of Health (department) may conduct an inspection at any time to verify compliance with the statute or this chapter. By applying for or holding a license, the facility consents to entry and inspection of the facility by the department or representative of the department in accordance with the statute and this chapter.

(1) An authorized representative of the department (surveyor) may enter the premises of a license applicant or license holder at reasonable times during business hours to conduct an on-site inspection incidental to the issuance of a license, and at other times as the department considers necessary to ensure compliance with:

(A) the statute or this chapter;

(B) an order of the commissioner of health (commissioner);

(C) a court order granting injunctive relief;

(D) a corrective action plan; or

(E) other enforcement action(s).

(2) The surveyor is entitled to access all books, records, or other documents maintained by or on behalf of the facility to the extent necessary to ensure compliance with the statute, this chapter, an order of the commissioner, a court order granting injunctive relief, a corrective action plan, or other enforcement action. The department shall maintain the confidentiality of facility records as applicable under federal or state law. Ensuring compliance includes permitting photocopying by the department or providing photocopies to a department surveyor of any records or other information by or on behalf of the department as necessary to determine or verify compliance with the statute or this chapter.

(3) An inspection conducted by the department shall be in accordance with the procedures set out in subsection (i) of this section.

(b) Types of inspections.

(1) Design and space inspection.

(A) The department shall conduct an inspection to determine compliance with the design and space requirements described in §117.31 of this title (relating to Design and Space Requirements), the requirements in §117.32(a), (c), (e), and (g) of this title (relating to Equipment), and §117.33(b)(1) and (3) - (10) of this title (relating to Water Treatment and Reuse) prior to issuance of the temporary initial license, unless the department waives the requirement.

(B) During any license period, the department may conduct a design and space inspection to determine whether modifications or renovations comply with §117.31 of this title.

(2) Initial inspection for the issuance of the first annual license. A department surveyor shall conduct an initial inspection after the date of issuance of the temporary initial license to determine if the facility meets the requirements of the statute and this chapter for licensing. The initial inspection is an evaluation of compliance with all requirements of the statute and this chapter.

(3) Renewal inspection. At the department's discretion, a department surveyor may perform an on-site inspection prior to renewal of a facility license to verify compliance with the statute and this chapter. The renewal inspection may include an evaluation of compliance with all requirements of the statute and this chapter.

(4) Inspection to investigate a complaint. The department surveyor shall perform an inspection of a facility on-site or by mail if the facility has demonstrated noncompliance with the statute or this chapter, or to investigate a complaint received by the department.

(5) Inspection based on annual report. After review of a facility's annual report, the department may request additional information or conduct an inspection by mail or on-site to determine compliance with the statute and this chapter.

(6) Inspection related to a report(s) to the director. The department may conduct an inspection incidental to a report to the director described in §117.46 of this title (relating to Reports to the Director).

(7) Follow-up inspection. A department surveyor shall perform an inspection on- site or by mail to verify completion of a corrective action plan(s) for deficiencies cited during any of the inspections described in paragraphs (1) - (6) of this subsection.

(c) Inspection procedures.

(1) Entrance conference. The department's surveyor shall hold a conference with the person who is in charge of the facility prior to commencing the inspection for the purpose of explaining the nature and scope of the inspection.

(2) Evaluation of compliance. Except for the purposes of conducting an inspection under subsection (b)(1), (4), (6), or (7) of this section, an onsite inspection will include an evaluation to determine compliance with, at a minimum, each of the requirements in:

(A) §117.32 of this title (relating to Equipment);

(B) §117.33 of this title (relating to Water Treatment and Reuse);

(C) §117.34 of this title (relating to Sanitary Conditions and Hygienic Practices);

(D) §117.41 of this title (relating to Quality Assurance for Patient Care);

(E) §117.43 of this title (relating to Provision and Coordination of Treatment and Services);

(F) §117.44 of this title (relating to Qualifications of Staff);

(G) §117.45 of this title (relating to Clinical Records);

(H) §117.46 of this title (relating to Reports to the Director);

(I) §117.61 of this title (relating to General Requirements);

(J) §117.62 of this title (relating to Training Curricula and Instructors);

(K) §117.63 of this title (relating to Competency Evaluation);

(L) §117.64 of this title (relating to Documentation of Competency); and

(M) §117.65 of this title (relating to Prohibited Acts).

(3) Exit conference. After an inspection of a facility the surveyor shall hold an exit conference with the facility administrator or his or her designee. During the exit conference, the surveyor shall:

(A) fully inform the facility representative of the preliminary finding(s) of the inspection;

(B) give the person a reasonable opportunity to submit additional facts or other information to the surveyor in response to those findings; and

(C) identify any records that were duplicated.

(4) Written notice of findings.

(A) The surveyor shall:

(i) prepare and provide the facility administrator or his or her designee specific and timely written notice of the findings in accordance with subparagraphs (B) and (C) of this paragraph; or

(ii) if the findings result in a referral described in §117.81(a)(1) of this title (relating to Corrective Action Plan), submit a written summary of the findings to the medical review board for its review and recommendation for appropriate action by the department.

(B) If no deficiencies are found during an inspection, the department shall provide a statement indicating this fact.

(C) If the written notice of findings includes deficiencies, the department and the facility shall comply with the procedure set out in this subparagraph.

(i) The department shall provide the facility with a statement of the deficiencies at the time of the exit conference or within 10 working days after the exit conference.

(ii) The facility administrator or administrator's designee shall sign the written statement of deficiencies and return it to the department with a corrective action plan(s) for each deficiency no later than 10 working days of its receipt of the statement of deficiencies. The signature does not indicate the administrator's or designee's agreement with deficiencies stated on the form.

(iii) The facility shall come into compliance 60 calendar days prior to the expiration date of the license or no later than the dates designated in the corrective action plan(s), whichever comes first.

(iv) The requirements in clause (i) of this subparagraph do not apply if the surveyor's written notice of findings results in a referral to the medical review board as described in subparagraph (A)(ii) of this paragraph,

(v) A corrective action plan completion date shall not exceed 45 calendar days from the date the deficiency(ies) is cited (exit date of the survey).

(vi) The facility may challenge any deficiency cited after receipt of the statement of deficiencies. A challenge to a deficiency(ies) shall be in accordance with this subparagraph.

(I) The facility shall comply with clause (ii) of this subparagraph regardless of its intent to challenge the deficiency(ies).

(II) An initial challenge to a deficiency(ies) shall be submitted in writing no later than five working days from the facility's receipt of the statement of deficiencies to the Program Director, End Stage Renal Disease Licensing Section or his or her designee, Health Facility Licensing Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756-3199, (512) 834-6646.

(III) If the initial challenge is favorable to the department, the facility may request a review of the initial challenge by submitting a written request to the Director or his or her designee, Health Facility Licensing Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199. The facility shall submit its written request for review of the initial challenge no later than five working days of its receipt of the department's response to the initial challenge. The department will not accept or review any documents that were not submitted with the initial challenge. A determination by the Director of the Health Facility Licensing Division relating to a challenge to a deficiency(ies) is the department's final determination concerning the challenge.

(IV) The department shall respond to any written challenge submitted under subclause (II) or (III) of this clause no later than 15 working days from its receipt.

(V) The department shall determine if a written corrective action plan(s) is acceptable. If the corrective action plan(s) is not acceptable to the department, the department shall notify the facility by telephone and request that the corrective action plan(s) be modified and resubmitted no later than 10 working days from the facility's receipt of such request.

(VI) If the facility does not come into compliance by the required date of correction reflected on the corrective action plan(s), the department may:

(-a-) appoint a monitor as described in §117.81 of this title;

(-b-) appoint a temporary manager as described in §117.83 of this title (relating to Involuntary Appointment of Temporary Manager);

(-c-) propose to deny, suspend, or revoke the license in accordance with §117.84 of this title (relating to Disciplinary Action).

(-d-) assess an administrative penalty(ies) in accordance with §117.85 of this title (relating to Administrative Penalties); or

(-e-) take all of the actions described in items (-a-) - (-d-) of this subclause.

(VII) The department shall verify the correction of deficiencies by mail or on-site inspection.

(VIII) Acceptance of a corrective action plan does not preclude the department from taking enforcement action as appropriate under §§117.83, 117.84, or 117.85 of this title.

(IX) The department shall refer issues and complaints relating to the conduct of or action(s) by licensed health care professionals to the appropriate licensing board(s).

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 March 22, 1999.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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Subchapter C. Minimum Standards for Design and Space, Equipment, Water Treatment and Reuse, and Sanitary and Hygienic Conditions

25 TAC §§117.32-117.34

The amendments are adopted under the Health and Safety Code, §251.002, which provides the Board of Health (board) with the authority to adopt fees in amounts reasonable and necessary to defray the cost of administering the Health and Safety Code, Chapter 251; §251.003 which provides the board with the authority to adopt rules to implement the statute, including requirements for the issuance, renewal, denial, suspension, and revocation of a license to operate an ESRD facility; §251.014 which provides the board with the authority to adopt rules to contain minimum standards to protect the health and safety of a patient in an ESRD facility; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

§117.34. Sanitary Conditions and Hygienic Practices.

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

(d) Hepatitis B prevention.

(1) (No change.)

(2) Prevention requirements concerning patients.

(A) (No change.)

(B) Serologic screening of patients.

(i) A patient new to dialysis or returning to a facility after extended hospitalization or absence of 30 calendar days or longer shall have been screened for HBsAg within one month before or at the time of admission to the facility or have a known anti-HBs status of at least 10 milli-international units per milliliter no more than 12 months prior to admission. The facility shall document how this screening requirement is met.

(ii) (No change.)

(C) Isolation procedures for the HBsAg-positive patient.

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

(iv) A patient new to dialysis or returning to a facility after extended hospitalization or absence of 30 calendar days or longer and who is admitted for treatment before results of HBsAg or anti-HBs testing are known shall undergo treatment as if the HBsAg test results were potentially positive, except that such a patient shall not be treated in the HBsAg isolation room, area, or machine.

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

(e) (No change.)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter D. Minimum Standards for Patient Care and Treatment

25 TAC §§117.41, 117.43-117.45

The amendments are adopted under the Health and Safety Code, §251.002, which provides the Board of Health (board) with the authority to adopt fees in amounts reasonable and nec-

essary to defray the cost of administering the Health and Safety Code, Chapter 251; §251.003 which provides the board with the authority to adopt rules to implement the statute, including requirements for the issuance, renewal, denial, suspension, and revocation of a license to operate an ESRD facility; §251.014 which provides the board with the authority to adopt rules to contain minimum standards to protect the health and safety of a patient in an ESRD facility; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

§117.43. Provision and Coordination of Treatment and Services.

(a) Patient rights. Each facility shall adopt, implement, and enforce policies and procedures appropriate to the patient population served which ensure each patient is:

(1)-(11) (No change.)

(12) transferred only for medical reasons, for the patient's welfare or that of other patients or staff members, or for nonpayment of fees. A patient shall be given 30 calendar days advance notice to ensure orderly transfer or discharge, except in cases where the patient presents an immediate risk to others;

(13) provided protection from abuse, neglect, or exploitation as those terms are defined in §1.204 of this title (relating to Abuse, Neglect, and Exploitation Defined);

(14) provided information regarding advance directives and allowed to formulate such directives to the extent permitted by law. This includes documents executed under the Natural Death Act, Health and Safety Code, Chapter 672; Civil Practice and Remedies Code, Chapter 135 concerning durable power of attorney for health care; and Health and Safety Code, Chapter 674 concerning out-of-hospital do-not-resuscitate;

(15) aware of the mechanisms and agencies to express a complaint against the facility without fear of reprisal or denial of services. A facility shall provide to each individual who is admitted to the facility a written statement that informs the individual that a complaint against the facility may be directed to the department. The statement shall be provided at the time of admission and shall advise the patient that registration of complaints may be filed with the director, Health Facility Licensing Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199, 1-800-228-1570. Correctional institutions shall not be required to include the 1-800 number in information provided to patients in these facilities; and

(16) fully informed of the rights listed in this subsection, the responsibilities established by the facility, and all rules and regulations governing patient conduct and responsibilities. A written copy of the patient's rights and responsibilities shall be provided to each patient or the patient's legal representative upon admission and a copy shall be posted with the facility license certificate.

(b) (No change.)

(c) Emergency preparedness.

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

(6) A written disaster preparedness plan specific to each facility shall be developed and in place. The plan shall be based on an assessment of the probability and type of disaster in each region and the local resources available to the facility. The plan shall include procedures designed to minimize harm to patients and staff along with ensuring safe facility operations. The plan and in-service programs for patients and staff shall include provisions or procedures for responsibility of direction and control, communications, alerting and warning systems, evacuation, and closure. Each staff member employed by or under contract with the facility shall be able to demonstrate their role or responsibility to implement the facility's disaster preparedness plan.

(7) A facility shall have an emergency lighting system capable of providing sufficient illumination to allow safe discontinuation of treatments and safe evacuation from the building. Battery pack systems shall be maintained and tested quarterly. If a facility maintains a back-up generator, the generator must be installed, tested and maintained in accordance with the National Fire Protection Association 110, Standard for Emergency and Standby Power Systems, 1993 Edition (NFPA 110), published by the National Fire Protection Association.

(8) A facility shall develop and post a telephone number listing specific to the facility equipment and locale to assist staff in contacting mechanical and technical support in the event of an emergency.

(d) Medication storage and administration.

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

(3) All verbal or telephone orders shall be received by a licensed nurse or physician assistant. Orders relating to a specific service (e.g. dietary services), may be received by the licensed professional responsible for providing the service (e.g. dietitian) and countersigned by the physician within 15 calendar days.

(4)-(8) (No change.)

(e) Nursing services.

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

(7) Sufficient direct care staff shall be on-site to meet the needs of the patients.

(A) The staffing level for a facility shall not exceed four patients per licensed nurse or patient care technician per patient shift. During treatment of eight or more patients, the licensed nurse functioning in the charge role shall not be included in this ratio.

(B) For pediatric dialysis patients, one licensed nurse shall be provided on- site for each patient weighing less than ten kilograms and one licensed nurse provided on-site for every two patients weighing from ten to 20 kilograms.

(8)-(9) (No change.)

(10) The initial patient evaluation shall be initiated by a licensed nurse functioning in the charge role or a registered nurse at the time of the first treatment in the facility and completed by a registered nurse within the first three treatments.

(f)-(i) (No change.)

(j) Medical services.

(1) (No change.)

(2) Medical staff.

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

(C) At a minimum, each patient receiving dialysis in the facility shall be seen by a physician on the medical staff once every two weeks during the patient's treatment time. Home patients shall be seen by a physician at least every three months. The record of these contacts shall include evidence of assessment for new and

recurrent problems and review of dialysis adequacy, monthly for in-facility patients and quarterly for home patients.

(D) (No change.)

(E) Orders for treatment shall be in writing and signed by the prescribing physician. Routine orders for treatment shall be updated at least annually.

(i) Orders for hemodialysis treatment shall include length of treatment, dialyzer, blood flow rate, dialysate composition, target weight, medications including heparin, and, as needed, specific infection control measures.

(ii) Orders for peritoneal dialysis treatment shall include fill volume(s), number of exchanges, dialysate concentrations, catheter care, medications, and, as needed, specific infection control measures.

(F) (No change.)

(k) (No change.)

(l) Temporary and transient admissions.

(1) Temporary admissions. If a facility dialyzes a patient who is normally dialyzed in another local facility, the referring and receiving facilities shall meet the requirements in this paragraph.

(A) The individual to be treated by the receiving facility must be a patient of a physician who is a member of the medical staffs of the referring and receiving facilities.

(B) The referring and receiving facilities shall establish, implement, and enforce written policies and procedures for communication of medical information and transfer of clinical records between facilities.

(C) The receiving facility shall continuously evaluate staffing levels and utilize this information in determining whether to accept a temporary admission for treatment.

(D) The receiving facility shall obtain the information described in §117.45(e) of this title (relating to Clinical Records) prior to providing dialysis. However, if the referring facility is closed when the patient's need for dialysis treatment is identified, the receiving facility may provide dialysis with, at a minimum, the following information:

(i) orders for treatment;

(ii) hepatitis B status;

(iii) medical justification by the physician ordering treatment that the patient's need for dialysis outweighs the need for the additional clinical information set out in §117.45(e) of this title.

(E) In the event a temporary patient's hepatitis status is unknown, the patient may undergo treatment as if the HBsAg test results were potentially positive, except that such a patient shall not be treated in the HBsAg isolation room, area, or machine.

(2) Transient admissions. If a facility dialyzes a patient who is normally dialyzed in a distant facility, the facility shall meet the requirements in this paragraph.

(A) The facility shall continuously evaluate staffing levels and utilize this information in determining whether to accept a transient patient for treatment.

(B) The facility shall obtain the information described in §117.45(e) of this title (relating to Clinical Records) prior to providing dialysis. However, if the transient patient arrives unannounced, the facility may provide dialysis with, at a minimum, the following information:

(i) evidence of evaluation of the patient by a physician on the staff of the facility;

(ii) orders for treatment;

(iii) hepatitis B status;

(iv) medical justification by the physician ordering treatment that the patient's need for dialysis outweighs the need for the additional clinical information set out in §117.45(e) of this title.

(C) In the event a transient patient's hepatitis status is unknown, the patient may undergo treatment as if the HBsAg test results were potentially positive, except that such a patient shall not be treated in the HBsAg isolation room, area, or machine.

(m) Laboratory services. A facility that provides laboratory services shall comply with the requirements of Federal Public Law 100-578, Clinical Laboratory Improvement Amendments of 1988 (CLIA 1988). CLIA 1988 applies to all facilities that examine human specimens for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings.

(n) Illegal remuneration prohibited. A facility shall not violate the Health and Safety Code, §161.191, et seq. concerning the prohibition on illegal remuneration for the purpose of securing or soliciting patients or patronage.

(o) Do-not-resuscitate orders. The facility shall comply with the Health and Safety Code, Chapter 674 concerning out-of-hospital do-not-resuscitate orders.

(p) Audits of billing. A facility shall develop, implement, and enforce a compliance policy for monitoring its receipt and expenditure of state or federal funds.

(q) Student health care professionals. If the facility has a contract or agreement with an accredited school of health care to use their facility for a portion of the students' clinical experience, those students may provide care under the following conditions.

(1) Students may be used in facilities, provided the instructor gives class supervision and assumes responsibility for all student activities occurring within the facility. If the student is licensed (e.g., a licensed vocational nurse attending a registered nurse program for licensure as a registered nurse) the facility shall ensure that the administration of any medication(s) is within the student's licensed scope of practice.

(2) A student may administer medications only if:

(A) on assignment as a student of his or her school of health care; and

(B) the instructor is on the premises and immediately supervises the administration of medication by an unlicensed student and the administration of such medication is within the instructor's licensed scope of practice.

(3) Students shall not be used to fulfill the requirement for administration of medications by licensed personnel.

(4) Students shall not be considered when determining staffing levels required by the facility.

(r) Complaint resolution. A facility shall adopt, implement, and enforce procedures for the resolution of complaints relevant to quality of care or services rendered by licensed health care professionals and other members of the facility staff, including

contract services or staff. The facility shall document the receipt and the disposition of the complaint. The investigation and documentation must be completed within 30 calendar days after the facility receives the complaint, unless the facility has and documents reasonable cause for a delay.

§117.44. Qualifications of Staff.

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

(c) Nursing staff.

(1) (No change.)

(2) Each nurse assigned charge responsibilities shall be a registered nurse and have six months experience in hemodialysis obtained within the last 24 months. An RN who holds a current certification from a nationally recognized board in nephrology nursing or hemodialysis may substitute the certification for the six months experience in dialysis obtained within the last 24 months. The responsibilities of an RN functioning as a charge nurse shall include:

(A) making daily assignments based on patient needs;

(B) providing immediate supervision of direct patient care;

(C) making patient assessments when indicated; and

(D) communicating with the physician(s), social worker(s) and dietitian(s).

(3) The following provisions create an exception to the requirement that the licensed nurse functioning in the charge role be a registered nurse.

(A) A licensed vocational nurse (LVN) who meets one of the following requirements may function in the charge role:

(i) the LVN was employed in a facility as of September 1, 1996, and had two years full time experience functioning in the charge role in a facility prior to September 1, 1996; or

(ii) the LVN has two years full time experience in hemodialysis, is certified as a hemodialysis nurse by a nationally recognized board (e.g. Board of Nephrology Nurse and Technician Examination), has completed a facility based training program for the charge role, and has demonstrated competence in the charge role.

(B) The responsibilities of an LVN functioning in the charge role, as delegated by the medical director, shall include:

(i) making daily assignments based on protocols to allow change of assignments based on patient needs;

(ii) providing immediate supervision of the direct patient care provided by dialysis technicians;

(iii) monitoring patients for changes in condition and notifying a RN or physician of such changes;

(iv) communicating with the physician(s), social worker(s) and dietitian(s).

(C) A LVN with two years full time experience in dialysis may function in the charge role in the temporary absence of the nurse functioning in the charge role at the facility.

(D) If a LVN is functioning in the charge role, in order to provide the direct supervision of dialysis technicians required by the statute, the facility's full time supervising nurse shall establish written protocols addressing the supervision of the technicians. The implementation of the protocol shall be considered to constitute direct supervision of the technicians by the RN. In the alternative, an RN who is the instructor of the facility's dialysis technician course, another RN, or a physician may provide onsite, direct supervision of the dialysis technicians.

(E) If a facility uses LVNs in the charge role, there must be written protocols specific to the facility to guide actions to be taken by the LVN functioning in the charge role in the event a patient's condition changes during treatment. These protocols must be approved by the medical director and be congruent with the state practice acts for registered nurses and licensed vocational nurses.

(F) In accordance with Title 22, Texas Administrative Code (TAC), §§217.12 relating to designations for registered nurse/ titles deemed misleading, an LVN functioning in the charge role may not be titled a "charge nurse."

(4) (No change.)

(d) (No change.)

(e) Social services staff. Each social worker shall:

(1) be licensed as a social worker under the Human Resources Code, Chapter 50, and hold a masters degree in social work from a graduate school of social work accredited by the Council on Social Work Education; or

(2) (No change.)

(f) Technical staff. A facility shall have the technical staff as described in this subsection. The facility's technical staff may be one or more individuals (including nursing staff) employed by or under contract with the facility as long as the individual(s) meets the minimum qualifications for each required level of responsibility as described in this subsection.

(1) All technical staff. Only individuals qualified by training, education, or experience may operate, repair, or replace components of the systems utilized in providing dialysis treatment or reprocessing dialyzers.

(A) Technical staff shall have the following minimum education, training and experience and documentation of such education, training, and experience shall be maintained on file in the facility:

(i) high school diploma or equivalent. For technical staff employed by the facility for two or more years prior to the effective date of these rules, this requirement is waived; and

(ii) training or experience in one or more of the following:

(I) completion of a college based technical dialysis program;

(II) completion of the didactic training and education requirement for patient care technicians set out in §117.62(a) and (b) of this title (relating to Training Curricula and Instructors);

(III) current certification in technical aspects of dialysis by a nationally recognized testing organization; or

(IV) 12 months experience in dialysis within the last two years.

(B) The technical staff trainee(s) shall pass a written competency examination, demonstrate skills related to the required level of responsibility and be certified by the medical director as competent to perform their duties.

(C) The technical staff shall demonstrate competency for the required level of responsibility through written and skills

testing annually. Evidence of competency shall be documented in writing and maintained in the personnel file.

(D) The technical staff shall complete a minimum of five hours of continuing education with a technical or end stage renal disease focus annually. The continuing education may be obtained through informal or formal education programs and shall be documented in facility files.

(2) Technical supervisory staff. The technical supervisor is responsible for the supervision of technical services. The technical supervisor shall meet the education, training, and experience requirements described in this paragraph.

(A) The technical supervisor shall meet the requirements in paragraph (1) of this subsection.

(B) At a minimum, the technical supervisor shall demonstrate competency in equipment maintenance and repair; mechanical service; water treatment systems; and reprocessing of hemodialyzers (if applicable).

(i) Prior to initially assuming technical supervisory responsibility, a technical supervisor trainee shall successfully complete the facility's orientation and training course(s) as established for each technical area.

(ii) The training course(s) shall be approved by the medical director and follow a written curriculum with stated objectives. The curriculum shall include all items noted in paragraphs (3)(B)(ii), (4)(B), and (5)(A) of this subsection.

(3) Water treatment system staff.

(A) Facility staff responsible for the water treatment system shall demonstrate understanding of the risks to patients of exposure to water which has not been treated so as to remove contaminants and impurities. Documentation of training to assure safe operation of the water treatment system shall be maintained for each individual who operates (regularly or intermittently) the system.

(B) The staff responsible for the water treatment system shall meet the education, training, and experience requirements described in paragraph (1) of this subsection and shall demonstrate competency by:

(i) successful completion of the facility training course specific to water treatment and related tasks. The training course shall be approved by the medical director and follow a written curriculum with stated objectives;

(ii) completion of a training curriculum which includes the following minimum components:

(I) introduction to end stage renal disease;

(II) principles of hemodialysis;

(III) principles of infection control and basic microbiology for water treatment systems, machines, and sampling techniques;

(IV) rationale for water treatment for dialysis;

(V) risks and hazards of the use of unsafe water for dialysis;

(VI) current water standards;

(VII) source water characteristics;

(VIII) communication with source water agencies and water treatment vendors;

(IX) selection of water treatment equipment;

(X) water purification equipment to include filtration, carbon adsorption and reverse osmosis;

(XI) ion exchange to include softeners and deionizers;

(XII) water distribution system and other equipment specific to the facility;

(XIII) monitoring system performance to include on-line and off-line monitoring, aseptic sample collection, incubation of samples and interpretation of results;

(XIV) evaluation of water treatment component performance to include filters, activated carbon adsorption beds, reverse osmosis, and ion exchange; and

(XV) evaluation of system performance to include monitoring schedules and review of system failures;

(iii) confirmation of the ability to distinguish all primary colors; and

(iv) successful completion of the facility's orientation and training course as established for the water treatment system technician trainee prior to the trainee's initial assumption of responsibility.

(4) Equipment maintenance and repair staff. The staff responsible for equipment maintenance and repair shall meet the education, training, and experience requirements described in paragraph (1) of this subsection and shall demonstrate competency by:

(A) successful completion of the facility training course outlined in paragraph (3) of this subsection, relating to water treatment systems;

(B) successful completion of a training curriculum which includes the following minimum components:

(i) prevention of transmission of hepatitis through dialysis equipment;

(ii) safety requirements of dialysate delivery systems;

(iii) repair and maintenance of dialysis and other equipment specific to the facility;

(iv) electrical safety, including lockout or tagout;

(v) emergency equipment maintenance;

(vi) building maintenance;

(vii) fire safety and prevention requirements; and

(viii) emergency response procedures; and

(C) successful completion of a written competency exam and demonstration of skills specific to the facility's mechanical and equipment service and water treatment and distribution systems.

(5) Reprocessing staff. The staff responsible for reprocessing hemodialyzers and other supplies shall meet the education, training, and experience requirements described in paragraph (1) of this subsection and shall demonstrate competency by:

(A) successful completion of a training curriculum which includes the components in the American National Standard, Reuse of Hemodialyzers, 1993 Edition, §5.2.1 published by the Association for the Advancement of Medical Instrumentation, 3330 Washington Boulevard, Suite 400, Arlington, Virginia 22201; and

(B) successful completion of a written competency exam which includes return demonstration of skills specific to reprocessing of hemodialyzers and other dialysis supplies.

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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Susan K. Steeg
General Counsel
Texas Department of Health
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25 TAC §117.46

The new section is adopted under the Health and Safety Code, §251.002, which provides the Board of Health (board) with the authority to adopt fees in amounts reasonable and necessary to defray the cost of administering the Health and Safety Code, Chapter 251; §251.003 which provides the board with the authority to adopt rules to implement the statute, including requirements for the issuance, renewal, denial, suspension, and revocation of a license to operate an ESRD facility; §251.014 which provides the board with the authority to adopt rules to contain minimum standards to protect the health and safety of a patient in an ESRD facility; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

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 E. Dialysis Technicians

25 TAC §117.65

The amendment is adopted under the Health and Safety Code, §251.002, which provides the Board of Health (board) with the authority to adopt fees in amounts reasonable and necessary to defray the cost of administering the Health and Safety Code, Chapter 251; §251.003 which provides the board with the authority to adopt rules to implement the statute, including requirements for the issuance, renewal, denial, suspension, and revocation of a license to operate an ESRD facility; §251.014 which provides the board with the authority to adopt rules to contain minimum standards to protect the health and safety of a patient in an ESRD facility; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

§117.65. Prohibited Acts.

(a) (No change.)

(b) Performance of the following acts by a dialysis technician who is not a licensed vocational nurse is prohibited:

(1) initiation or discontinuation of dialysis via a central catheter, manipulation of a central catheter, or dressing changes for a central catheter;

(2)-(3) (No change.)

(4) performance of non-access site arterial puncture;

(5) acceptance of physician orders; or

(6) provision of hemodialysis treatment to pediatric patients under 14 years of age or under 35 kilograms.

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 F. Corrective Action Plan and Enforcement

25 TAC §§117.81-117.86

The amendment and new sections are adopted under the Health and Safety Code, §251.002, which provides the Board of Health (board) with the authority to adopt fees in amounts reasonable and necessary to defray the cost of administering the Health and Safety Code, Chapter 251; §251.003 which provides the board with the authority to adopt rules to implement the statute, including requirements for the issuance, renewal, denial, suspension, and revocation of a license to operate an ESRD facility; §251.014 which provides the board with the authority to adopt rules to contain minimum standards to protect the health and safety of a patient in an ESRD facility; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

§117.84. Disciplinary Action.

(a) The Texas Department of Health (department) may deny, suspend, or revoke a license if the applicant or facility:

(1) fails to comply with any provision of the statute;

(2) fails to comply with any provision of this chapter;

(3) commits fraud, misrepresentation, or concealment of a material fact on any documents required to be submitted to the

department or required to be maintained by the facility pursuant to this chapter;

(4) aids, abets, or permits the commission of an illegal act; or

(5) fails to comply with an order of the commissioner of health or another enforcement procedure under the statute.

(b) The department may deny a license if the applicant or licensee fails to provide the required license fee, application or renewal information.

(c) The department may suspend or revoke an existing valid license or disqualify a person from receiving a license because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a licensed facility.

(1) In determining whether a criminal conviction directly relates, the department shall consider the provisions of Texas Civil Statutes, Article 6252-13c.

(2) The following felonies and misdemeanors directly relate because these criminal offenses indicate an inability or a tendency for the person to be unable to own or operate a facility:

(A) a misdemeanor violation of the statute;

(B) a conviction relating to deceptive business practices;

(C) a misdemeanor or felony involving moral turpitude;

(D) a misdemeanor of practicing any health-related profession without a required license;

(E) a conviction under any federal or state law relating to drugs, dangerous drugs, or controlled substances;

(F) an offense under the Texas Penal Code, Title 5, involving a patient or a patient of any health care facility, a home and community support services agency, or a health care professional; or

(G) other misdemeanors and felonies which indicate an inability or tendency for the person to be unable to own or operate a facility if action by the department will promote the intent of the statute, this chapter, or Texas Civil Statutes, Article 6252-13c.

(3) Upon a licensee's felony conviction, felony probation revocation, revocation or parole, or revocation of mandatory supervision, the license shall be revoked.

(d) If the department proposes to deny, suspend, or revoke a license, the department shall notify the facility by certified mail, return receipt requested, or personal delivery of the reasons for the proposed action and offer the facility an opportunity for a hearing.

(1) The facility shall request a hearing within 30 calendar days of receipt of the notice. Receipt of the notice is presumed to occur on the tenth calendar day after the notice is mailed to the last address known to the department unless another date is reflected on a United States Postal Service return receipt.

(2) The request for a hearing shall be in writing and submitted to the Director, Health Facility Licensing Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199.

(3) A hearing shall be conducted pursuant to the Administrative Procedure Act, Texas Government Code, Chapter 2001, and the department's formal hearing procedures in Chapter 1 of this title (relating to Texas Board of Health).

(4) If the facility does not request a hearing in writing within 30 calendar days of receipt of the notice, the facility is deemed to have waived the opportunity for hearing and the proposed action shall be taken.

(5) If the facility fails to appear or be represented at the scheduled hearing, the facility has waived the right to a hearing and the proposed action shall be taken.

(e) If the department suspends a license, the suspension shall remain in effect until the department determines that the reason for suspension no longer exists. An authorized representative of the department shall investigate prior to making a determination.

(1) During the time of suspension, the suspended license holder shall return the license to the department.

(2) If a suspension overlaps a renewal date, the suspended license holder shall comply with the renewal procedures in this chapter; however, the department may not renew the license until the department determines that the reason for suspension no longer exists.

(f) If the department revokes or does not renew a license, a person may reapply for a license by complying with the requirements and procedures in this chapter at the time of reapplication. The department may refuse to issue a license if the reason for revocation or nonrenewal continues to exist.

(g) Upon revocation or nonrenewal, a license holder shall return the license to the department.

§117.85. Administrative Penalties.

(a) Under §§251.066 - 251.070 of the statute, the Texas Department of Health (department) may assess an administrative penalty against a person who violates the statute or this chapter.

(b) The penalty may not exceed $1,000 for each violation. Each day of a continuing violation constitutes a separate violation.

(c) In determining the amount of an administrative penalty assessed under this section, the department shall consider:

(1) the seriousness of the violation;

(2) the history of previous violations;

(3) the amount necessary to deter future violations;

(4) efforts made to correct the violation; and

(5) any other matters that justice may require.

(d) All proceedings for the assessment of an administrative penalty are subject to the Administrative Procedure Act, Government Code, Chapter 2001.

(e) If after investigation of a possible violation and the facts surrounding that possible violation the department determines that a violation has occurred, the department shall give written notice of the violation to the person alleged to have committed the violation. The notice shall include:

(1) a brief summary of the alleged violation;

(2) a statement of the amount of the proposed penalty, based on the factors listed in subsection (c)(2) of this section. This statement shall be mailed to the facility no later than 90 working days after the investigation is completed (exit date); and

(3) a statement of the person's right to a hearing on the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.

(f) Not later than the 20th calendar day after the date the notice is received, the person notified may accept the determination of the department made under this section, including the recommended penalty, or make a written request for a hearing on that determination.

(g) If the person notified of the violation accepts the determination of the department, the commissioner shall issue an order approving the determination and ordering that the person pay the recommended penalty.

(h) If the person notified fails to respond in a timely manner to the notice or if the person requests a hearing, the commissioner's designee shall:

(1) set a hearing;

(2) give written notice of the hearing to the person; and

(3) designate a hearings examiner to conduct the hearing. The hearings examiner shall make findings of fact and conclusions of law and shall promptly issue to the commissioner a proposal for decision as to the occurrence of the violation and a recommendation as to the amount of the proposed penalty if a penalty is determined to be warranted.

(i) Based upon the findings of fact and conclusions of law and the recommendation of the hearings examiner, the commissioner by order may find that a violation has occurred and may assess a penalty, or may find that no violation has occurred. The commissioner or the commissioner's designee shall give notice of the commissioner's order to the person notified. The notice shall include:

(1) separate statements of the findings of fact and conclusions of law;

(2) the amount of any penalty assessed; and

(3) a statement of the right of the person to judicial review of the commissioner's order.

(j) Not later than the 30th calendar day after the date the decision is final, the person shall:

(1) pay the penalty in full;

(2) pay the amount of the penalty and file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty; or

(3) without paying the amount of the penalty, file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty. Within the 30-day period, a person who acts under this paragraph may:

(A) stay enforcement of the penalty by:

(i) paying the amount of the penalty to the court for placement in an escrow account; or

(ii) giving to the court a supersedeas bond that is approved by the court for the amount of the penalty and that is effective until all judicial review of the board's order is final; or

(B) request the court to stay enforcement of the penalty by:

(i) filing with the court a sworn affidavit of the person stating that the person is financially unable to pay the amount of the penalty and is financially unable to give the supersedeas bond; and

(ii) giving a copy of the affidavit to the department by certified mail.

(k) If the department receives a copy of an affidavit under subsection (j)(3)(B) of this section, the department may file with the court, within five calendar days after the date the copy is received, a contest to the affidavit.

§117.86. Recovery of Costs.

(a) The Texas Department of Health (department) may assess reasonable expenses and costs against a person in a administrative hearing if, as a result of the hearing, the person's license is denied, suspended, or revoked or if administrative penalties are assessed against the person.

(b) The person shall pay expenses and costs assessed under this section not later than the 30th calendar day after the date of a board order requiring the payment of expenses and costs is final.

(c) The department may refer the matter to the attorney general for collection of the expenses and costs.

(d) If the attorney general brings an action against a person under §251.063 or §251.065 of the statute or to enforce an administrative penalty assessed, and an injunction is granted against the person or the person is found liable for a civil or administrative penalty, the attorney general may recover, on behalf of the attorney general and the department, reasonable expenses and costs.

(e) For purposes of this section, "reasonable expenses and costs" include expenses incurred by the department and the attorney general in the investigation, initiation, or prosecution of an action, including reasonable investigative costs, court costs, attorney's fees, witness fees, and deposition expenses.

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 F. Enforcement

25 TAC §§117.82-117.85

The repeal is adopted under the Health and Safety Code, §251.002, which provides the Board of Health (board) with the authority to adopt fees in amounts reasonable and necessary to defray the cost of administering the Health and Safety Code, Chapter 251; §251.003 which provides the board with the authority to adopt rules to implement the statute, including requirements for the issuance, renewal, denial, suspension, and revocation of a license to operate an ESRD facility; §251.014 which provides the board with the authority to adopt rules to contain minimum standards to protect the health and safety of a patient in an ESRD facility; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

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 157. Emergency Medical Care

Subchapter F. Advisory Committee

25 TAC §157.101

The Texas Department of Health (department) adopts an amendment to §157.101 concerning the Emergency Health Care Advisory Committee (committee) with changes to the proposed text as published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12083). The committee provides assistance to the Texas Board of Health (board) and the department on the need for emergency medical services (EMS) in the state including the specialized needs of pediatric patients, and hospital administrative and operational considerations relating to EMS/trauma systems development and facility designation.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules to establish advisory committees. The rules must state the purpose and composition of the committee, describe the tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 1995, the board established a rule relating to the Emergency Health Care Advisory Committee. The rule states that the committee will automatically be abolished on May 1, 1999. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until May 1, 2003.

This section amends provisions relating to the operation of the committee. Specifically, language is revised to reference the Government Code; to continue the committee until May 1, 2003; to address changes to the composition of the committee; to clarify that members holdover until their replacement is appointed; to require that the presiding officer and the assistant presiding officer of the committee will be selected by the chairman of the board for a term of two years; to allow a temporary vacancy in the office of assistant presiding officer to be filled by vote of the committee until appointment by the chairman of the board occurs; to clarify that the committee is prohibited from holding an executive session (closed meeting) for any reason; to clarify that the committee and its members may not participate in legislative activity in the name of the board, the department, or the committee except with certain approval; to require the committee's annual report in May rather than January; and to reference reimbursement of a member's expenses if authorized by the General Appropriations Act or budget execution process. These changes will clarify procedures for the committee and emphasize the advisory nature of the committee.

The department is making the following minor changes due to staff comments to clarify the intent and improve the accuracy of the section.

Change: Concerning §157.101(f), proposed language referencing existing members continuing to serve was deleted since the addition of a new consumer member will not affect the service by the existing members.

Change: Concerning §157.101(g), the language was revised to clarify that members holdover past the expiration of their term until their successor is appointed.

The following comments were received concerning the proposed amendment. Following each comment is the department's response and any resulting change(s).

Comment: Concerning proposed §157.101(f)(1)(B), there were 11 comments supporting the concept of a legislated governor-appointed advisory committee to the board on EMS and stating that the proposed amendment does not address the issue of providing adequate comment from the prehospital EMS community to the board. The commenters went on to request that a separate EMS Advisory Committee be established by the board because the current committee structure does not include sufficient prehospital EMS representation.

Response: The department disagrees. Prior to establishment of the committee in 1995, the board was advised by three separate committees - the Trauma Technical Advisory Committee, the Pediatric EMS Advisory Committee for Children, and the Texas EMS Advisory Council. The functions of the three committees were consolidated into one committee to promote efficiency, decrease duplication, promote objectivity, and increase statewide coordination and networking. The membership of the one committee varied from the memberships of the three committees because of the inability to have an efficient single committee with a representative for every level of EMS certificate or other interested parties and in order to stress the importance of consumer input. To address the concerns of commenters, the board expressly required in the 1995 rule that three standing subcommittees were established - the pediatric subcommittee, the trauma subcommittee, and the EMS subcommittee. The board is continuing this structure in this adopted rule. Since subcommittees may include noncommittee members, additional prehospital EMS providers may be on the standing EMS subcommittee or any other standing committee. A new advisory committee for prehospital EMS providers is not necessary. In addition any person, including any prehospital EMS provider, may provide comments to the committee at each meeting, even if the individual is not a committee member.

The legislated - governor appointed EMS committee recommended by the Sunset Commission will be the subject of proposed legislation during the 76th legislative session. The department will be making revisions to its committee structure if the legislation is enacted. No change was made as a result of these comments.

Comment: Concerning proposed §157.101(f)(1)(B)(viii), there was one comment requesting that the wording a "facility" administrator be changed to a "hospital" administrator.

Response: The department disagrees that the term should be changed to "hospital' since that would encompass any hospital administrator. The department has revised subsection (f)(2)(H) to state that the member shall be a designated trauma facility administrator which is the appropriate category of membership specifically interested in EMS service.

Comment: Concerning proposed §157.101(f)(1)(B)(viii), there were two comments that representation of hospitals was insufficient, particularly rural hospitals.

Response: The department disagrees because the various categories of persons involved in EMS are already represented on the committee with a reasonable limit of 15 on the total number of members. In making appointments the board does consider the nominee's representation of an urban or rural area. No change was made as a result of this comment.

Comment: Concerning §157.101(h), there was one comment that the committee's presiding officers should not be appointed by the board chair, but elected by the committee, because the committee members know better who would be the best persons to hold those positions.

Response: The department disagrees because the committee is established and the membership appointed by the board to advise the board on EMS and trauma system issues. The leadership of the committee is extremely important to assure that the board's goals are being addressed appropriately and the board feels that it should not delegate the responsibility for choosing that leadership. No change was made as a result of this comment.

The following organizations, associations, or provider groups commented on the amendment: Emergency Health Care Advisory Committee; EMS Association of Texas; Texas Ambulance Association; Advanced Ambulance Services, Inc.; Brady-McCulloch County EMS; Gaddy's Ambulance Service, Inc.; Life Ambulance Service, Inc.; LifeNet, Inc.; Littlefield EMS; MedCare EMS, Inc.; Plainview Fire Department; and Washington County EMS. The comments received were generally favorable of the rule as proposed; however the commenters had specific concerns and offered suggestions for change.

The amendment is adopted under the Health and Safety Code, §11.016, which allows the board to establish advisory committees; the Government Code, Chapter 2110, which sets standards for the evaluation of advisory committees by the agencies for which they function; and the Health and Safety Code, §12.001, which provides the board with authority to adopt rules for the performance of every duty imposed by law upon the board, the department, and the commissioner of health.

§157.101. Emergency Health Care Advisory Committee.

(a) The committee. An advisory committee shall be appointed under and governed by this section.

(1) (No change.)

(2) The advisory committee is established under the provisions of the Health and Safety Code, §11.016, which states the Texas Board of Health (board) may appoint advisory committees.

(b) Applicable law. The committee is subject to the Government Code, Chapter 2110, concerning state agency advisory committees.

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

(e) Review and duration. By May 1, 2003, the board will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

(f) Composition. The committee shall be composed of 15 members appointed by the board as follows:

(1) five shall be consumer members; and

(2) ten shall be non-consumer members as follows:

(A) an emergency physician;

(B) a provider of prehospital emergency medical services;

(C) an emergency medical technician (EMT), emergency medical technician- intermediate (EMT-I) or emergency medical technician-paramedic (EMT-P);

(D) an emergency nurse;

(E) a pediatrician;

(F) a trauma surgeon;

(G) a trauma nurse;

(H) a designated trauma facility administrator;

(I) a fire department provider; and

(J) an EMS medical director.

(g) Terms of office. The term of office of each member shall be six years. Members shall serve after expiration of their term until their successor is appointed.

(1) Members shall be appointed for staggered terms so that the terms of a substantially equivalent number of members will expire on December 31st of each even-numbered year.

(2) (No change.)

(h) Officers. The chairman of the board shall appoint a presiding officer and an assistant presiding officer to begin serving on May 1 of each odd-numbered year.

(1) Each officer shall serve until April 30th of each odd-numbered year. Each officer may holdover until his or her replacement is appointed by the chairman of the board.

(2) The presiding officer:

(A) shall preside at all committee meetings at which he or she is in attendance;

(B) shall call meetings in accordance with this section;

(C) shall appoint subcommittees of the committee as necessary;

(D) shall cause proper reports to be made to the board; and

(E) may serve as an ex-officio member of any subcommittee of the committee.

(3) The assistant presiding officer shall perform the duties of the presiding officer in case of the absence or disability of the presiding officer. If the office of presiding officer becomes vacant, the assistant presiding officer will serve until a successor is appointed to complete the unexpired portion of the term of the office of presiding officer.

(4) If the office of assistant presiding officer becomes vacant, it may be filled temporarily by vote of the committee until a successor is appointed by the chairman of the board.

(5)-(6) (No change.)

(7) The presiding officer and assistant presiding officer serving on January 1, 1999, will continue to serve until the chairman of the board appoints their successors.

(i) Meetings. The committee shall meet at least twice annually and as necessary to conduct committee business.

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

(3) The committee is not a "governmental body" as defined in the Open Meeting Act. However, in order to promote public participation, each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551, with the exception that the provisions allowing executive sessions shall not apply.

(4)-(7) (No change.)

(j) Attendance. Members shall attend committee meetings as scheduled. Members shall attend meetings of subcommittees to which the member is assigned.

(1)-(3) (No change.)

(k)-(m) (No change.)

(n) Statement by members.

(1) The board, the department, and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the board, department, or committee.

(2) The committee and its members may not participate in legislative activity in the name of the board, the department, or the committee except with approval through the department's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(o) Reports to the board. The committee shall file an annual written report with the board.

(1) The report shall list:

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

(E) the status of any rules which were recommended by the committee to the board; and

(F) anticipated activities of the committee for the next year.

(2) (No change.)

(3) The report shall cover the meetings and activities in the immediate preceding 12 months and shall be filed with the board each May. It shall be signed by the presiding officer and appropriate department staff.

(p) Reimbursement for expenses. In accordance with the requirements set forth in the Government Code, Chapter 2110, a committee member may receive reimbursement for the member's expenses incurred for each day the member engages in official committee business if authorized by the General Appropriations Act or budget execution process.

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

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 March 19, 1999.

TRD-9901675
Susan K. Steeg
General Counsel
Texas Department of Health
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Proposal publication date: December 4, 1998
For further information, please call: (512) 458–7236

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Chapter 289. Radiation Control

Subchapter A. Control of Radiation

25 TAC §289.5

The Texas Department of Health (department) adopts the repeal of §289.5 concerning the Texas-Atomic Energy Commission regulatory transfer agreement without changes to the proposed text as published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12117). Therefore, the section will not be republished. The section for repeal adopts by reference the document titled "Texas-AEC Regulatory Transfer Agreement."

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, 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). Section 289.5 has been reviewed and the department has determined that the reasons for adopting the section no longer exist.

The document this section adopted by reference is an agreement between the State of Texas and the United States Nuclear Regulatory Commission. The Texas Radiation Control Act does not require that it be adopted as rule. Repeal of this section does not impact the agreement.

The department published a Notice of Intention to Review for §289.5 as required by Rider 167 in the *Texas Register* (23 TexReg 9079) on September 4, 1998. No comments were received by the department on this section.

No comments were received on the proposal during the comment period.

The repeal is adopted under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The General Appropriations Act, Article IX, Rider 167, passed by the 75th Legislature is implemented by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 22, 1999.

TRD-9901685
Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458–7236

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Subchapter B. Memoranda of Understanding

25 TAC §289.81

The Texas Department of Health (department) adopts the repeal of §289.81 concerning the memorandum of understanding (MOU) on in situ uranium mining between the Texas Department of Health and the Texas Department of Water Resources without changes to the proposed text as published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12117). Therefore, the section will not be republished.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, 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). Section 289.81 has been reviewed and the department has determined that the reasons for adopting the section no longer exist.

The appropriate provisions of this MOU have been updated and incorporated in an MOU between the department and the Texas Natural Resource Conservation Commission regarding radiation control functions.

The department published a Notice of Intention to Review for §289.81 as required by Rider 167 in the *Texas Register* (23 TexReg 9079) on September 4, 1998. No comments were received by the department on this section.

No comments were received on the proposal during the comment period.

The repeal is adopted under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The General Appropriations Act, Article IX, Rider 167, passed by the 75th Legislature is implemented 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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Susan K. Steeg
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Chapter 289. Radiation Control

The Texas Department of Health (department) adopts the repeal of existing §289.112 without changes and new §289.205 concerning hearing and enforcement procedures with changes to the proposed text as published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12118), as a result of comments received during the 30-day comment period. The repeal of §289.112 is adopted without changes and therefore will not be republished.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, 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). Section 289.112 has been reviewed and the department has determined that the reasons for adopting the section continue to exist; however, a new section was proposed. The department published a Notice of Intention to Review for §289.112 as required by Rider 167 in the *Texas Register* (23 TexReg 10504) on October 9, 1998. No comments were received by the department on this section.

The repealed section adopts by reference Part 13, titled "Hearing and Enforcement Procedures" of the *Texas Regulations for Control of Radiation* (TRCR). The new section incorporates language from TRCR Part 13 that has been rewritten into Texas Register format and includes the addition and revision of several subsections of the section. The repeal and new section are part of the renumbering phase in the process of rewriting the department's radiation rules in Texas Register format. The new section reflects the renumbering.

The new section includes new language describing the process for hearings on denials of applications. Clarifying language is added concerning modifications, revocations or suspensions of licenses; certificates of registration, accreditation of mammography facilities; and industrial radiographer certification. The language for issuing, renewing, and amending licenses to process materials resulting in byproduct material or dispose of byproduct material and to process radioactive waste is revised to clarify noticing and hearing requirements. New language on severity levels for mammography violations is included to reflect current requirements, while examples of severity levels of violations are deleted. Other minor grammatical changes are made to the section for clarification.

The department is making the following changes due to staff comments to clarify the intent and improve the accuracy of the section.

Change: Concerning §289.205(b)(16), the department deleted the words "suffering" and "who" and added the words "that the person has suffered" after the word "demonstrates" to make the language consistent with that of the Texas Radiation Control Act.

Change: Concerning §289.205(c)(2), the department deleted the word "requestor" as it did not provide clarification to this paragraph.

Change: Concerning §289.205(c)(2)(B), the department reworded the subparagraph for clarification and moved it to subparagraph (A), as it is part of what must be contained in a request for hearing. The subsequent subparagraph is renumbered. Change is reflected in §289.205(c)(2)(A)(v).

Change: Concerning §289.205(d)(1), the department corrected the reference to the Texas Radiation Control Act from §401.003(B) to §401.003(3)(B).

Change: Concerning §289.205(d)(2)(B)(i), the department added wording requiring a licensee to "cause notice of the proposed action to be published and," to the beginning of the clause to clarify that this is the responsibility of the licensee.

Change: Concerning §289.205(d)(3)(B), the department deleted the words, "a statement regarding the" to be grammatically correct.

Change: Concerning §289.205(e)(1)(B)(i), the department added wording requiring a licensee to "cause notice to be published and," to the beginning of the clause to clarify that this is the responsibility of the licensee.

Change: Concerning §289.205(e)(3), the department deleted "a" and added the word "the" and deleted the words "certain as" from the second sentence to provide clarification.

Change: Concerning §289.205(e)(3)(F), the department added the words "service by" after "The return of" to clarify the intent of the subparagraph.

Change: Concerning §289.205(e)(3)(G), the department deleted the words "return receipt requested," and added the words "addressed to the last known address," following the words "certified mail" for consistency throughout the section on requirements for certified mail.

Change: Concerning §289.205(f)(3), the department added wording requiring a licensee to "cause notice to be published and" to clarify that this is the responsibility of the licensee.

Change: Concerning §289.205(g), the department deleted the words "license, certificate of registration," after "Revocation of," and the words "or industrial radiographer certification for fraud, misrepresentation, or mistake," after "mammography facilities." The requirements concerning revocation of licenses, certificates of registration and industrial radiographer certifications are delineated in subsection (i). Subsection (g) will only address revocation of mammography facility accreditations.

Change: Concerning §289.205(g)(1), the department deleted the words, "A license, certificate of registration," from the beginning of the paragraph. The words, ", or industrial radiographer certification" after the words "mammography facility" were deleted. The requirements concerning revocation of licenses, certificates of registration and industrial radiographer certifications are delineated in subsection (i). The words, "for any of the following:" were added to refer to new subparagraphs (A), (B), and (C). The words, "on the grounds of fraud, misrepresentation, or mistake" were deleted because the intent of the words is more clearly specified in new subparagraphs (A), (B), and (C).

Change: Concerning new §289.205(g)(1)(A), (B), and (C), the department added these subparagraphs to delineate the reasons that an accreditation of mammography facility may be revoked.

Change: Concerning §289.205(g)(2), the department deleted the words, "a license, certificate of registration," "or industrial radiographer certification," "licensee/registrant" "/certified industrial radiographer," and "license, certificate of registration," from the first sentence. The words, "licensee, registrant," and ",or industrial certified radiographer" were deleted from the last sentence. The requirements concerning revocation of licenses, certificates of registration, and industrial radiographer certifications are delineated in subsection (i).

Change: Concerning §289.205(g)(3), the department added a paragraph delineating the requirements for requesting a hearing for revocation of a mammography facility accreditation.

Change: Concerning §289.205(i), the department deleted the words "accredited mammography facilities," ",and accreditation of mammography facilities," "accreditation of a mammography facility," "accredited mammography facility," and "mammography facility accreditation," throughout the subsection as this subsection addresses compliance procedures that do not pertain to accredited mammography facilities. Requirements concerning revocations for mammography facilities are addressed in subsection (g).

Change: Concerning §289.205(l)(3), the department corrected the references from subsection (i)(6) to subsection (i)(8) and subsection (i)(7) to subsection (i)(9).

Change: Concerning §289.205(l)(4), the department corrected the reference from subsection (i)(7) to subsection (i)(9).

Change: Concerning §289.205(m)(6), the department deleted the words "return receipt requested." and added the words "addressed to the last known address." following the words "certified mail" for consistency throughout the section on requirements for certified mail.

Change: Concerning §289.205(n)(3), the department changed the heading to "Hearing location." from "Place of hearing." for clarification.

The following comments were received concerning the proposed section. Following each comment is the department's response and any resulting change(s).

Comment: Concerning §289.205(c)(5), the commenter questioned if this is to allow the agency to schedule a hearing in the expectation of potentially receiving a request from an affected person? The commenter stated that if so, this is a good change as it will allow the agency to expedite the hearing process in the event a request is received; however, the agency should not be able to request a hearing on its own initiative as it already has made its determination.

Response: The department has the authority to hold a hearing even if a hearing is not requested by the licensee. No change was made as a result of the comment.

Comment: Concerning §289.205(i), the commenter suggested restructuring this section for clarity as subsection (i)(8) modifies subsection (i)(2), after being procedurally referenced in subsection (i)(5). The commenter stated that it doesn't make sense unless you read the entire section and then have to interpret the cross-connections, as everything is the same rank (e.g., the things the agency can do; why they can do it; how they must do it).

Response: Section 289.205(i)(8) also modifies subsection (i)(3) and subsection (i)(7). No change was made as a result of the comment.

The commenter is a representative from International Isotopes, Inc. The commenter was generally favorable of the rule as proposed; however, the commenter had questions or specific concerns, and offered suggestions for changes to the proposal as discussed in the summary of the comments.

Subchapter C. Texas Regulations for Control of Radiation

25 TAC §289.112

The repeal is adopted under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with the authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, or the commissioner of health. The General Appropriations Act, Article IX, Rider 167, passed by the 75th Legislature is implemented 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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Susan K. Steeg
General Counsel
Texas Department of Health
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Subchapter D. General

25 TAC §289.205

The new section is adopted under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with the authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, or the commissioner of health. The General Appropriations Act, Article IX, Rider 167, passed by the 75th Legislature is implemented by the adoption.

§289.205. Hearing and Enforcement Procedures.

(a) Purpose. This section governs the following in accordance with the Texas Radiation Control Act (Act), the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001, and the Formal Hearing Procedures, Chapter 1, §§1.21-1.34 of this title (relating to the Texas Board of Health):

(1) proceedings for the granting, denying, renewing, transferring, amending, suspending, revoking, or annulling of a:

(A) license or certificate of registration;

(B) accreditation of a mammography facility; or

(C) industrial radiographer certification;

(2) determining compliance with or granting of exemptions from agency rule, order, or condition of license or certificate of registration;

(3) assessing administrative penalties; and

(4) determining propriety of other agency orders.

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

(1) Administrative penalty–A monetary penalty assessed by the agency in accordance with the Act, §401.384, to emphasize the need for lasting remedial action and to deter future violations.

(2) Applicant–A person seeking a license, certificate of registration, accreditation of mammography facility, or industrial radiographer certification, issued under the provisions of the Act and the requirements in this chapter.

(3) Board–The Texas Board of Health.

(4) Certified industrial radiographer–An individual who meets the definition of radiographer as stated in §289.255(c) of this title (relating to Radiation Safety Requirements and Licensing and Registration Procedures for Industrial Radiography).

(5) Commissioner–The Texas commissioner of health.

(6) Contested case–A proceeding in which the agency determines the legal rights, duties, or privileges of a party after an opportunity for adjudicative hearing.

(7) Director–The director of the radiation control program under the agency's jurisdiction.

(8) Enforcement conference–A meeting held by the agency with management of a licensee, registrant, or a certified industrial radiographer to discuss the following:

(A) safety, safeguards, or environmental problems;

(B) compliance with regulatory, license condition, or registration condition requirements;

(C) proposed corrective measures including, but not limited to, schedules for implementation; and

(D) enforcement options available to the agency.

(9) Hearing–A proceeding to examine an application or other matter before the agency in order to adjudicate rights, duties, or privileges.

(10) Hearing examiner–An attorney selected by the agency to conduct hearings.

(11) Interested person–A person who participates in a hearing concerning a contested case but who is not admitted as a party by the hearing examiner.

(12) Major amendment–An amendment to a license issued in accordance with the requirements of §289.260 of this title (relating to Licensing of Uranium Recovery and Byproduct Material Disposal Facilities) that:

(A) reflects a transfer of ownership of the licensed facility;

(B) authorizes enlargement of the licensed area beyond the boundaries of the existing license;

(C) authorizes a change of the method specified in the license for disposal of byproduct material as defined in the Act, §401.003(3)(B); or

(D) grants an exemption from any provision of §289.260 of this title.

(13) Notice of violation–A written statement of one or more alleged infringements of a legally binding requirement. The

notice normally requires the licensee, registrant, certified mammography system, or certified industrial radiographer to provide a written statement describing the following:

(A) corrective steps taken by the licensee, registrant, certified mammography system, or certified industrial radiographer, and the results achieved;

(B) corrective steps to be taken to prevent recurrence; and

(C) the projected date for achieving full compliance. The agency may require responses to notices of violation to be under oath.

(14) Order–A specific directive contained in a legal document issued by the agency.

(15) Party–A person designated as such by the hearing examiner. A party may consist of the following:

(A) the agency;

(B) an applicant, licensee, registrant, accredited mammography facility, or certified industrial radiographer; and

(C) any person affected.

(16) Person affected–A person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is:

(A) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located; or

(B) doing business or has a legal interest in land in the county or adjacent county.

(17) Preliminary report–A document prepared by the agency containing the following:

(A) a statement of facts on which the agency bases the conclusion that a violation has occurred;

(B) recommendations that an administrative penalty be imposed on the person charged;

(C) recommendations for the amount of that proposed penalty; and

(D) a statement that the person charged has a right to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(18) Radiation and Perpetual Care Fund–A fund established in the state treasury for the purposes described in the Act, §401.305.

(19) Requestor–A person claiming party status as a person affected.

(20) Severity level–A classification of violations based on relative seriousness of each violation and the significance of the effect of the violation on the occupational or public health or safety or the environment.

(21) Violation–An infringement of any rule, license or registration condition, order of the agency, or any provision of the Act.

(c) Procedures for licensing actions under the Act, §401.054.

(1) Except as provided in subsections (d)-(f) of this section, when the agency grants, renews, denies, transfers, or amends any specific license for the possession of radioactive materials, or grants exemptions from rules, orders, or licenses in accordance with the Act, the agency shall, no later than 30 days following the end of the month in which the action was taken, submit notice of the action for publication in the *Texas Register*. The action taken will remain in full force and effect unless and until modified by subsequent action of the agency.

(2) Any person who considers himself/herself a person affected by an agency action described in paragraph (1) of this subsection or any applicant/licensee may request a hearing by writing the director within 30 days after the notice is published in the *Texas Register*.

(A) The request for a hearing must contain the following:

(i) name and address of the person/applicant/licensee who considers himself/herself affected by agency action;

(ii) identification of the subject license;

(iii) reasons why the person/applicant/licensee considers himself/herself affected;

(iv) relief sought; and

(v) name and address of the attorney if the applicant/licensee or requestor is represented by an attorney.

(B) Failure to submit a written request for a hearing within 30 days could result in denial of party status and render the agency action final.

(3) Either the applicant/licensee or the agency may contest the standing of a requestor as a person affected by motion filed with the hearing examiner no later than ten days prior to the hearing. The requestor has the burden of proof in a hearing to determine whether the requestor is a person affected.

(4) The hearing examiner may designate parties at the commencement of the hearing on the merits.

(5) A hearing may be scheduled by the agency regardless of whether a request for a hearing has been received.

(d) Special procedures for issuing, renewing, or amending byproduct material licenses in accordance with §289.260 of this title.

(1) When the agency determines that the issuance or renewal, in accordance with §289.260 of this title, of a license to process materials resulting in byproduct material or to dispose of byproduct materials as defined in the Act, §401.003(3)(B), will have a significant impact on the human environment, the agency shall prepare or secure a written analysis of the impact and make it available to the public for written comment at least 30 days before a public hearing, if any, on the issuance or renewal of the license.

(2) At least 30 days prior to the issuance of a new license, renewal, or major amendment, a notice of such action will be published in the following:

(A) *Texas Register*; and

(B) a newspaper published in each county in which the proposed facility is located or, in which the proposed facility will be located. The applicant/licensee shall do the following:

(i) cause notice of the proposed action to be published and pay for the publication of the newspaper notice(s); and

(ii) file proof of publication required in this subparagraph with the agency within 30 days of publication. An affi-

davit by the publisher accompanied by a printed copy of the notice as published shall be conclusive evidence of publication.

(3) The notice referenced in paragraph (2) of this subsection shall contain at least the following:

(A) statement identifying the location of the proposed facility and a summary of the proposed actions;

(B) availability of an environmental analysis for the proposed facility; and

(C) offer of an opportunity for a hearing to any person affected.

(4) When a hearing is requested in writing within 30 days after publication of the notice described in paragraph (2) of this subsection, the procedures described in subsection (c)(3) and (4) of this section and Formal Hearing Procedures, Chapter 1, §§1.21-1.34 of this title apply. Failure to submit a written request for a hearing in the form specified by subsection (c)(2) of this section within 30 days may result in no hearing being held and the proposed agency action being taken.

(5) A hearing may be scheduled by the agency regardless of whether a request for a hearing has been received.

(e) Special procedures for issuing or renewing licenses to process or store radioactive waste from other persons in accordance with §289.254 of this title (relating to Licensing of Radioactive Waste Processing and Storage Facilities).

(1) At least 30 days prior to issuance or renewal of a license to process or store radioactive waste from other persons, in accordance with §289.254 of this title, a notice of such action will be published in the following:

(A) *Texas Register*; and

(B) a newspaper published in each county in which the proposed facility is located or, in which the proposed facility will be located. The applicant/licensee shall do the following:

(i) cause notice to be published and pay for the publication of the newspaper notice(s); and

(ii) file proof of publication of the notice required in paragraph (1)(B) of this subsection with the agency within 30 days of publication. An affidavit by the publisher accompanied by a printed copy of the notice as published shall be conclusive evidence of publication.

(2) The notice specified in paragraph (1) of this subsection shall contain at least the following:

(A) the agency's intent to issue or renew a license in accordance with §289.254 of this title;

(B) location of the proposed facility;

(C) in the case of a Category III storage or processing facility, the availability of an environmental analysis for each proposed activity the agency determines has a significant impact on the human environment; and

(D) opportunity for a person affected to request a hearing.

(3) A hearing will be held only when requested, unless scheduled by the agency on its own motion. When a hearing is requested in writing by the date stated in the notice described in paragraph (1) of this subsection, the procedures described in subsection (c)(3) and (4) of this section and the Formal Hearing Procedures, Chapter 1, §§1.21-1.34 of this title apply. Failure to submit a written request for a hearing in the form prescribed in subsection (c)(2) of this section on or before the stated date could result in denial of party status and in issuance or renewal of the license by the commissioner.

(A) Notice of the hearing shall be published in the following:

(i) *Texas Register*; and

(ii) a newspaper published in each county in which the proposed facility is located or, in which the proposed facility will be located.

(B) Notice of the hearing shall contain the subject, time, date, and location of the hearing.

(C) The applicant/licensee shall cause notice to be published and pay for the publication of the newspaper notice(s).

(D) The applicant/licensee shall file proof of publication of the notice required in subparagraph (A)(ii) of this paragraph with the agency at least ten days before the hearing. An affidavit by the publisher accompanied by a printed copy of the notice as published shall be conclusive evidence of publication.

(E) If no newspaper is published in the county or counties in which the proposed facility is to be located, a written copy of the notice of hearing shall be posted at the courthouse door and five other public places in the immediate locality to be affected for at least 30 days prior to the beginning of the hearing.

(F) The return of service by the sheriff or constable, or the affidavit of any credible person made on a written copy of the notice so posted showing the fact of the posting and filed with the agency at least ten days prior to the hearing date shall be conclusive evidence of posting.

(G) The applicant/licensee shall give written notice of the hearing by certified mail, addressed to the last known address, to persons shown on the current county tax records as owning property adjacent to the proposed site. The written notice shall contain the same information described in subparagraph (B) of this paragraph.

(i) The applicant/licensee shall furnish the agency with a list of names and addresses of the adjacent property owners no later than ten days before the hearing.

(ii) The list of names and addresses will be deemed accurate and valid if obtained from the current county tax records of the county where the adjacent property is located as of the mailing date of the notice of hearing. The information shall be certified by an appropriate county official.

(iii) The applicant/licensee shall certify to the mailing of the notice of hearing by certified mail, and proof of mailing to the proper address or the receipt shall be accepted at the hearing as conclusive evidence of the fact of the mailing.

(H) Failure to comply with the provisions of subparagraphs (A)(ii), (E), and (G) of this paragraph may result in denial of the license.

(f) Special procedures for amending waste licenses in accordance with §289.254 of this title.

(1) If the agency amends a license to process or store radioactive waste, in accordance with §289.254 of this title, the amendment will take effect immediately.

(2) Notice of amendment shall be published one time in the following:

(A) *Texas Register*;

(B) a newspaper of general circulation in the county or counties in which the licensed activity is located. The licensee shall file with the agency, within 30 days of publication, proof of publication of the notice.

(3) The licensee shall cause notice to be published and pay for publication of the newspaper notice(s).

(4) An affidavit from the publisher accompanied by a printed copy of the notice as published shall be conclusive evidence of publication.

(5) The notice shall contain the following:

(A) identity of the licensee and the license amended;

(B) a concise statement of the substance of the amendment; and

(C) opportunity for a person affected to request a hearing.

(6) The agency shall notify any person who has submitted an advance, written request to be notified of any proposed amendment to the license. Proof of mailing to the proper address shall be conclusive evidence of the agency's compliance.

(7) A person who considers himself/herself a person affected may request the agency to hold a hearing by writing the director, in the manner provided by subsection (c)(2) of this section, no later than 30 days after the notice is published. Failure to submit a written request for a hearing within 30 days could result in denial of party status and render the agency action final.

(8) Upon receipt of a request for hearing, the agency or the licensee may follow the procedures set out in subsection (c)(3) and (4) of this section to contest standing.

(9) Notice of a hearing on the merits shall be given in accordance with appropriate provisions of subsection (e)(3) of this section.

(g) Revocation of accreditation of mammography facilities.

(1) An accreditation of mammography facility may be revoked for any of the following:

(A) any material false statement in the application or any statement of fact required under provision of the Act;

(B) conditions revealed by such application or statement of fact or any report, record, inspection, or other means that would warrant the agency to refuse to grant an accreditation of mammography facility on an original application; or

(C) failure to observe any of the terms and conditions of the Act, this chapter, or order of the agency.

(2) Before the agency revokes an accreditation of mammography facility, the agency shall give notice by personal service or by certified mail, addressed to the last known address, of the facts or conduct alleged to warrant the revocation by complaint, and order the accredited mammography facility to show cause why the mammography facility accreditation should not be revoked. The accredited mammography facility shall be given an opportunity to request a hearing on the matter no later than 30 days after receipt of the notice.

(3) Any accredited mammography facility against whom the agency contemplates an action described in paragraph (1) of this subsection may request a hearing by writing the director within 30 days of service or date of mailing.

(A) The written request for a hearing must contain the following:

(i) statement requesting a hearing;

(ii) name, address, and identification number of the accredited mammography facility against whom the action is being taken.

(B) Failure to submit a written request for a hearing within 30 days will render the agency action final.

(h) Denial of an application for a license, certificate of registration, accreditation of a mammography facility, or industrial radiographer certification.

(1) When the agency contemplates denial of an application for a license, certificate of registration, accreditation of a mammography facility, or industrial radiographer certification, the licensee, registrant, mammography facility seeking accreditation, or certified industrial radiographer shall be afforded the opportunity for a hearing. Notice of the denial shall be delivered by personal service or certified mail, addressed to the last known address, to the licensee, registrant, mammography facility seeking accreditation, or certified industrial radiographer.

(2) Any applicant, licensee, registrant, mammography facility seeking accreditation, or certified industrial radiographer against whom the agency contemplates an action described in paragraph (1) of this subsection may request a hearing by writing the director within 30 days of service or date of mailing.

(A) The written request for a hearing must contain the following:

(i) statement requesting a hearing; and

(ii) name and address of the applicant, licensee, registrant, mammography facility seeking accreditation, or certified industrial radiographer;

(B) Failure to submit a written request for a hearing within 30 days will render the agency action final.

(i) Compliance procedures for licensees, registrants, and certified industrial radiographers.

(1) A licensee, registrant, or certified industrial radiographer who commits a violation(s) will be issued a notice of violation.

(2) The terms and conditions of all licenses and certificates of registration shall be subject to amendment or modification. A license, certificate of registration, or industrial radiographer certification may be modified, suspended, or revoked by reason of amendments to the Act, or for violation of the Act, the requirements of this chapter, a condition of the license, certificate of registration, or an order of the agency.

(3) Any license, certificate of registration, or industrial radiographer certification may be modified, suspended, or revoked in whole or in part, for any of the following:

(A) any material false statement in the application or any statement of fact required in accordance with provisions of the Act;

(B) conditions revealed by such application or statement of fact or any report, record, or inspection, or other means that would warrant the agency to refuse to grant a license, certificate of registration, or industrial radiographer certification on an original application; or

(C) violation of, or failure to observe applicable terms and conditions of the Act, this chapter, or of the license, certificate of registration, or industrial radiographer certification or order of the agency.

(4) If another state or federal entity takes an action such as modification, revocation, or suspension of the license, certificate of registration, or industrial radiographer certification, the agency may take a similar action against the licensee, registrant, or certified industrial radiographer.

(5) When the agency determines that the action provided for in paragraph (8) of this subsection or subsection (j) of this section is not to be taken immediately, the agency may offer the licensee, registrant, or certified industrial radiographer an opportunity to attend an enforcement conference to discuss the following with the agency:

(A) methods and schedules for correcting the violation(s); or

(B) methods and schedules for showing compliance with applicable provisions of the Act, the rules, license or registration conditions, or any orders of the agency.

(6) Notice of any enforcement conference shall be delivered by personal service, or certified mail, addressed to the last known address. An enforcement conference is not a prerequisite for the action to be taken under paragraph (8) of this subsection or subsection (j) of this section.

(7) Except in cases in which the public health, interest, or safety requires otherwise, no license, certificate of registration, or industrial radiographer certification shall be modified, suspended, or revoked unless, prior to the institution of proceedings therefore, facts or conduct that may warrant such action shall have been called to the attention of the licensee, registrant, or certified industrial radiographer in writing, and the licensee, registrant, or certified industrial radiographer shall have been accorded an opportunity to demonstrate compliance with all lawful requirements.

(8) When the agency contemplates modification, suspension, or revocation of the license, certificate of registration, or industrial radiographer certification, the licensee, registrant, or certified industrial radiographer shall be afforded the opportunity for a hearing. Notice of the contemplated action, along with a complaint, shall be given to the licensee, registrant, or certified industrial radiographer by personal service or certified mail, addressed to the last known address.

(9) Any applicant, licensee, registrant, or certified industrial radiographer against whom the agency contemplates an action described in paragraph (8) of this subsection may request a hearing by writing the director within 30 days of service or date of mailing.

(A) The written request for a hearing must contain the following:

(i) statement requesting a hearing;

(ii) name, address, and identification number of the licensee, registrant, or certified industrial radiographer against whom the action is being taken.

(B) Failure to submit a written request for a hearing within 30 days will render the agency action final.

(j) Assessment of Administrative Penalties.

(1) When the agency determines that monetary penalties are appropriate, proposals for assessment of and hearings on administrative penalties shall be made in accordance with the Act, §401.384, and applicable sections of the Formal Hearing Procedures, Chapter 1, §§1.21-1.34 of this title.

(2) Assessment of administrative penalties shall be based on the following criteria:

(A) the seriousness of the violation(s);

(B) previous compliance history;

(C) the amount necessary to deter future violations;

(D) efforts to correct the violation; and

(E) any other mitigating or enhancing factors.

(3) Application of administrative penalties. The agency may impose differing levels of penalties for different severity level violations and different classes of users as follows.

(A) Administrative penalties may be imposed for severity level I and II violations. Administrative penalties will be considered for severity level III, IV, and V violations when they are combined with those of higher severity level(s) or for repeated violations that could have been prevented by corrective action and for which the licensee, registrant, or certified industrial radiographer did not take effective corrective action.

(B) The following Tables IA and IB show the base administrative penalties.
Figure: 25 TAC §289.205(j)(3)(B)

(C) Adjustments to the severity levels and percentages in Table IB may be made for the presence or absence of the following factors:

(i) prompt identification and reporting;

(ii) corrective action to prevent recurrence;

(iii) compliance history;

(iv) prior notice of similar event;

(v) multiple occurrences; and

(vi) negligence that resulted in or increased adverse effects.

(D) The penalty may be in an amount not to exceed $10,000 a day for a person who violates the Act or a rule, order, license or registration issued under the Act. Each day a violation continues may be considered a separate violation for purposes of penalty assessment.

(4) The Office of General Counsel may conduct settlement negotiations.

(k) Severity levels of violations for licensees, registrants, or certified industrial radiographers.

(1) Violations for licensees, registrants, or certified industrial radiographers shall be categorized by one of the following severity levels.

(A) Severity level I are violations that are most significant and may have a significant negative impact on occupational and/or public health and safety or on the environment.

(B) Severity level II are violations that are very significant and may have a negative impact on occupational and/or public health and safety or on the environment.

(C) Severity level III are violations that are significant and which, if not corrected, could threaten occupational and/or public health and safety or the environment.

(D) Severity level IV are violations that are of more than minor significance, but if left uncorrected, could lead to more serious circumstances.

(E) Severity level V are violations that are of minor safety or environmental significance.

(2) Additional violations for mammography registrants. Violations for mammography registrants shall be categorized by one of the following severity levels.

(A) Severity level I violations indicate a serious noncompliance that may adversely affect image quality or that may compromise the quality of mammography services.

(B) Severity level II violations indicate key quality system requirements are being met, but there is a failure to meet one or more quality standards that may lead to a compromise of the quality of mammography services.

(C) Severity level III violations indicate that the quality system requirements are being met, but minor corrective actions are required for compliance with the quality standards.

(D) Severity level IV violations indicate that the quality system requirements and standards are being met, but minor corrective actions are required for compliance.

(3) Criteria to elevate or reduce severity levels.

(A) Violations may be elevated to a higher severity level for the following reasons:

(i) more than one violation resulted from the same underlying cause;

(ii) a violation contributed to or was the consequence of the underlying cause, such as a management breakdown or breakdown in the control of licensed or registered activities;

(iii) a violation occurred multiple times between inspections;

(iv) a violation was willful. This means the violation was the result of careless regard for requirements, deception, or other indications of willfulness by the licensee/registrant or employees of the licensee/registrant, or certified industrial radiographer; or

(v) compliance history.

(B) Violations may be reduced to a lower level for the following reasons:

(i) the licensee/registrant identified and corrected the violation prior to the agency inspection; or

(ii) the licensee/registrant's actions corrected the violation and prevented recurrence.

(4) Examples of severity levels. Examples of severity levels are available upon request to the agency.

(l) Impoundment of sources of radiation.

(1) In the event of an emergency, the agency shall have the authority to impound or order the impounding of sources of radiation possessed by any person not equipped to observe or failing to observe the provisions of the Act, or any rules, license or registration conditions, or orders issued by the agency. The agency shall submit notice of the action to be published in the *Texas Register* no later than 30 days following the end of the month in which the action was taken.

(2) At the agency's discretion, the impounded sources of radiation may be disposed of by:

(A) returning the source of radiation to a properly licensed or registered owner, upon proof of ownership, who did not cause the emergency;

(B) releasing the source of radiation as evidence to police or courts;

(C) returning the source of registration to a licensee or registrant after the emergency is over and settlement of any compliance action; or

(D) sale, destruction or other disposition within the agency's discretion.

(3) If agency action is necessary to protect the public health and safety, no prior notice need be given the owner or possessor. If agency action is not necessary to protect the public health and safety, the agency will give written notice to the owner and/or the possessor of the impounded source of radiation of the intention to dispose of the source of radiation. Notice shall be the same as provided in subsection (i)(8) of this section. The owner or possessor shall have 30 days from the date of personal service or mailing to request a hearing under the Formal Hearing Procedures, Chapter 1, §§1.21-1.34 of this title, and in accordance with subsection (i)(9) of this section, concerning the intention of the agency. If no hearing is requested within that period of time, the agency may take the contemplated action, and such action is final.

(4) Upon agency disposition of a source of radiation, the agency may notify the owner and/or possessor of any expense the agency may have incurred during the impoundment and/or disposition and request reimbursement. If the amount is not paid within 60 days from the date of notice, the agency may request the Attorney General to file suit against the owner/possessor for the amount requested. If the owner/possessor desires to contest the amount of such charge, the owner/possessor may request a hearing under the Formal Hearing Procedures, Chapter 1, §§1.21-1.34 of this title and in accordance with subsection (i)(9) of this section.

(5) If the agency determines from the facts available to the agency that an impounded source of radiation is abandoned, with no reasonable evidence showing its owner or possessor, the agency may make such disposition of the source of radiation as it sees fit.

(m) Emergency orders for licenses, certificates of registration, or certified industrial radiographers.

(1) When an emergency exists requiring immediate action to protect the public health or safety or the environment, the agency may, without notice or hearing, issue an order citing the existence of such emergency and require that certain actions be taken as it shall direct to meet the emergency. The agency shall, no later than 30 days following the end of the month in which the action was taken, submit notice of the action for publication in the *Texas Register*. The action taken will remain in full force and effect unless and until modified

by subsequent action of the agency. These emergency orders shall apply to licenses, certificates of registration, or certified industrial radiographers.

(2) In addition to the requirements of paragraph (1) of this subsection, the agency shall issue an order directing any action and corrective measure needed to remedy or neutralize the following emergency situations:

(A) when the agency determines that byproduct material as defined in the Act, §401.003(3)(B), or the operation generating the byproduct material, or that radioactive waste threatens the public health or safety or the environment; and

(B) if the licensee managing the byproduct material, or the operation generating the byproduct material or the radioactive waste, is unable to correct or neutralize the threat.

(3) An emergency order takes effect immediately upon service.

(4) Any person receiving an emergency order shall comply immediately.

(5) The agency shall use any security provided by a licensee under the Act to pay toward the costs of such actions and corrective measures taken. If the cost of actions and corrective measures require more funds than the security has provided, the agency shall request the Attorney General to seek reimbursement from the licensee or person causing the threat.

(A) The agency may send a copy of its order specified in this subsection to the Comptroller of Public Accounts together with necessary documents authorizing the Comptroller of Public Accounts to enforce security supplied by the licensee, convert the necessary amount of security into cash, and disburse from this security in the fund the amount necessary to pay costs of the agency actions and corrective measures. The agency shall direct the comptroller as to the amounts and recipients of the funds.

(B) The agency may request the Attorney General to file suit for reimbursement if the agency uses security from the Radiation and Perpetual Care Fund to pay for actions or corrective measures to remedy spills or contamination by radioactive material resulting from a violation of the Act or a rule, license, or order of the agency.

(6) The licensee, registrant, or certified industrial radiographer shall be afforded the opportunity for a hearing on an emergency order. Notice of the action, along with a complaint, shall be given to the licensee, registrant, or certified industrial radiographer by personal service or certified mail, addressed to the last known address. A hearing shall be held on an emergency order if the person receiving the order makes a written application to the agency for a hearing within 30 days of the order date.

(A) The hearing shall be held not less than 10 days nor more than 20 days after receipt of the written application for hearing.

(B) At the conclusion of the hearing and after the proposal for decision is made as provided in the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001, the commissioner shall take one of the following actions:

(i) determine that no further action is warranted;

(ii) amend the license or certificate of registration;

(iii) revoke or suspend the license, certificate of registration, or industrial radiographer certification;

(iv) rescind the emergency order; or

(v) issue such other order as is appropriate.

(C) The application and hearing shall not delay compliance with the emergency order.

(n) Miscellaneous provisions.

(1) Computation of time. A time period established by the requirements of this chapter shall begin on the first day after the event that invokes the time period. When the last day of the period falls on a Saturday, Sunday, or state or federal holiday, the period shall end on the next day that is not a Saturday, Sunday, or state or federal holiday. The time period shall expire at 5:00 p.m. of the last day of the computed period.

(2) Interested person.

(A) An interested person may:

(i) make sworn or unsworn statements;

(ii) attend a hearing and may present evidence after the presentation of evidence by the parties; or

(iii) be represented by an attorney.

(B) An interested person may not:

(i) cross-examine the witnesses of the parties;

(ii) object to evidence presented by the parties; or

(iii) appeal a decision rendered by the agency.

(C) An interested person is not responsible for sharing the costs of the transcription of the hearing, but may purchase a transcript.

(D) The parties may cross-examine witnesses presented by an interested person.

(E) At the discretion of the hearing examiner an interested person may make an unsworn statement. Such statement shall not be made a part of the record.

(3) Hearing location. Hearings will be held at the agency offices in Austin unless the hearing examiner specifies another location.

(4) Prepared testimony. The following shall apply to written testimony of a witness:

(A) the testimony of a witness may be reduced to writing and offered into evidence as an exhibit, provided:

(i) the witness is present and has been sworn;

(ii) the witness identifies and adopts the written testimony as his/her own; and

(iii) all parties receive a copy of the testimony at least ten days before its submission at the hearing.

(B) written testimony shall be subject to objection and may be stricken by the hearing examiner. The witness shall be subject to cross-examination.

(5) Prior testimony. Testimony and evidence presented in the hearing to determine standing have the same weight at the hearing on the merits if a tape recording or written transcript of the standing hearing is available.

(6) Non-party witness and mileage fees.

(A) A witness or deponent who is not a party (or an employee, agent, or representative of a party) and who is subpoenaed or otherwise compelled to attend an agency hearing or a proceeding to give a deposition, or to produce books, records, papers, accounts, documents, or other objects necessary and proper for the purposes of the hearing or proceeding may receive reimbursement for transportation and other costs at rates established by the current Appropriations Act for state employees.

(B) The person requesting the attendance of the witness or deponent must deposit with the agency the funds estimated by the hearing examiner to accrue in accordance with subparagraph (A) of this paragraph when filing a motion for the issuance of a subpoena or a commission to take a deposition.

(7) Service. A return of service by the person who performed personal service, postal return receipt, or proof of mailing to the last known address shall be conclusive evidence of service.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Susan K. Steeg
General Counsel
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Proposal publication date: December 4, 1998
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Chapter 289. Radiation Control

The Texas Department of Health (department) adopts the repeal of existing §289.115 without changes and new §289.255 concerning radiation safety requirements and licensing and registration procedures for industrial radiography with changes to the proposed text as published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12126), as a result of comments received during the 30-day comment period. The repeal of §289.115 is adopted without changes and therefore will not be republished.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, 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). Section 289.115 has been reviewed and the department has determined that the reasons for adopting the section continue to exist; however, a new section was proposed. The department published a Notice of Intention to Review for §289.115 as required by Rider 167 in the *Texas Register* (23 TexReg 9079) on September 4, 1998. No comments were received by the department on this section.

The repealed section adopts by reference Part 31, titled "Radiation Safety Requirements and Licensing and Registration Procedures For Industrial Radiography" of the Texas Regulations for Control of Radiation. The new section incorporates language from Part 31 that has been rewritten into Texas Register format and includes addition and revision of several subsections of the section. The repeal and new section are part of the renumbering phase in the process of rewriting the department's radiation rules in the Texas Register format. The new section reflects the renumbering.

The revision incorporates industrial radiography training requirements that are items of compatibility with the United States Nuclear Regulatory Commission (NRC) and as an agreement state, Texas must adopt them. Additional options for personnel monitoring are added. The fee for industrial radiographer certification is raised to reflect a more accurate cost recovery by the department. References to other sections of this chapter are clarified to reflect the Texas Register format. Other minor grammatical changes are made to the section for clarification.

The department is making the following changes due to staff comments to clarify the intent and improve the accuracy of the section.

Change: Concerning §289.255(c)(15), the department deleted this sentence and formulated two new sentences to more clearly state the intent of the definition.

Change: Concerning §289.255(c)(19), the department replaced the word "control" with "drive" for consistency with the term "drive cable" throughout the section.

Change: Concerning §289.255(d)(1), the department deleted the reference "and (7)(A)" because this reference was redundant as §289.255(b)(3) already required registration.

Change: Concerning §289.255(d)(4), in the first sentence, the department replaced the word "subsection" with "section" to state the correct reference intended by this paragraph and added the references "(b)(3) and (5), (j)" before the reference "(m)(1)(A)" to ensure that all the necessary exemptions were addressed. The department also deleted the reference "and (7)(A)" at the end of the first sentence since it was unnecessary and deleted the second sentence since it restated what was already included in §289.255(m)(1)(A).

Change: Concerning §289.255(e), the department restructured the second sentence by deleting the phrase "in accordance with subsection (w)(1) of this section" at the end of the sentence and added the phrase "in accordance with subsection (w)(1) of this section," after the word "records" for clarification of the intent of the subsection.

Change: Concerning §289.255(f)(1), the department changed the "§289.202(f)" reference to "§289.202(p)(1) and (2)" because "§289.202(f)" was an incorrect reference.

Change: Concerning §289.255(h)(1)(E), the department deleted this subparagraph to avoid duplication of records by licensees and registrants as they are already required to maintain these records in accordance with §289.255(j)(2) and (6).

Change: Concerning §289.255(h)(2), the department changed the form number from "255-2" to "255-U" to more accurately reflect the form numbering system used throughout the section.

Change: Concerning §289.255(i)(1), the department deleted the words "of use" and replaced them with "before using equipment," to clarify the intent of the paragraph.

Change: Concerning §289.255(i)(2)(A), in the last sentence, the department added the words "inspection and maintenance" after the word "This" to specify which program the subparagraph addresses.

Change: Concerning §289.255(k)(2)(B), the department deleted the word "control" before the word "drive" for consistency with the term "drive cable" throughout the section.

Change: Concerning §289.255(m)(1), the department replaced the words "a current" with "the original or a copy of an" and added to the end of the sentence the phrase "or a certification ID card" to allow for various options of proof of radiographer trainee status.

Change: Concerning §289.255(m)(2)(A)(ii)(I), the department replaced the word "radiographer" before the words "trainee status card" with "legible" to emphasize that the document must be capable of being read.

Change: Concerning §289.255(m)(2)(A)(ii)(III), the department replaced the word "x rays" with "x-ray machines" to more clearly state the intent of the subclause.

Change: Concerning §289.255(m)(2)(A)(ii)(V), the department changed the form number from "255-OOS" to "255-OS" to more accurately reflect the form numbering system used throughout the section.

Change: Concerning §289.255(m)(2)(A)(iv), the department changed the "(p)(1)" reference to "(p)(2)" because "(p)(1)" was an incorrect reference.

Change: Concerning new §289.255(m)(3)(B), the department added this subparagraph that specifically lists the responsibilities of the radiographer trainer regarding the supervision of radiographer trainees to clarify the intent of this subsection. As a result of adding this subparagraph, the proposed §289.255(m)(3) text was renumbered to allow for the addition of the new subparagraph and comply with the Texas Register format. Change is reflected in renumbered (m)(3)(A)-(B).

Change: Concerning §289.255(m)(4), the department added the word "industrial" before "radiography" for consistency throughout the section.

Change: Concerning §289.255(m)(4)(B)(ii), the department deleted the reference "(2)(A)(ii) and (iii)", added "(2)(A)(iii)" after the phrase "paragraph (1)(A) and", and added the phrase "subsection (n)(1)(B) of this section" to state the correct references intended by this clause.

Change: Concerning §289.255(m)(4)(C)(xv), the department changed the references "(u)(4)(A)-(D)" to "(u)(4)(A)-(C)" and "(v)(7)(A)-(D)" to "(v)(7)(A)-(C)" to state the correct references intended by this clause.

Change: Concerning §289.255(o)(1)(C), the department added the words "for examination" after the word "application" to specify the application to be submitted as intended by this subparagraph.

Change: Concerning §289.255(o)(2)(D), the department deleted the first sentence because it was redundant.

Change: Concerning §289.255(o)(2)(F), the department replaced the word "have" with "present" to more clearly state the intent of this subparagraph.

Change: Concerning §289.255(p)(1), the department changed the form number from "255-OOS" to "255-OS" to more accurately reflect the form numbering system used throughout the section.

Change: Concerning §289.255(p)(1)(B), the department added the words "for radiographer certification" after the word "application" to specify the application to be submitted as intended by this subparagraph.

Change: Concerning §289.255(q)(2), the department deleted the words "When performing" before the word "industrial" and replaced this phrase with the word "During" so the sentence reads better.

Change: Concerning §289.255(q)(2)(A)(i), the department deleted this clause and replaced it with "an individual monitoring device that meets the requirements of §289.202(p)(3) of this title" so as not to limit licensees and registrants to current available individual monitoring devices but to allow for new technologies in personnel monitoring.

Change: Concerning §289.255(q)(2)(G), in the first sentence, the department replaced the words "film badge, TLD, or OSL" with "monitoring device" so as not to limit licensees and registrants to current available individual monitoring devices but to allow for new technologies in personnel monitoring.

Change: Concerning §289.255(q)(2)(H), the department replaced the words "film badge, TLD, or OSL" with "individual monitoring device" so as not to limit licensees and registrants to current available individual monitoring devices but to allow for new technologies in personnel monitoring.

Change: Concerning §289.255(q)(2)(I), in the first sentence, the department replaced the words "Film badges, TLDs, or OSLs" with "Individual monitoring devices" and in the second and third sentences replaced the words "film badge, TLD, or OSL" with "individual monitoring device" so as not to limit licensees and registrants to current available individual monitoring devices but to allow for new technologies in personnel monitoring.

Change: Concerning §289.255(q)(2)(J), in the first sentence, the department replaced the phrase "a film badge, TLD, or OSL" with "an individual monitoring device" and throughout this subparagraph, replaced the words "film badge, TLD, or OSL" with "individual monitoring device" so as not to limit licensees and registrants to current available individual monitoring devices but to allow for new technologies in personnel monitoring.

Change: Concerning §289.255(q)(4)(A), at the end of the sentence, the department deleted the phrase "prior to use at the start of each work shift" because it was redundant in this subparagraph.

Change: Concerning §289.255(q)(4)(D), at the end of the sentence, the department deleted the phrase "for correct response to radiation" because it was redundant in this subparagraph.

Change: Concerning §289.255(q)(6)(B), the department deleted this subparagraph and replaced it with "Records of the individual monitoring device monitoring results received from the individual monitoring device processor." so as not to limit licensees and registrants to current available individual monitoring devices but to allow for new technologies in personnel monitoring.

Change: Concerning §289.255(t)(1)(B), the department deleted this subparagraph and replaced it with "an individual monitoring device that meets the requirements of §289.202(p)(3) of this title for each worker" so as not to limit licensees and registrants to current available individual monitoring devices but to allow for new technologies in personnel monitoring.

Change: Concerning §289.255(t)(3), the department deleted the word "valid" before the words "trainee status card" to more

clearly state the intent of the paragraph and also changed the "(m)(1)(A)" reference to "(m)(1)" to state the correct reference intended by this paragraph.

Change: Concerning §289.255(u)(4)(C), the department replaced the "(n)" reference with "(n)(1)" to state the correct reference intended by this subparagraph.

Change: Concerning §289.255(u)(5), the department deleted the words "and survey records" after the word "surveys" since the records requirements are in another subsection.

Change: Concerning §289.255(u)(5)(C), at the end of the second sentence, the department replaced the "§289.202(n)(3)" reference with "§289.202(n)(1)(B) and (C)" to state the correct reference intended by this subparagraph.

Change: Concerning §289.255(u)(6), the department deleted the phrase "and exemptions" after the word "requirements" since the exemptions are addressed in another subsection.

Change: Concerning §289.255(v)(5)(C)(ii), the department added the phrase ", the NRC," after the word "agency" to accurately state that the NRC is also an authorizing entity as intended by this clause.

Change: Concerning §289.255(v)(7)(C), the department replaced the "(n)" reference with "(n)(1)" to state the correct reference intended by this subparagraph.

Change: Concerning §289.255(v)(8), the department deleted the words "and survey records" after the word "surveys" since the records requirements are in another subsection.

Change: Concerning §289.255(w)(2), in the second sentence, the department added the words "and registrant" after the word "licensee" to accurately state who is responsible for maintaining the records of the calibrations.

Change: Concerning §289.255(w)(3)(A), the department added the words "and registrant" after the word "licensee" to accurately state who is responsible for maintaining the records of the quarterly inventories. The department also deleted the phrase "sealed sources and of" after the word "inventory" and replaced it with "sources of radiation, including" to specify the correct items to be inventoried as intended by this subparagraph.

Change: Concerning §289.255(w)(3)(B), the department deleted the word "sealed" before the word "source" to correctly state the types of radiation to be included in the record as intended by this subparagraph.

Change: Concerning §289.255(w)(4)(A), the department added the words "and registrant" after the word "licensee" to accurately state who is responsible for maintaining the records intended by this subparagraph.

Change: Concerning new §289.255(w)(4)(A)(vi), the department added this clause to address all the necessary equipment intended by this clause.

Change: Concerning §289.255(w)(5), in the first sentence, the department replaced the word "checks" with the word "tests" for consistency in this paragraph. In the second sentence, the department added the words "and registrant" after the word "licensee" to accurately state who is responsible for maintaining the records intended by this subparagraph and also replaced the phrase "until disposal is authorized by the agency" with "for two years from the date of the test" to more accurately reflect the intended record retention period.

Change: Concerning §289.255(w)(7)(B), the department replaced the "(n)" reference with "(n)(1)" to state the correct reference as intended by this subparagraph. At the end of the sentence, the department replaced the phrase "until disposal is authorized by the agency" with "for five years after the record is made" to more accurately reflect the intended record retention period.

Change: Concerning §289.255(w)(8)(A), in the first sentence, the department added the word "pocket" after the word "Direct-reading" and added the phrase "or electronic personal dosimeter" before the word "readings" to reflect consistency of context used in equivalent subsections throughout the section. In the second sentence, the department replaced the words "film badge, TLD, or OSL" with "individual monitoring device" so as not to limit licensees and registrants to current available individual monitoring devices but to allow for new technologies in personnel monitoring. At the end of the second sentence, the department replaced the phrase "until the agency authorizes disposal" with "for agency inspection until disposal is authorized by the agency" for consistency throughout the section.

Change: Concerning §289.255(w)(8)(C), the department replaced the words "film badge, TLD, or OSL" with "individual monitoring device" so as not to limit licensees and registrants to current available individual monitoring devices but to allow for new technologies in personnel monitoring.

Change: Concerning §289.255(w)(8)(D), the department replaced the words "film badges, TLDs, or OSLs" with "individual monitoring devices" so as not to limit licensees and registrants to current available individual monitoring devices but to allow for new technologies in personnel monitoring.

Change: Concerning §289.255(w)(12), in the end of the second sentence, the department replaced the phrase "until the agency authorizes disposal" with "for agency inspection until disposal is authorized by the agency" for consistency throughout the section.

Change: Concerning §289.255(w)(13), the department deleted the phrase "and exemptions" after the word "requirements" since the exemptions are addressed in another subsection and not in this paragraph.

Change: Concerning §289.255(w)(13)(A), at the end of the sentence, the department replaced the phrase "two years after the evaluation" with the phrase "five years from the date of the evaluation" to more accurately reflect the intended record retention period.

Change: Concerning §289.255(w)(13)(B), at the end of the sentence, the department replaced the phrase "until disposal is authorized by the agency" with the phrase "for five years from the date of the test" to more accurately reflect the intended record retention period.

Change: Concerning §289.255(w)(13)(C), at the end of the sentence, the department replaced the phrase "two years after the evaluation" with the phrase "five years from the date of the evaluation" to more accurately reflect the intended record retention period.

Change: Concerning §289.255(w)(14)(B), at the end of the sentence, the department replaced the phrase "until disposal is authorized by the agency" with the phrase "for two years from the date of the test" to more accurately reflect the intended record retention period.

Change: Concerning §289.255(w)(15), the department added a new sentence "Records of utilization logs." to comply with the Texas Register format that requires a lead-in sentence if all other paragraphs within the same subsection contain this. At the end of the proposed first sentence, the department replaced the phrase "until disposal is authorized by the agency" with the phrase "for two years from the date the utilization log is made" to more accurately reflect the intended record retention period.

Change: Concerning proposed §289.255(y)(1)(B)(iii), the department replaced the word "personnel" with "individual" and replaced the word "equipment" with "devices" for consistency throughout the section.

Change: Concerning proposed §289.255(y)(3), the department deleted this paragraph and replaced it with a new revised paragraph to reflect consistency of terminology used throughout the section, to include for: subsection (j), changed the word "Installations" to "Installation Tests;" subsection (m)(1)(A) and (2)(A) and (n), changed the reference "(n)" to "(n)(1);" and subsection (q), changed the name of the record from "Personnel Monitoring" to "Individual Monitoring Devices" and to the record titled "Direct-Reading Dosimeter Readings" added the words "Pocket or Electronic Personal" before the word "Dosimeter." The department also changed the "Record Keeping Time Interval" accordingly to reflect the specific subsection context record retention period, to include for: subsection (h), changed from "until disposal is authorized by the agency" to "2 years;" subsection (j), changed from "until disposal is authorized by the agency" to "2 years;" subsection (m)(1)(A) and (2)(A) and (n), changed from "until disposal is authorized by the agency" to "5 years;" subsection (u)(6)(B), changed from "2 years" to "5 years;" subsection (u)(6)(C)(i), changed from "until disposal is authorized by the agency" to "5 years;" subsection (u)(6)(C)(ii), changed from "until disposal is authorized by the agency" to "5 years;" subsection (u)(6)(C)(iii), changed from "2 years" to "5 years;" and subsection (v)(9)(C), changed from "until disposal is authorized by the agency" to "2 years."

The following comments were received concerning the proposed section. Following each comment is the department's response and any resulting change(s).

Comment: Concerning §289.255 in general, the commenter stated that the new format and numbering are hard to read and follow. He suggested the department highlight/shade the subsection letters and the titles so that the reader can at least see when one subsection starts and ends.

Response: The department is required to use the Texas Register format for the adoption of all rules. When the final printed copy is distributed to all affected licensees and registrants, the revised text will be shaded to make it easy to note the revisions; therefore, the subsection letters and the titles will not be shaded, unless they have been revised. No change was made as a result of the comment.

Comment: Concerning §289.255 in general, the commenter stated that he experienced confusion with the overall readability due to the Texas Administrative Code (TAC) format requirements. The commenter further stated that the new 25 TAC format is hard to read compared to the prior format of the Texas Regulations for Control of Radiation (TRCR). The commenter expressed that this will lead to extra costs and potential errors for those trying their best to read, cross-reference, and ensure compliance to the requirements. He further added that the category headings are hard to find because they are buried in the text.

Response: The department is required to use the Texas Register format for the adoption of all rules. In an attempt to reduce the level of confusion and errors, the department has included a "Cross-Reference" table that provides the old rule numbers and the equivalent new rule subsection numbers. The table is located at the back of all rules that have been converted into the Texas Register format and distributed to licensees and registrants. The table will be provided when this section is adopted and distributed. No change was made as a result of the comment.

Comment: Concerning §289.255(c), the commenter questioned the difference between "lay-barge radiography," "offshore radiography," and "underwater radiography." The commenter stated that he recalled an interpretation by department staff that explained offshore radiography to be performed on water with depth less than six feet.

Response: The department defines the terms in question in §289.255(c)(22), (24), and (52) accordingly. The department has made no official interpretation to explain that "offshore" is meant to be radiography performed in water with depths less than six feet. No change was made as a result of the comment.

Comment: Concerning §289.255(c)(38), the commenter questioned if two persons were needed to transport the radioactive source because of the requirements in §289.255(v)(7)(G). The commenter added that this is unnecessary and costly.

Response: Subsection §289.255(v)(7)(G) explains when at least two radiographic personnel are required and that requirement does not include transport of radioactive sources. No change was made as a result of the comment.

Comment: Concerning §289.255(d)(4), the commenter stated that he experienced confusion with the new language in the paragraph and noted that this paragraph states, "Facilities which utilize radiation machines for industrial radiography at permanent radiographic installations only are exempt from the requirements of this subsection except for the requirements of subsections §289.255(m)(1)(A) and (u)(6)(A), (B), (E) and (7)(A). The individual operating radiation machines at permanent radiographic installations must successfully complete a course of at least 40 hours on the applicable subjects..." The commenter expressed that the phrase "this subsection" seemed to mean the entire §289.255. He further stated that no other interpretation logically fit based on positioning of this paragraph and that since his entire operation consisted of a single shielded room x-ray machine, the only requirements of §289.255 that seemed to apply to his operation were the following: §289.255(d)(4) concerning operators required 40 hour training course; §289.255(m)(1)(A) regarding that trainees must possess current trainee status cards; §289.255(u)(6)(A), (B), and (E) concerning annual evaluation of radiation systems; and §289.255(u)(7)(A) that requires radiation machines must be registered.

The commenter further stated that by reading this proposed section, items previously required, but now exempted included the following: §289.255(e)-equipment receipt, transfer, and disposal records; §289.255(f)-radiation survey instruments; §289.255(g)-quarterly inventory; §289.255(h)-utilization logs; §289.255(i)-daily equipment inspection; §289.255(j)-shielded room alarms and entrance controls;

§289.255(k)-notification of incidents; §289.255(m)(2), (3), and (4) radiographer, radiographer trainer, RSO certification; §289.255(q)-personnel monitoring control; §289.255(r)-access control; and §289.255(s)-posting.

The commenter added that a lot of change has been made to this section, but that he is not particularly opposed because of the low risk of a well-designed shielded room x-ray unit. The commenter further expressed that if he had misunderstood the intent of the section, then he urged the department to strengthen the language and positioning of this exception in order to ensure that everyone clearly understands.

Response: The department further clarified the paragraph by adding the references "(b)(3) and (5), (j)" before the reference "(m)(1)(A)" in this paragraph to ensure that all the necessary exemptions were addressed. The department also deleted the reference "and (7)(A)" at the end of the first sentence since it was unnecessary and deleted the second sentence since it restated what was already included in §289.255(m)(1)(A).

Comment: Concerning §289.255(h)(1)(B), the commenter stated that the words "and signature" need to be added after the word "name" to meet the NRC compatibility requirements equivalent to 10 Code of Federal Regulations (CFR) 34.71(a)(2).

Response: The department added the suggested language to comply with NRC compatibility requirements equivalent to 10 CFR 34.71(a)(2) because as an agreement state, Texas must adopt this section as comparable to NRC's regulations.

Comment: Concerning §289.255(i)(1)(B), the commenter asked how he is supposed to determine that the survey instrument is responding when using an x-ray machine since the x-ray machine has to be in the "on" position in order to make this determination.

Response: The requirement of this subparagraph is for checks for response to radiation and not intended to require calibration. The department suggests that the licensee or registrant simply perform a battery check of the survey meter to check for response. No change was made as a result of the comment.

Comment: Concerning §289.255(j)(3), the commenter asked how he is supposed to test that the alarm system is operating properly before the installation is used for radiographic operations when the x-ray machine has to be in the "on" position in order to make this determination. The commenter stated that his facility currently possesses a machine with internal machine checks.

Response: The department suggests that the registrant apply to the department for approval of alternative methods for controlling access to high radiation areas in accordance with §289.202(s)(3) as stated in §289.255(j)(1). No change was made as a result of the comment.

Comment: Concerning §289.255(l)(3), the commenter stated that if the enforcement actions did not suspend or revoke the identification (ID) card, then the individual's card should be reciprocally recognized.

Response: The department notes that this paragraph states "Enforcement actions....by an independent certifying entity may be considered when reviewing..." This paragraph does not mean that an individual's card would not be recognized for any type of enforcement action but instead the word "may" is permissive and informs the reader that the department may consider such actions prior to granting reciprocity. No change was made as a result of the comment.

Comment: Concerning §289.255(m)(2)(A)(ii)(IV), the commenter asked what the word "travel" means in this context.

Response: The word "travel" in this context has the same meaning as it would in any other context and that is to transport to and from a point of origin or final destination. This clause provides a list of items that cannot be used to receive credit for the hours of on-the-job training. Travel is included in that list because there is no educational benefit being gained for the person sitting in a vehicle, driver or passenger, "traveling" to a job site. No change was made as a result of the comment.

Comment: Concerning §289.255(m)(3)(B), the commenter suggested the department consider issuing trainer cards rather than taking the time to amend licenses.

Response: This issue will be addressed in a future revision of this section because a revision as suggested by the commenter would incur a fee and there are other departmental resource issues to be considered. No change was made as a result of the comment.

Comment: Concerning §289.255(o), the commenter suggested the department provide an explanation of the procedures for submitting the application and money.

Response: There will be two separate application forms, one for the exam and one for the certification (that involves review of the training documentation). Often, an individual will submit an application for an exam, take the exam, but not complete the required on-the-job training until some time later. In this case, the individual would submit the separate application for certification (and the $100 fee) upon completion of the training. In a situation where an individual has completed the training requirements and applies to take the exam, a single check or money order for the combined fee of $125 may be submitted, but both application forms must be submitted in order for the department to appropriately allocate the fee money. No change was made as a result of the comment.

Comment: Concerning §289.255(o)(1)(B), the commenter expressed that this subsection states a fee of $25 for the exam and §289.255(p) states a fee of $100 for the ID card. The commenter asked if the new cost for the ID card is $125. The commenter asked if someone under reciprocity with an ID card from another agreement state/NRC will have to pay $100 to get a Texas ID card.

Response: A certification ID card is issued upon completion of the requirements for certification. One requirement is to successfully pass the exam and the exam fee is $25. Another requirement is to complete the training requirements. The fee for review of training requirements is $100. Since all requirements must be met before a certification ID card is issued, the total cost is $125. A person granted reciprocity with an ID card from another certifying entity is not required to get a Texas certification ID card. No change was made as a result of the comment.

Comment: Concerning §289.255(p)(1)(A), the commenter asked how the fees were determined and broken down to $100 and $25.

Response: The department calculated the fees by using actual staff time and resource costs assigned to those activities. The department created two separate fees, one for the examination

and one for the actual certification to reflect a more accurate cost recovery by the department. The examination cost is normalized over the total number of persons tested while the certification cost considers the staff time required to review the individual's qualifications. The two different fees also allow the department to accurately recover costs when only one component of certification is performed by the department. For example, an individual may take the exam in Texas, but submit training documentation and be certified by another certifying entity. No change was made as a result of the comment.

Comment: Concerning §289.255(q)(2)(G), the commenter asked why the subparagraph requires that the film badge or TLD be turned in for processing if the readings from the electronic personal dosimeter are greater than 200 millirem (2 mSv) as this specific equipment already gives you the dose and dose rate.

Response: The electronic personal dosimeter will give those readings for the day or shift that it is being used, but may not represent the individual's cumulative dose for the time period being monitored by the film badge, TLD, or OSL. This requirement is included in this subparagraph so that the individual performing radiographic operations does not become dependent on the electronic personal dosimeter and alarming ratemeter but instead continues to practice and comply with all requirements that are meant to provide for the radiographic personnel's safety. No change was made as a result of the comment.

Comment: Concerning §289.255(r)(1), the commenter asked why the paragraph requires that the individual maintaining visual surveillance of the operation specifically has to be a radiographer. The commenter suggested the words "a radiographer" be changed to "radiographic personnel."

Response: The department added the suggested language to this paragraph.

Comment: Concerning §289.255(u)(4)(D), the commenter asked in what situation would this subparagraph apply that is different from a situation in which §289.255(u)(4)(E) would apply.

Response: The difference between §289.255(u)(4)(D) and (E) is that §289.255(u)(4)(E) only applies in a one-person operation where an individual is not only the radiographer and the radiation safety officer (RSO), but is also the only individual that performs radiography. The rules permit this in a permanent radiographic installation or with the use of only x-ray machines. No change was made as a result of the comment.

Comment: Concerning §289.255(u)(4)(F), the commenter asked who trains the trainer when one individual serves as RSO, radiographer, and trainer. The commenter stated this subparagraph needed clarification as well as the documentation of this training.

Response: The requirements of this subparagraph do not specify who has to perform the training and therefore the decision of who trains the trainer, when one individual serves as RSO, radiographer, and trainer, is left to the licensee and/or registrant. Records of the annual refresher training are required by §289.255(u)(4)(J) and (v)(7)(L). No change was made as a result of the comment.

Comment: Concerning §289.255(v)(5)(C), the commenter asked why this subparagraph includes depleted uranium (DU) for leak testing. The commenter further questioned why a separate DU leak test must be performed every 12 months if leak testing sources every six months is already required.

Response: The licensee can perform a DU leak test at the same time that leak testing of sources is performed and thus be in compliance with the requirements of this subparagraph. No change was made as a result of the comment.

Comment: Concerning §289.255(v)(7)(F), the commenter asked who trains the trainer when one individual serves as RSO, radiographer, and trainer. The commenter stated this subparagraph needed clarification as well as the documentation of this training.

Response: The requirements of this subparagraph do not specify who has to perform the training and therefore the decision of who trains the trainer, when one individual serves as RSO, radiographer, and trainer, is left to the licensee and/or registrant. Records of the annual refresher training are required by §289.255(u)(4)(J) and (v)(7)(L). No change was made as a result of the comment.

Comment: Concerning §289.255(w)(1)(B)(iv), the commenter questioned what is meant by the word "mass" in this context. The commenter suggested the department clarify this term.

Response: "Mass" in this context means the number of pounds of DU the licensee possesses. No change was made as a result of the comment.

Comment: Concerning §289.255(y)(1)(B)(iii), the commenter stated that his facility has no optically stimulated luminescence devices or electronic personal dosimeters and suggested the department add clarifying language such as "when applicable" or "as applicable" if equipment is not available for use.

Response: The department added the words "as a minimum" to this clause to allow for flexibility when the licensee and/or registrant does not possess all of the different personnel monitoring equipment.

Commenters included representatives from Raytheon TI Systems, Frank Malek and Associates, Sharp Radiation Services, MQS Inspection, and San Jacinto College.

Subchapter C. Texas Regulations for Control of Radiation

25 TAC §289.115

The repeal is adopted under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with the authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, or the commissioner of health. The General Appropriations Act, Article IX, Rider 167, passed by the 75th Legislature is implemented 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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TRD-9901708

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Texas Department of Health
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Proposal publication date: December 4, 1998
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Subchapter F. License Regulations

25 TAC §289.255

The new section is adopted under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with the authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, or the commissioner of health. The General Appropriations Act, Article IX, Rider 167, passed by the 75th Legislature is implemented by the adoption.

§289.255. Radiation Safety Requirements and Licensing and Registration Procedures For Industrial Radiography.

(a) Purpose.

(1) The requirements in this section establish radiation safety requirements and licensing and registration procedures for using sources of radiation for industrial radiography and for certification of industrial radiographers.

(2) The requirements in this section apply to licensees and registrants who possess sources of radiation for industrial radiography, including radiation machines, accelerators, and sealed radioactive sources.

(3) Each licensee and registrant is responsible for ensuring compliance with this chapter, license and registration conditions, and orders of the agency.

(4) Each licensee and registrant is also responsible for ensuring that radiographic personnel performing activities under a license or registration comply with this chapter, license and registration conditions, and orders of the agency.

(b) Scope.

(1) The requirements of this section are in addition to and not in substitution for other applicable requirements of this chapter.

(2) The requirements of §289.251 of this title (relating to Exemptions, General Licenses, and General License Acknowledgments), §289.252 of this title (relating to Licensing of Radioactive Material), and §289.257 of this title (relating to Packaging and Transportation of Radioactive Material) apply to licensees subject to this section.

(3) The requirements of §289.226 of this title (relating to Registration of Radiation Machine Use and Services) apply to registrants subject to this section.

(4) The requirements of §289.119 of this title (relating to Radiation Safety Requirements for Particle Accelerators) apply to certain persons using accelerators subject to this section.

(5) The requirements of the following sections of this chapter apply to all licensed and registered industrial radiographic operations:

(A) §289.201 of this title (relating to General Provisions);

(B) §289.202 of this title (relating to Standards for Protection Against Radiation);

(C) §289.203 of this title (relating to Notices, Instructions, and Reports to Workers; Inspections);

(D) §289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material(s) Licenses, Emergency Planning and Implementation, and Other Regulatory Services); and

(E) §289.205 of this title (relating to Hearing and Enforcement Procedures).

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

(1) Additional authorized use/storage site–Authorized use/storage locations specifically named on a license or certificate of registration other than the main site specified on a license or certificate of registration, or other than temporary job sites.

(2) ANSI–American National Standards Institute.

(3) Annual refresher safety training–A review conducted or provided by the licensee or registrant for its employees on radiation safety aspects of industrial radiography. The review may include, as appropriate, the results of internal audits, new procedures or equipment, new or revised regulations, accidents or errors that have been observed, and should also provide opportunities for employees to ask safety questions.

(4) Associated equipment–Equipment that is used in conjunction with a radiographic exposure device to make radiographic exposures that drives, guides, or comes in contact with the source, (such as, guide tube, control tube, control cable (drive cable), removable source stop, "J" tube and collimator when it is used as an exposure head).

(5) Cabinet x-ray system–An x-ray system with the x-ray tube installed in an enclosure independent of existing architectural structures except the floor on which it may be placed. An x-ray tube used within a shielded part of a building, or x-ray equipment that may temporarily or occasionally incorporate portable shielding, is not considered a cabinet x-ray system. The cabinet x-ray system is intended to:

(A) contain at least that portion of a material being irradiated;

(B) provide radiation attenuation; and

(C) exclude personnel from its interior during generation of radiation.

(6) Certifiable cabinet x-ray system–An existing uncertified x-ray system that has been modified to meet the certification requirements specified in 21 Code of Federal Regulations (CFR) 1020.40.

(7) Certification identification (ID) card–The document issued by the agency to individuals who have completed the requirements stated in subsection (m)(2)(A) of this section.

(8) Certified cabinet x-ray system–An x-ray system that has been certified in accordance with 21 CFR 1010.2 as being manufactured and assembled on or after April 10, 1975, according to the provisions of 21 CFR 1020.40.

(9) Certifying entity–An independent certifying organization meeting the requirements in Appendix A of 10 CFR Part 34 or

an agreement state meeting the requirements in Appendix A, Parts II and III of 10 CFR Part 34.

(10) Collimator–A small radiation shield that is placed on the end of a guide tube or directly onto a radiographic exposure device to restrict the size of the radiation beam when the sealed source is cranked into position to make a radiographic exposure.

(11) Control cable (drive cable)–The cable that is connected to the source assembly and used to drive the source from and return it to the shielded position.

(12) Control mechanism (drive mechanism)–A device that enables the source assembly to be moved from and returned to the shielded position. A drive mechanism is also known as a crank assembly.

(13) Control tube–A protective sheath for guiding the drive cable. The control tube connects the drive mechanism to the radiographic exposure device.

(14) Crank-out device–The drive cable, control tube, and drive mechanism used to move the sealed source to and from the shielded position to make an industrial radiographic exposure.

(15) Enclosed radiography–Industrial radiography conducted in an enclosed cabinet or room. Enclosed radiography includes shielded-room radiography.

(16) Exposure head–A device that locates the gamma radiography sealed source in the selected working position. An exposure head is also known as a source stop.

(17) Fluoroscopic imaging assembly–A subsystem in which x-ray photons produce a fluoroscopic image. It includes the image receptors such as the image intensifier and spot-film device, electrical interlocks, if any, and structural material providing linkage between the image receptor and source assembly.

(18) GED–General educational development.

(19) Guide tube–A flexible or rigid tube, such as a "J" tube, for guiding the source assembly and the attached drive cable from the exposure device to the exposure head. The guide tube may also include the connections necessary for attachment to the exposure device and to the exposure head.

(20) Independent certifying organization–An independent organization that meets all of the criteria of Appendix A of 10 CFR Part 34.

(21) Industrial radiography (radiography)–A nondestructive testing method using ionizing radiation, such as gamma rays or x rays, to make radiographic images for the purpose of detecting flaws in objects without destroying them.

(22) Lay-barge radiography–Industrial radiography performed on any water vessel used for laying pipe.

(23) Lock-out survey–A radiation survey performed to determine that a sealed source is in its fully shielded position before moving the radiographic exposure device or source changer to a different temporary job site or before securing the radiographic exposure device or source changer against unauthorized removal.

(24) Offshore–Within the territorial waters of the state of Texas. The territorial waters of Texas extend to the three marine league line or nine nautical miles from the Texas coast.

(25) On-the-job training–Experience in all of the areas considered to be directly involved in the radiography process. The hours of on-the-job training do not include safety meetings, classroom training, travel, darkroom activities, film development and interpretation, or use of a cabinet x-ray unit.

(26) Permanent radiographic installation–An enclosed shielded room, cell, or vault, not located at a temporary jobsite, in which radiography is performed and meets the criteria of subsection (j) of this section.

(27) Permanent storage site–Any location that is specifically named on a license or certificate of registration and that is used only for storage of sources of radiation.

(28) Personal supervision–Guidance and instruction provided to a radiographer trainee by a radiographer trainer who is present at the site, in visual contact with the trainee while the trainee is using sources of radiation, associated equipment, and survey meters, and in such proximity that immediate assistance can be given if required.

(29) Pipeliners–A directional beam radiographic exposure device.

(30) Platform radiography–Industrial radiography performed on an offshore platform or other structure over a body of water.

(31) Practical examination–A demonstration through practical application of the safety rules and principles in industrial radiography including use of all appropriate equipment and procedures.

(32) Radiation safety officer (RSO)–An individual named by the licensee or registrant who has a knowledge of, responsibility for, and authority to enforce appropriate radiation protection rules, standards, and practices on behalf of the licensee or registrant and who meets the requirements of subsection (m)(4) of this section.

(33) Radiographer–Any individual who has successfully completed the training, testing, and documentation requirements of subsection (m)(2)(A) of this section and who is responsible to the licensee or registrant for assuring compliance with the requirements of the agency's regulations and conditions of the license or certificate of registration. These individuals may be referred to as certified industrial radiographers or certified radiographers. The individual may also:

(A) perform industrial radiographic operations; or

(B) be in attendance at the site where the sources of radiation are being used.

(34) Radiographer certification–Written approval received from a certifying entity stating that an individual has satisfactorily met certain established radiation safety, testing, and experience criteria.

(35) Radiographer trainee–Any individual who has successfully completed the training and documentation requirements of subsection (m)(1)(A) of this section and who must use sources of radiation and related handling tools or radiation survey instruments under the personal supervision of a radiographer trainer.

(36) Radiographer trainer–A radiographer who instructs and supervises radiographer trainees during on-the-job training and who meets the requirements of subsection (m)(3) of this section.

(37) Radiographic exposure device–Any instrument containing a sealed source that is used to make a radiograph (e.g., camera).

(38) Radiographic operations–All activities associated with the presence of x-ray machines or radioactive sources in a

radiographic exposure device during the use of the machine or device or transport (except when being transported by a common or contract transport). Radiographic operations include surveys to confirm the adequacy of boundaries, setting up equipment, and any activity inside restricted area boundaries.

(39) Radiographic personnel–Any radiographer, radiographer trainer, or radiographer trainee.

(40) Residential location–Any area where structures are located in which people lodge or live, and the grounds on which these structures are located including, but not limited to, houses, apartments, condominiums, and garages.

(41) S-tube–A tube through which the radioactive source travels when inside a radiographic exposure device.

(42) Shielded position–The location within the radiographic exposure device or source changer where the sealed source is secured and restricted from movement.

(43) Shielded-room radiography–Industrial radiography conducted in a room shielded so radiation levels at every location on the exterior meet the limitations specified in §289.202(n) of this title. A shielded room is also known as a bay or bunker.

(44) Source assembly (pigtail)–An assembly that consists of the sealed source and a connector that attaches the source to the control cable. The source assembly may also include a ball stop used to secure the source in the shielded position.

(45) Source changer–A device designed and used to replace sealed sources in radiographic exposure devices, including those used to transport and store sealed sources.

(46) Storage area–Any location, facility, or vehicle that is used to store and secure a radiation machine, radiographic exposure device, a storage container, or a sealed source when it is not used for radiographic operations. Storage areas are locked or have a physical barrier to prevent accidental exposure, tampering, or unauthorized removal of the machine, device, container, or source.

(47) Storage container–A device in which the sealed source is secured and stored.

(48) Storage facility–A structure designed to house one or more sources of radiation to provide security and shielding at a permanent storage site. A storage facility is also known as a vault.

(49) Temporary job site–Any location where industrial radiography is performed other than the specific use location(s) listed on a license or certificate of registration. If use of sources of radiation is authorized at a temporary job site, storage incident to that use is also authorized.

(50) Trainee status card–The document issued by the agency following completion of the requirements of subsection (m)(1)(A) of this section.

(51) Transport container–A package that is designed to provide radiation safety and security when sealed sources are transported and meets all applicable requirements of the United States Department of Transportation (DOT).

(52) Underwater radiography–Industrial radiography performed when the radiographic exposure device and/or related equipment are beneath the surface of the water.

(d) Exemptions.

(1) Uses of certified and certifiable cabinet x-ray systems are exempt from the requirements of this section except for the requirements of subsections (b)(3) and (5) and (u)(6)(C)-(E) of this section.

(2) Industrial uses of hand-held light intensified imaging devices are exempt from the requirements in this section if the exposure level 18 inches from the source of radiation to any individual does not exceed 2 millirem per hour (mrem/hr) (0.02 millisievert per hour (mSv/hr)). Devices with exposure levels that exceed the 2 mrem/hr (0.02 mSv/hr) level shall meet the applicable requirements of this section and §289.252 of this title or §289.226 of this title, as applicable.

(3) Radiation machines determined by the agency to constitute a minimal threat to human health and safety in accordance with §289.201(q)(2) of this title, are exempt from the requirements in this section except for the requirements of paragraph (1) of this subsection.

(4) Facilities that utilize radiation machines for industrial radiography at permanent radiographic installations only are exempt from the requirements of this section except for the requirements of subsections (b)(3) and (5), (j), (m)(1)(A) and (u)(6)(A), (B), and (E).

(e) Receipt, transfer, and disposal of sources of radiation and devices using depleted uranium (DU) for shielding. Each licensee and registrant shall make and maintain records in accordance with subsection (w)(1) of this section, showing the receipt, transfer, and disposal of sources of radiation and devices using DU for shielding.

(f) Radiation survey instruments.

(1) Each licensee and registrant shall have a sufficient number of calibrated, appropriate, and operable radiation survey instruments at each location where sources of radiation are present to perform the radiation surveys required by this section and §289.202(p)(1) and (2) of this title. These radiation survey instruments shall be capable of measuring a range from 2 mrem/hr (0.002 mSv/hr) through 1 rem per hour (rem/hr) (0.01 sievert per hour (Sv/hr)).

(2) Each radiation survey instrument shall be calibrated:

(A) by a person licensed or registered by the agency, another agreement state, or the NRC to perform such service;

(B) at energies appropriate for the licensee's or registrant's use;

(C) at intervals not to exceed six months and after each instrument servicing other than battery replacement;

(D) at two points located approximately one-third and two-thirds of full- scale on each scale for linear scale instruments; for logarithmic scale instruments, at mid-range of each decade, and at two points of at least one decade; and for digital instruments, at three points between 2 and 1,000 mrem/hr (0.02 and 10 mSv/hr); and

(E) to demonstrate an accuracy within plus or minus 20% of the true radiation level at each point checked.

(3) Each radiation survey instrument shall be checked with a radiation source at the beginning of each day of use and at the beginning of each work shift to ensure it is operating properly.

(4) Records of the calibrations required by paragraph (2) of this subsection shall be maintained in accordance with subsection (w)(2) of this section.

(g) Quarterly inventory.

(1) Each licensee and registrant shall perform a physical inventory at intervals not to exceed three months to account for

all sources of radiation and for devices containing DU received or possessed.

(2) Records of the quarterly inventories required by paragraph (1) of this subsection shall be made and maintained for agency inspection in accordance with subsection (w)(3) of this section.

(h) Utilization logs.

(1) Each licensee and registrant shall make and maintain current logs of the use, removal, and return to storage of each source of radiation. The information shall be recorded in the log when the source is removed from and returned to storage. The logs shall include:

(A) a unique identification, for example, the serial number, of the following:

(i) each radiation machine;

(ii) each radiographic exposure device containing a sealed source or transport and storage container in which the sealed source is located; and

(iii) each sealed source;

(B) the name and signature of the radiographer using the source of radiation;

(C) the location(s) and date(s) where each source of radiation is used; and

(D) the date(s) each source of radiation is removed from storage and returned to storage.

(2) Utilization logs may be kept on BRC Form 255-U, Utilization Log, or on clear, legible records containing all the information required by paragraph (1) of this subsection.

(3) Records of utilization logs shall be made and maintained for agency inspection in accordance with subsection (w)(15) of this section.

(i) Inspection and maintenance of radiation machines, radiographic exposure devices, transport and storage containers, associated equipment, source changers, and survey instruments.

(1) Each day before using equipment, the radiographer shall:

(A) perform visual and operational checks on radiation machines, survey instruments, radiographic exposure devices, transport and storage containers, associated equipment and source changers to ensure that:

(i) the equipment is in good working condition;

(ii) the sources are adequately shielded in radiographic exposure devices; and

(iii) required labeling is present and legible.

(B) determine the survey instrument is responding using check sources or other appropriate means; and

(C) remove the equipment from service until repaired if equipment problems are found.

(2) Each licensee and registrant shall have written procedures for the following:

(A) inspection and routine maintenance of radiation machines, radiographic exposure devices, source changers, associated equipment, transport and storage containers, and survey instruments at intervals not to exceed three months to ensure the proper functioning of components important to safety. All appropriate components shall be maintained in accordance with manufacturers' specifications. Radiation machines, radiographic exposure devices, transport containers and source changers being stored are exempted from this requirement provided that each radiation machine, radiographic exposure device, transport container, or source changer is inspected and repaired prior to being returned to service. This inspection and maintenance program shall cover, as a minimum, the items listed in subsection (y)(2) of this section; and

(B) inspection and maintenance necessary to maintain the Type B packaging used to transport radioactive material. The inspection and maintenance program must include procedures to assure that Type B packages are shipped and maintained in accordance with the certificate of compliance or other approval.

(3) Records of equipment problems and of any maintenance performed in accordance with paragraph (1) of this subsection shall be made and maintained in accordance with subsection (w)(4) of this section.

(j) Permanent radiographic installations.

(1) Permanent radiographic installations shall have high radiation area entrance controls as described in §289.202(s)(1)-(4) of this title or if applicable, the Texas Regulations for Control of Radiation (TRCR) Part 35, §§35.8 and 35.9, as adopted by reference in §289.119 of this title (relating to Radiation Safety Requirements for Particle Accelerators).

(2) The entrance controls shall be tested for proper operation at the beginning of each day of equipment use.

(3) The alarm system shall be tested for proper operation with a source of radiation each day before the installation is used for radiographic operations. The test shall include a check for the visible and/or audible signals.

(4) Entrance control devices that reduce the radiation level upon entry (designated in paragraph (1) of this subsection) shall be tested monthly.

(5) If an entrance control device or alarm is operating improperly, it shall be immediately labeled as defective and repaired within seven calendar days. The facility may continue to be used during this seven-day period, provided the licensee or registrant implements the continuous surveillance requirements of subsection (r) of this section, ensures that radiographic personnel use an alarming ratemeter, and complies with the requirements of subsection (v)(7)(G) of this section.

(6) Records of the tests and repairs required by this subsection shall be made and maintained in accordance with subsection (w)(5) of this section.

(k) Notification of incidents.

(1) The agency shall be notified of the loss or theft of sources of radiation, overexposures, and excessive levels in accordance with §289.202(ww)-(yy), and (bbb) of this title.

(2) In addition, each licensee or registrant shall submit a written report within 30 days to the agency whenever one of the following events occurs:

(A) a source assembly cannot be returned to the fully-shielded position and properly secured;

(B) the source assembly becomes unintentionally disconnected from the drive cable;

(C) any component critical to safe operation of the radiographic exposure device fails to properly perform its intended function;

(D) an indicator on a radiation machine fails to show that radiation is being produced;

(E) an exposure switch on a radiation machine fails to terminate production of radiation when turned to the off position; or

(F) a safety interlock fails to terminate x-ray production.

(3) The licensee or registrant shall include the following information in each report submitted in accordance with paragraph (2) of this subsection:

(A) a description of the equipment problem;

(B) cause of each incident, if known;

(C) manufacturer and model number of equipment involved in the incident;

(D) manufacturer and model and serial number of equipment involved in the incident;

(E) location, time, and date of the incident;

(F) actions taken to establish normal operations;

(G) corrective actions taken or planned to prevent recurrence; and

(H) names of personnel involved in the incident.

(l) Reciprocity.

(1) All reciprocal recognition of licenses or certificates of registration by the agency will be granted in accordance with §289.226(r) of this title or §289.252(s) of this title.

(2) Reciprocal recognition by the agency of an individual radiographer certification will be granted provided that:

(A) the individual holds a valid certification in the appropriate category and class issued by a certifying entity, as defined in subsection (c) of this section;

(B) the requirements and procedures of the certifying entity issuing the certification afford the same or comparable certification standards as those afforded by subsection (m)(2)(A)(i)-(iv) of this section; and

(C) the individual submits a legible copy of the certification to the agency prior to entry into Texas.

(3) Enforcement actions with the agency, another agreement state, or the NRC or sanctions by an independent certifying entity may be considered when reviewing a request for reciprocal recognition from a licensee, registrant, or certified radiographer.

(4) Certified radiographers who are granted reciprocity by the agency shall maintain the certification upon which the reciprocal recognition was granted, or prior to the expiration of such certification, shall meet the requirements of subsection (m)(2)(A) of this section.

(m) Requirements for qualifications of radiographic personnel.

(1) Radiographer trainee. No licensee or registrant shall permit any individual to act as a radiographer trainee until the individual possesses the original or a copy of an agency-issued trainee status card or certification ID card.

(A) To obtain an agency-issued trainee status card, the licensee, registrant, or the individual must document to the agency on BRC Form 255-E or equivalent that such individual has successfully completed a course of at least 40 hours on the applicable subjects outlined in subsection (y)(1) of this section. The course must be one accepted by the agency, another agreement state, or the NRC.

(B) The trainee must carry a copy of the completed BRC Form 255-E, in the interim period after submitting documentation to the agency and before receiving a trainee status card. The copy of the completed BRC Form 255-E that was submitted to the agency may be used in lieu of the trainee status card for a period of 60 days from the date recorded by the trainee on the documentation.

(C) The individual shall notify the agency by telephone, telegram, telefacsimile, electronic media transmission, or in writing of the need for a replacement trainee status card. The individual shall carry a copy of documentation of the request while performing industrial radiographic operations until a replacement trainee status card is received from the agency.

(2) Radiographer. No licensee or registrant shall permit any individual to act as a radiographer until the individual carries a valid radiographer certification. To obtain a radiographer certification, an individual must comply with subsection (p)(1) of this section and the following:

(A) the licensee, registrant, or the individual must document to the agency on BRC Form 255-R or equivalent that such individual:

(i) has completed the requirements of paragraph (1)(A) of this subsection;

(ii) has completed on-the-job training as a radiographer trainee supervised by one or more radiographer trainers authorized on a license or certificate of registration;

(I) The radiographer trainee must carry a legible trainee status card in accordance with paragraph (1) of this subsection while obtaining the on-the-job training specified in subclauses (II)-(VII) of this clause.

(II) The on-the-job training shall include at least 200 hours of active participation in radioactive materials industrial radiographic operations or 120 hours of active participation in x-ray industrial radiographic operations.

(III) Individuals performing industrial radiography utilizing radioactive materials and x-ray machines must complete both segments (320 hours) of on-the-job training.

(IV) The hours of on-the-job training do not include safety meetings, classroom training, travel, darkroom activities, film development and interpretation, or use of a cabinet x-ray unit.

(V) One year of documented experience or on-the-job training as authorized by another agreement state or the NRC may be substituted for subclauses (II) or (III) of this clause. The documentation must be submitted to the agency on BRC Form 255-OS or equivalent.

(VI) The trainee shall be under the personal supervision of a radiographer trainer whenever a radiographer trainee:

(-a-) uses radiation machines, radiographic exposure devices, or associated equipment; or

(-b-) performs radiation surveys required by subsection (v)(8) of this section to determine that the sealed source has returned to the shielded position after an exposure or the radiation machine has stopped producing radiation.

(VII) The personal supervision shall include the following.

(-a-) The radiographer trainer's physical presence at the site where the sources of radiation are being used;

(-b-) The availability of the radiographer trainer to give immediate assistance if required; and

(-c-) The radiographer trainer's direct observation of the trainee's performance of the operations referred to in this section.

(iii) has successfully completed within the last five years the appropriate agency-administered examination prescribed in subsection (o)(2) of this section or the appropriate examination of another certifying entity that affords the same or comparable certification standards as those afforded by this clause and clauses (i), (ii) and (iv) of this subparagraph; and

(iv) possesses a current certification ID card issued in accordance with subsection (p)(2) of this section or by another certifying entity that affords the same or comparable certification standards as those afforded by this clause and clauses (i)-(iii) of this subparagraph.

(B) Reciprocal recognition by the agency of an individual radiographer certification may be granted according to subsection (l)(2) and (3) of this section:

(C) Once an individual has completed the requirements of paragraph (2)(A)(iv) of this subsection, the licensee or registrant is not required to submit the documentation referenced in paragraph (2)(A)(i) and (ii) of this subsection.

(3) Radiographer trainer.

(A) No licensee or registrant shall permit any individual to act as a radiographer trainer until:

(i) it has been documented to the agency on BRC Form 255-T or equivalent that such individual has:

(I) met the radiographer certification requirements of paragraph (2)(A) of this subsection; and

(II) one year of documented experience as a certified radiographer.

(ii) such individual is named on the specific license or certificate of registration issued by the agency and under which the individual is acting as a radiographer trainer; and

(iii) determination is made by the agency that the individual is not currently under order from the agency prohibiting the individual from acting as a radiographer trainer.

(B) The specific duties of the radiographer trainer include, but are not limited to, the following:

(i) providing personal supervision to any radiographer trainee at the site where the sources of radiation are being used; and

(ii) preventing any unauthorized use of a source of radiation by a radiographer trainee.

(4) RSO for industrial radiography.

(A) An RSO shall be designated on every industrial radiography license and certificate of registration issued by the agency.

(B) The RSO's qualifications shall be submitted to the agency and shall include as a minimum:

(i) possession of a high school diploma or a certificate of high school equivalency based on the GED test;

(ii) completion of the training and testing requirements of paragraph (1)(A) and (2)(A)(iii) of this subsection and subsection (n)(1)(B) of this section; and

(iii) two years of documented radiation protection experience, including knowledge of industrial radiographic operations with at least 40 hours of active participation in industrial radiographic operations.

(C) The specific duties of the RSO include, but are not limited to, the following:

(i) establishing and overseeing operating, safety, emergency, and as low as reasonably achievable (ALARA) procedures, and to review them regularly to ensure that the procedures are current and conform with the requirements of this chapter;

(ii) overseeing and approving all phases of the training program for radiographic personnel so that appropriate and effective radiation protection practices are taught;

(iii) ensuring that required radiation surveys and leak tests are performed and documented in accordance with this chapter, including any corrective measures when levels of radiation exceed established limits;

(iv) ensuring that personnel monitoring devices are calibrated and used properly by occupationally-exposed personnel;

(v) ensuring that timely notifications to employees are made as required by §289.203 of this title;

(vi) ensuring that timely notifications to the agency are made as required by this section and §289.202 of this title;

(vii) ensuring that any required interlock switches and warning signals are functioning and that radiation signs, ropes, and barriers are properly posted and positioned;

(viii) investigating, determining the cause, taking steps to prevent the recurrence, and reporting to the agency each:

(I) known or suspected case of radiation exposure to an individual or radiation level detected in excess of limits established by this chapter; and

(II) theft or loss of a source(s) of radiation.

(ix) having a thorough knowledge of management policies and administrative procedures of the licensee or registrant;

(x) assuming control and having the authority to institute corrective actions including shutdown of operations when necessary in emergency situations or unsafe conditions;

(xi) maintaining records as required by this chapter in accordance with subsection (w) of this section;

(xii) ensuring the proper storing, labeling, transport, and use of exposure devices and sources of radiation;

(xiii) ensuring that inventory and inspection and maintenance programs are performed in accordance with subsections (g) and (i) of this section;

(xiv) ensuring that personnel are complying with the requirements of this chapter and the conditions of the license or the certificate of registration; and

(xv) ensuring that the operating, safety, and emergency procedures of the licensee or registrant are met in accordance

with subsections (u)(4)(A)-(C) and (G) and (v)(7)(A)-(C) and (I) of this section.

(n) Additional qualification requirements.

(1) No licensee or registrant shall permit any individual to act as a radiographer trainee, radiographer, radiographer trainer, or RSO until such individual has:

(A) received copies of and demonstrated an understanding of the following by successful completion of a written or oral examination administered by the licensee or registrant covering this material:

(i) the requirements contained in this section and the applicable requirements of §289.201 of this title, §289.202 of this title, §289.203 of this title, and §289.257 of this title;

(ii) the appropriate conditions of the license(s) and certificate(s) of registration;

(iii) the licensee's or registrant's operating, safety, and emergency procedures; and

(B) demonstrated competence in the use of sources of radiation, radiographic exposure devices, associated equipment, related handling tools, and radiation survey instruments, that may be employed in industrial radiographic assignments by successful completion of a practical examination administered by the licensee or registrant covering such use.

(2) Records of the administration of and the examinations required by paragraph (1) of this subsection shall be made and maintained for agency inspection in accordance with subsection (w)(7) of this section.

(o) Application and fee for radiographer certification examinations.

(1) Application.

(A) An application for taking the examination shall be on forms prescribed and furnished by the agency.

(B) The non-refundable application fee for examination shall be $25.

(C) The appropriate fee shall be submitted with the application for examination when filing with the agency.

(D) The application and the non-refundable fee shall be submitted to the agency on or before the dates specified by the agency.

(2) Examination. The examination shall be given for the purpose of determining the qualifications of applicants.

(A) The scope of the examination and the methods of procedure, including determination of the passing score, shall be prescribed by the agency. The examination will assess the applicant's knowledge to safely use sources of radiation and related equipment and the applicant's knowledge of this section, §289.201 of this title, and §289.202 of this title.

(B) The examination will be administered by the agency or persons authorized by the agency.

(C) A candidate failing an examination may apply for re-examination in accordance with paragraph (1) of this subsection and will be re-examined. A candidate shall not retake the same version of the agency-administered examination.

(D) The examination shall normally be offered once each month. Times, dates, and locations of the examination will be furnished by the agency.

(E) The examination will be in the English language.

(F) To take the examination, an individual shall present a photo identification card, such as a driver's license, at the time of the examination.

(G) Calculators will be permitted during the examination. However, calculators or computers with preprogrammed data or formulas, including exposure calculators, will not be permitted during the examination.

(H) The examination will be a "closed-book" examination.

(I) Any individual observed by an agency proctor to be compromising the integrity of the examination shall be required to surrender the examination, the answer sheet, and all scratch paper. Such individual will not be allowed to complete the examination, will forfeit the examination fee, and will leave the examination site to avoid disturbing other examinees. Such individual must wait 90 days before taking a new examination and must resubmit a new application and a $25 non-refundable examination fee.

(J) Examination material shall be returned to the agency at the end of the examination. No photographic or other copying of examination questions or materials shall be permitted. Disclosure by any individual of the contents of any examination prior to its administration is prohibited.

(K) The names and scores of individuals taking the examination shall be a public record.

(p) Radiographer certification.

(1) An application for radiographer certification shall be on BRC Form 255-R, BRC Form 255-OS, or equivalent.

(A) The non-refundable fee for radiographer certification shall be $100.

(B) The appropriate fee shall be submitted with the application for radiographer certification when filing with the agency.

(2) A certification ID card shall be issued to each individual who successfully completes the requirements of subsection (m)(2)(A)(i)-(iii) of this section.

(A) Each individual's certification ID card shall contain the individual's photograph. The agency will take the photograph at the time the examination is administered.

(B) The certification ID card remains the property of the agency and may be revoked or suspended under the provisions of paragraph (4) of this subsection.

(C) Any individual who needs to replace a certification ID card shall submit to the agency a written request for a replacement certification ID card, stating the reason a replacement certification ID card is needed. A non-refundable fee of $35 shall be paid to the agency for each replacement of a certification ID card. The prescribed fee shall be submitted with the written request for a replacement certification ID card. The individual shall carry a copy of the request while performing industrial radiographic operations until a replacement certification ID card is received from the agency.

(D) Each certification ID card is valid for a period of five years, unless revoked or suspended in accordance with paragraph

(4) of this subsection. Each certification ID card expires at the end of the day, in the month and year stated on the certification ID card.

(3) Renewal of a radiographer certification.

(A) Applications for examination to renew a radiographer certification shall be filed in accordance with subsection (o)(1) of this section.

(B) The examination for renewal of a radiographer certification shall be administered in accordance with subsection (o)(2) of this section.

(C) A renewal certification ID card shall be issued in accordance with paragraph (2) of this subsection.

(4) Suspension or revocation of a radiographer certification.

(A) Any radiographer who violates the requirements of this chapter, or provides any material false statement in the application or any statement of fact required in accordance with this chapter, may be required to show cause at a formal hearing why the radiographer certification should not be suspended or revoked in accordance with §289.205 of this title.

(B) When an agency order has been issued for an industrial radiographer to cease and desist from the use of sources of radiation or the agency suspends or revokes the individual's radiographer certification, the radiographer shall surrender the certification ID card to the agency until the order is changed or the suspension expires.

(C) An individual whose radiographer certification has been suspended or revoked by the agency or another certifying entity shall obtain written approval from the agency to apply to take the examination.

(q) Personnel monitoring control.

(1) The personnel monitoring program shall meet the applicable requirements of §289.202 of this title.

(2) During industrial radiographic operations, the following shall apply:

(A) No licensee or registrant shall permit an individual to act as a radiographer, radiographer trainer, or radiographer trainee unless each individual wears, on the trunk of the body at all times during radiographic operations:

(i) an individual monitoring device that meets the requirements of §289.202(p)(3) of this title;

(ii) direct-reading pocket dosimeter or an electronic personal dosimeter; and

(iii) an alarming ratemeter.

(B) For permanent radiographic installations where other appropriate alarming or warning devices are in routine use, the wearing of an alarming ratemeter is not required.

(C) Pocket dosimeters shall meet the criteria in ANSI 13.5-1972 at the time of manufacture and shall have a range of zero to 200 mrem (2 mSv). Electronic personal dosimeters may only be used in place of ion-chamber pocket dosimeters.

(D) Pocket dosimeters shall be recharged at the start of each work shift.

(E) As a minimum, direct reading pocket dosimeters shall be recharged and electronic personal dosimeters reset, and "start" readings recorded:

(i) immediately before checking out any source of radiation from an authorized storage location for the purposes of conducting industrial radiographic operations; and

(ii) before beginning radiographic operations on any subsequent calendar day (if the source of radiation has not been checked back into an authorized storage site).

(F) Whenever radiographic operations are concluded for the day, the "end" readings on pocket dosimeters or electronic personal dosimeters shall be recorded and the accumulated occupational doses for that day determined and recorded.

(G) If an individual's pocket dosimeter is discharged beyond its range (for example, goes "off-scale"), or if an individual's electronic personal dosimeter reads greater than 200 mrem (2 mSv), industrial radiographic operations by that individual shall cease and the individual's monitoring device shall be processed immediately. The individual shall not return to work with sources of radiation until a determination of the radiation exposure has been made. This determination shall be made by the RSO or the RSO's designee. The results of this determination shall be included in the records maintained in accordance with subsection (w)(8) of this section.

(H) Each individual monitoring device shall be assigned to and worn by only one individual.

(I) Individual monitoring devices must be replaced at least monthly. After replacement, each individual monitoring device must be returned to the supplier for processing within 14 calendar days of the exchange date specified by the personnel monitoring supplier or as soon as practicable. In circumstances that make it impossible to return each individual monitoring device within 14 calendar days, such circumstances must be documented and available for review by the agency.

(J) If an individual monitoring device is lost or damaged, the worker shall cease work immediately until a replacement individual monitoring device is provided and the exposure is calculated for the time period from issuance to loss or damage of the individual monitoring device. The results of the calculated exposure and the time period for which the individual monitoring device was lost or damaged shall be included in the records maintained in accordance with subsection (w)(8) of this section.

(3) Pocket dosimeters or electronic personal dosimeters shall be checked for correct response to radiation at periods not to exceed one year. Acceptable dosimeters shall read within plus or minus 20% of the true radiation exposure.

(4) Each alarming ratemeter shall:

(A) be checked without being exposed to radiation prior to use at the start of each work shift, to ensure that the audible alarm is functioning properly;

(B) be set to give an alarm signal at a preset dose rate of 500 mrem/hr (5 mSv/hr) or lower with an accuracy of plus or minus 20% of the true radiation dose rate;

(C) require special means to change the preset alarm function; and

(D) be calibrated for correct response to radiation at intervals not to exceed one year.

(5) The following records required by this subsection shall be made and maintained in accordance with subsection (w)(8) of this section.

(A) Records of pocket dosimeter response.

(B) Records of pocket dosimeter and electronic personal dosimeter readings of personnel exposures.

(6) The following records required by this subsection shall be maintained in accordance with subsection (w)(8) of this section.

(A) Records of alarming ratemeter calibrations.

(B) Records of individual monitoring device monitoring results received from the individual monitoring device processor.

(r) Access control.

(1) During each industrial radiographic operation, radiographic personnel shall maintain visual surveillance of the operation to protect against unauthorized entry into a radiation area or high radiation area, except at permanent radiographic installations where all entryways are locked and the requirements of subsection (j) of this section are met.

(2) Radiographic exposure devices shall not be left unattended except when in storage or physically secured against unauthorized removal or tampering.

(s) Posting. All areas in which industrial radiography is being performed shall be posted conspicuously in accordance with §289.202 of this title including the following.

(1) Radiation areas. Each radiation area shall be posted conspicuously with a sign(s) displaying the radiation caution symbol and the words "CAUTION, RADIATION AREA" or "DANGER, RADIATION AREA."

(2) High radiation area. Each high radiation area shall be posted conspicuously with a sign(s) displaying the radiation caution symbol and the words "CAUTION, HIGH RADIATION AREA" or "DANGER, HIGH RADIATION AREA."

(3) Whenever practicable, ropes and/or barriers shall be used in addition to appropriate signs to designate areas in accordance with §289.202(n)(1) of this title and to help prevent unauthorized entry.

(4) During pipeline industrial radiographic operations, sufficient radiation signs and other barriers shall be posted to prevent unmonitored individuals from entering the area in accordance with §289.202(n)(1) of this title.

(5) In lieu of the requirements of subsection (s)(1) and (2) of this section, a restricted area may be established in accordance with §289.202(n)(1) of this title and be posted in accordance with subsection (s)(1) and (2) of this section, for example, both signs may be posted at the same location at the boundary of the restricted area.

(6) Exceptions listed in §289.202(bb) of this title do not apply to industrial radiographic operations.

(t) Specific requirements for radiographic personnel performing industrial radiography.

(1) At a job site, the following shall be supplied by the licensee or registrant:

(A) at least one operable, calibrated survey instrument for each exposure device or radiation machine in use;

(B) an individual monitoring device that meets the requirements of §289.202(p)(3) of this title for each worker;

(C) an operable, calibrated pocket dosimeter or electronic personal dosimeter with a range of zero to 200 mrem (2 mSv) for each worker;

(D) an operable, calibrated, alarming ratemeter for each worker; and

(E) the appropriate barrier ropes and signs.

(2) Each radiographer at a job site shall carry a valid certification ID card issued by the agency or another certifying entity whose certification offers the same or comparable certification standards.

(3) Each radiographer trainee at a job site shall carry a trainee status card issued by the agency or equivalent documentation in accordance with subsection (m)(1) of this section.

(4) Radiographic personnel shall not perform radiographic operations if any of the items in paragraphs (1)-(3) of this subsection are not available at the job site or are inoperable. Radiographic personnel shall ensure that the items listed in paragraph (1) of this subsection, radiographic exposure devices, and radiation machines are used in accordance with the requirements of this section.

(5) During an inspection by the agency, an agency inspector may terminate an operation if any of the items in paragraphs (1)-(3) of this subsection are not available and operable or if the required number of radiographic personnel are not present. Operations shall not be resumed until all required conditions are met.

(u) Radiation safety requirements for the use of radiation machines.

(1) Locking of radiation machines. The control panel of each radiation machine shall be equipped with a locking device that will prevent the unauthorized use of an x-ray system or the accidental production of radiation. The radiation machine shall be kept locked and the key removed at all times except when under the direct visual surveillance of a radiographer.

(2) Permanent storage precautions for the use of radiation machines. Radiation machines shall be secured while in storage to prevent tampering or removal by unauthorized individuals.

(3) Requirements for radiation machines used in industrial radiographic operations.

(A) Equipment used in industrial radiographic operations involving radiation machines manufactured after October 1, 1987, shall be certified at the time of manufacture to meet the criteria set forth by ANSI N537-1976, except accelerators used in industrial radiography.

(B) The registrant's name and city or town where the main business office is located shall be prominently displayed with a durable, legible, clearly visible label(s) on both sides of all vehicles used to transport radiation machines for temporary job site use.

(4) Operating and internal audit requirements for the use of radiation machines.

(A) Each registrant shall conduct an internal audit program to ensure that the requirements of this chapter, the conditions of the certificate of registration, and the registrant's operating, safety, and emergency procedures are followed by radiographic personnel.

(B) Each radiographer's and radiographer trainee's performance during an actual radiographic operation shall be audited and documented at intervals not to exceed six months.

(C) If a radiographer or a radiographer trainee has not participated in a radiographic operation during the six months since the last audit, the radiographer or the radiographer trainee shall demonstrate knowledge of the training requirements of subsection (n)(1) of this section by an oral or written and practical examination administered by the registrant before the individual can next participate in a radiographic operation.

(D) The agency may consider alternatives in those situations where the individual serves as both radiographer and RSO.

(E) In those operations where a single individual serves as both radiographer and RSO and performs all radiography operations, an audit program is not required.

(F) The registrant shall provide annual refresher safety training, as defined in subsection (c) of this section, for each radiographer trainee, radiographer, or radiographer trainer at intervals not to exceed 12 months.

(G) No individual, other than a radiographer or a radiographer trainee, who is under the personal supervision of a radiographer trainer, shall manipulate controls or operate radiation machines used in industrial radiographic operations. Only one radiographer is required to operate radiation machines during industrial radiography.

(H) Radiographic operations shall not be conducted at storage sites unless specifically authorized by the certificate of registration.

(I) Records of audits specified in this subsection shall be made and maintained in accordance with subsection (w)(6)(A) of this section.

(J) Records of the annual refresher training required by subparagraph (F) of this paragraph shall be made and maintained in accordance with subsection (w)(7).

(5) Radiation surveys for the use of radiation machines.

(A) No industrial radiographic operation shall be conducted unless at least one calibrated and operable radiation survey instrument, as described in subsection (f) of this section, is used for each radiation machine energized.

(B) A physical radiation survey shall be made after each radiographic exposure using radiation machines to determine that the machine is "off."

(C) All potential radiation areas where industrial radiographic operations are to be performed shall be posted in accordance with subsection (s) of this section, based on estimated dose rates, before industrial radiographic operations begin. An area survey shall be performed during the first radiographic exposure to confirm that subsection (s) of this section requirements have been met and that unrestricted areas do not have radiation levels in excess of the limits specified in §289.202(n)(1)(B) and (C) of this title.

(D) Records of the surveys required by subparagraph (C) of this paragraph shall be made and maintained in accordance with subsection (w)(12) of this section.

(6) Requirements for radiation machines in enclosed radiography.

(A) Systems for enclosed radiography, including shielded-room radiography and cabinet x-ray systems not otherwise exempted, shall comply with all applicable requirements of this section.

(B) Systems for enclosed radiography designed to allow admittance of individuals and systems not otherwise exempted shall be evaluated at intervals not to exceed one year to ensure compliance with the applicable requirements of this section and §289.202(n)(1)-(3) of this title.

(C) Certified and certifiable cabinet x-ray systems, including those designed to allow admittance of individuals, are exempt from the requirements of this section except that:

(i) No registrant shall permit any individual to operate a cabinet x-ray system until the individual has received a copy of and instruction in the operating procedures for the unit.

(ii) Tests for proper operation of interlocks must be conducted and recorded at intervals not to exceed 12 months.

(iii) The registrant shall perform an evaluation to determine compliance with §289.202(n)(1)-(3) of this title and 21 CFR 1020.40 at intervals not to exceed one year.

(D) Certified cabinet x-ray systems shall be maintained in compliance with 21 CFR 1020.40 and no modification shall be made to the system unless prior agency approval has been granted in accordance with §289.201(c)(1) of this title.

(E) Records required by this subsection shall be made and maintained in accordance with subsection (w)(13) of this section.

(7) Registration requirements for industrial radiographic operations.

(A) Radiation machines used in industrial radiographic operations shall be registered in accordance with §289.226 of this title.

(B) In addition to the registration requirements in §289.226(c) and (h) of this title, an application for a certificate of registration shall include the following information:

(i) a schedule or description of the program for training radiographic personnel that specifies:

(I) initial training;

(II) annual refresher training;

(III) on-the-job training;

(IV) procedures for administering the oral and written examination to determine the knowledge, understanding, and ability of radiographic personnel to comply with the requirements of this chapter, the conditions of the certificate of registration, and the registrant's operating, safety, and emergency procedures; and

(V) procedures for administering the practical examination to demonstrate competence in the use of sources of radiation, radiographic exposure devices, related handling tools, and radiation survey instruments that may be employed in industrial radiographic assignments.

(ii) written operating, safety, and emergency procedures, including all items listed in subsection (y)(4) of this section;

(iii) a description of the internal audit program to ensure that radiographic personnel follow the requirements of this chapter, the conditions of the certificate of registration, and the registrant's operating, safety, and emergency procedures at intervals not to exceed six months;

(iv) a list of permanent radiographic installations, descriptions of permanent storage use sites, and the location(s) where all records required by this section and other sections of this chapter will be maintained. Radiographic equipment shall not be stored or used at a permanent site unless such site is specifically authorized by the certificate of registration. A storage site is permanent if radiation machines are stored at that location and if one or more of the following applies:

(I) the registrant establishes telephone service that is used for contracting or providing industrial radiographic services for the registrant;

(II) industrial radiographic services are advertised for or from the site;

(III) radiation machines stored at that location are used for industrial radiographic operations conducted at other sites; or

(IV) any registrant conducting radiographic operations or storing radiation machines at any location not listed on the certificate of registration for a period in excess of 90 days in a calendar year, shall notify the agency prior to exceeding the 90 days.

(v) a description of the organization of the industrial radiographic program, including delegations of authority and responsibility for operation of the radiation safety program; and

(vi) procedures for verifying and documenting the certification status of radiographers and for ensuring that the certification of individuals acting as radiographers remains valid.

(C) A certificate of registration will be issued if the requirements of this paragraph of this subsection and §289.226(c) and (h) of this title are met.

(v) Radiation safety requirements for the use of sealed sources.

(1) Limits on external radiation levels from storage containers and source changers. The maximum exposure rate limits for storage containers and source changers are 200 mrem/hr (2 mSv/hr) at any exterior surface, and 10 mrem/hr (0.1 mSv/hr) at 1 meter from any exterior surface with the sealed source in the shielded position.

(2) Locking of radiographic exposure devices, storage containers and source changers.

(A) Each radiographic exposure device, storage container, and source changer shall have a lock or outer locked container designed to prevent unauthorized or accidental removal or exposure of a sealed source. Each exposure device and source changer shall be kept locked and, if a keyed lock, the key removed at all times except when under the direct visual surveillance of a radiographer or an individual specifically authorized by the agency.

(B) Each radiographic exposure device, storage container, and source changer shall be locked and the key removed from any keyed lock prior to being transported from one location to another and also prior to being stored at a given location.

(3) Permanent storage precautions for the use of sealed sources.

(A) Radiographic exposure devices, source changers, and transport containers that contain sealed sources shall be secured while in storage to prevent tampering or removal by unauthorized individuals.

(B) Radiographic exposure devices, source changers, or transport containers that contain radioactive material may not be stored in residential locations. This section does not apply to storage of radioactive material in a vehicle in transit for use at temporary job sites, if the licensee complies with paragraph (8)(G) of this subsection and if the vehicle does not constitute a permanent storage location as described in paragraph (12)(B)(iv) of this subsection.

(4) Performance requirements for industrial radiography equipment. Equipment used in industrial radiographic operations shall meet the following minimum criteria.

(A) Each radiographic exposure device, source assembly, sealed source, and associated equipment shall meet the criteria set forth by ANSI N432-1980.

(i) All newly manufactured radiographic exposure devices and associated equipment acquired by licensees after September 1, 1993, shall comply with the requirements of this section.

(ii) All radiographic exposure devices and associated equipment in use after January 1, 1996, shall comply with the requirements of this section.

(iii) In lieu of subparagraph (A) of this paragraph, equipment used in industrial radiographic operations need not comply with §8.9.2(c) of the Endurance Test in ANSI N432-1980, if the prototype equipment has been tested using a torque value representative of the torque that an individual using the radiography equipment can realistically exert on the lever or crankshaft of the drive mechanism.

(B) Engineering analysis may be submitted by a licensee to demonstrate the applicability of previously performed testing on similar individual radiography equipment components. Upon review, the agency may find this an acceptable alternative to actual testing of the component in accordance with subparagraph (A) of this paragraph.

(C) In addition to the requirements specified in subparagraph (A) of this paragraph the following requirements apply to radiographic exposure devices, source changers, source assemblies and sealed sources.

(i) Radiographic exposure devices intended for use as Type B transport containers shall meet the applicable requirements of §289.257 of this title.

(ii) Modification of radiographic exposure devices, source changers, source assemblies, and associated equipment is prohibited, unless specifically authorized on the license.

(D) In addition to the requirements specified in subparagraphs (A)-(C) of this paragraph, radiographic exposure devices, source assemblies, and associated equipment that allow the source to move outside the device shall meet the following criteria:

(i) The source assembly shall be designed so that the source will not become disconnected if cranked outside the guide tube. The source assembly must be such that it cannot be unintentionally disconnected under normal and reasonably foreseeable abnormal conditions.

(ii) The drive cable must be positively connected to the source assembly before the source assembly can be driven out of the fully shielded position in a radiographic exposure device or source changer.

(iii) The radiographic exposure device shall automatically secure the source assembly when it is cranked back into

the fully shielded position within the radiographic exposure device. This securing system shall only be released by means of a deliberate operation on the radiographic exposure device.

(iv) The outlet nipple and drive cable fittings of each radiographic exposure device shall be equipped with safety plugs or covers that will protect the source assembly from damage and from other foreign matter, such as water, mud, or sand, during storage and transportation.

(v) Each sealed source or source assembly shall have attached to it or engraved on it, a durable, legible, visible label with the words "DANGER. RADIOACTIVE." The label may not interfere with the safe operation of the exposure device or associated equipment.

(vi) Guide tubes must be used when moving the source out of the radiographic exposure device.

(vii) Guide tubes other than "J" tubes shall have passed the kinking and crushing tests for control units as specified in ANSI N432-1980.

(viii) An exposure head, endcap, or similar device designed to prevent the source assembly from extending beyond the end of the guide tube shall be attached to the outermost end of the guide tube during radiographic operations.

(ix) The guide tube exposure head connection must be able to withstand the tensile test for control units as specified in ANSI N432-1980.

(x) Source changers shall provide a system for ensuring that the source will not be accidentally withdrawn from the changer when connecting or disconnecting the drive cable to or from a source assembly.

(5) Leak testing, repair, opening, and replacement of sealed sources and devices. Leak testing, repair, opening, and replacement of sealed sources and devices shall be performed according to the following criteria:

(A) Leak testing of sealed sources shall be done in accordance with §289.201(g) of this title, except records of leak tests shall be maintained in accordance with subsection (w)(11) of this section.

(B) The replacement, leak testing analysis, repair, opening, or any modification of a sealed source shall be performed only by persons specifically authorized to do so by the agency, the NRC, or another agreement state.

(C) Each exposure device using DU shielding and an "S" tube configuration shall be tested for DU contamination.

(i) Tests for DU contamination shall be performed at intervals not to exceed 12 months.

(ii) The analysis shall be capable of detecting the presence of 0.005 microcuries (185 Bq) of radioactive material on the test sample and shall be performed by a person specifically authorized by the agency, the NRC, or an agreement state to perform the analysis.

(iii) Should such testing reveal the presence of DU contamination, the exposure device shall be removed from use until an evaluation of the wear of the S-tube has been made.

(iv) Should the evaluation reveal that the S-tube is worn through, the device may not be used again.

(v) DU shielded devices do not have to be tested for DU contamination while in storage and not in use.

(vi) The device shall be tested for DU contamination before using or transferring such a device, if the interval of storage exceeds 12 months.

(D) A record of the DU leak test shall be maintained in accordance with subsection (w)(11) of this section.

(6) Labeling and storage.

(A) Each transport container shall have permanently attached to it a durable, legible, clearly visible label(s) that has, as a minimum, the standard trefoil radiation caution symbol conventional colors, for example, magenta, purple or black on a yellow background, having a minimum diameter of 25 millimeters, and the following wording "CAUTION. RADIOACTIVE MATERIAL. NOTIFY CIVIL AUTHORITIES (OR NAME OF COMPANY)" or "DANGER. RADIOACTIVE MATERIAL. NOTIFY CIVIL AUTHORITIES (OR NAME OF COMPANY)." In addition, transport containers shall meet applicable requirements of the DOT.

(B) Radiographic exposure devices, source changers, and storage containers shall be physically secured to prevent tampering or removal by unauthorized personnel. The licensee shall store radioactive material in a manner that will minimize danger from explosion or fire.

(C) The licensee shall lock and physically secure the transport package containing radioactive material in the transporting vehicle to prevent accidental loss, tampering, or unauthorized removal.

(D) The licensee's name and city or town where the main business office is located shall be prominently displayed with a durable, clearly visible label(s) on both sides of all vehicles used to transport radioactive material for temporary job site use.

(E) The licensee shall ensure that each radiographic exposure device has attached to it a durable, legible, clearly visible label bearing the following:

(i) chemical symbol and mass number of the radionuclide in the device;

(ii) activity and the date on which this activity was last measured;

(iii) manufacturer, model and serial number of the sealed source;

(iv) licensee's name, address, and telephone number; and

(v) as a minimum, the standard radiation caution symbol as defined in §289.202 of this title, and the following wording "CAUTION. RADIOACTIVE MATERIAL–DO NOT HANDLE. NOTIFY CIVIL AUTHORITIES (OR NAME OF COMPANY)" or "DANGER. RADIOACTIVE MATERIAL–DO NOT HANDLE. NOTIFY CIVIL AUTHORITIES (OR NAME OF COMPANY)."

(F) Each radiographic exposure device shall have a permanently stamped, legible, and clearly visible unique serial number.

(7) Operating and internal audit requirements for the use of sealed sources of radiation.

(A) Each licensee shall conduct an internal audit program to ensure that the requirements of this chapter, the conditions of the license, and the licensee's operating, safety, and emergency procedures are followed by radiographic personnel.

(B) Each radiographer's and radiographer trainee's performance during an actual radiographic operation shall be audited and documented at intervals not to exceed six months.

(C) If a radiographer or a radiographer trainee has not participated in a radiographic operation during the six months since the last audit, the radiographer or the radiographer trainee shall demonstrate knowledge of the training requirements of subsection (n)(1) of this section by an oral or written and practical examination administered by the licensee before these individuals can next participate in a radiographic operation.

(D) The agency may consider alternatives in those situations where the individual serves as both radiographer and RSO.

(E) In those operations where a single individual serves as both radiographer and RSO, and performs all radiography operations, an inspection program is not required.

(F) Each licensee shall provide annual refresher safety training, as defined in subsection (c) of this section, for each radiographer and radiographer trainee at intervals not to exceed 12 months.

(G) Each licensee shall provide, as a minimum, two radiographic personnel for each exposure device in use for any industrial radiography conducted at a location other than at a permanent radiographic installation (shielded room, bay, or bunker) meeting the requirements of subsection (j)(1) of this section. If one of the personnel is a radiographer trainee, the other shall be a radiographer trainer authorized by the license.

(H) Collimators shall be used in industrial radiographic operations that use crank-out devices except when physically impossible.

(I) No individual other than a radiographer or a radiographer trainee who is under the personal supervision of a radiographer trainer shall manipulate controls or operate radiographic exposure devices and associated equipment used in industrial radiographic operations.

(J) Radiographic operations shall not be conducted at storage sites unless specifically authorized by the license.

(K) Records of audits specified in this subsection shall be made and maintained by the licensee in accordance with subsection (w)(6)(B) of this section.

(L) Records of the annual refresher training required by subparagraph (F) of this paragraph shall be made and maintained in accordance with subsection (w)(7) of this section.

(8) Radiation surveys for the use of sealed sources of radiation.

(A) No industrial radiographic operation shall be conducted unless at least one calibrated and operable radiation survey instrument, as described in subsection (f) of this section, is used at each site where radiographic exposures are made.

(B) A survey with a radiation survey instrument meeting the requirements of subsection (f)(1)-(3) of this section shall be made after each radiographic exposure to determine that the sealed source has been returned to its fully shielded position, and before exchanging films, repositioning the exposure head, or dismantling equipment. The entire circumference of the radiographic exposure device shall be surveyed. If the radiographic exposure device has a source guide tube, the survey shall also include the source guide tube and any collimator.

(C) All potential radiation areas where industrial radiographic operations are to be performed shall be posted in accordance with subsection (s) of this section, based on calculated dose rates, before industrial radiographic operations begin. An area survey shall be performed during the first radiographic exposure (for example, with the sealed source in the exposed position) to confirm that the requirements of subsection (s) of this section have been met.

(D) Each time re-establishment of the restricted area is required, the requirements of subparagraph (C) of this paragraph shall be met.

(E) The requirements of subparagraph (D) of this paragraph do not apply to pipeline industrial radiographic operations when the conditions of exposure including, but not limited to, the radiographic exposure device, duration of exposure, source strength, pipe size, and pipe thickness remain constant.

(F) A lock-out survey, in which all accessible surfaces of the radiographic exposure device or source changer are surveyed, shall be performed.

(G) Surveys shall be performed on storage containers to ensure that radiation levels do not exceed the limits specified in §289.202(n)(1) of this title. These surveys shall be performed initially with the maximum amount of radioactive material present in the storage location and thereafter at the time of the quarterly inventory and whenever storage conditions change.

(H) A survey meeting the requirements of subparagraph (B) of this paragraph shall be performed on the radiographic exposure device and the source changer after every sealed source exchange.

(I) Records of the surveys required by subparagraphs (C), (D), and (F)-(H) of this paragraph shall be made and maintained in accordance with subsection (w)(12) of this section.

(9) Requirements for sealed sources in enclosed radiography.

(A) Systems for enclosed radiography, including shielded-room radiography not otherwise exempted, shall comply with all applicable requirements of this section.

(B) Systems for enclosed radiography designed to allow admittance of individuals and systems not otherwise exempted shall be evaluated at intervals not to exceed one year to ensure compliance with the applicable requirements of this section and §289.202(n)(1)-(3) of this title.

(C) Tests for proper operation of interlocks must be conducted and recorded in accordance with subsection (j) of this section.

(D) Records required by this subsection shall be made and maintained in accordance with subsection (w)(14) of this section.

(10) Underwater, offshore platform, and lay-barge radiography.

(A) Underwater, offshore platform, and/or lay-barge radiography shall not be performed unless specifically authorized in a license issued by the agency in accordance with subsection (v)(12) of this section.

(B) In addition to the other requirements of this section, the following requirements apply to the performance of offshore platform or lay-barge radiography.

(i) Cobalt-60 sources with activities in excess of 20 curies (nominal) and iridium-192 sources with activities in excess of 100 curies (nominal) shall not be used in the performance of offshore platform or lay-barge radiography.

(ii) Collimators shall be used for all industrial radiographic operations performed on offshore platforms or lay-barges.

(11) Prohibitions.

(A) Industrial radiography performed with a sealed source that is not fastened to or contained in a radiographic exposure device (fishpole technique) is prohibited unless specifically authorized in a license issued by the agency.

(B) Retrieval of disconnected sources or sources that cannot be returned by normal means to a fully shielded position or automatically secured in the radiographic exposure device, shall not be performed unless specifically authorized by a license condition.

(12) Licensing requirements for industrial radiographic operations.

(A) Sealed sources used in industrial radiographic operations shall be licensed in accordance with §289.252 of this title.

(B) In addition to the licensing requirements in §289.252 of this title, an application for a license shall include the following information.

(i) A schedule or description of the program for training radiographic personnel that specifies:

(I) initial training;

(II) annual refresher training;

(III) on-the-job training;

(IV) procedures for administering the oral and written examinations to determine the knowledge, understanding, and ability of radiographic personnel to comply with the requirements of this chapter, the conditions of the license, and the licensee's operating, safety, and emergency procedures; and

(V) procedures for administering the practical examination to demonstrate competence in the use of sources of radiation, radiographic exposure devices, related handling tools, and radiation survey instruments that may be employed in industrial radiographic assignments.

(ii) Written operating, safety, and emergency procedures, including all items listed in subsection (y)(4) of this section.

(iii) A description of the internal audit program to ensure that radiographic personnel follow the requirements of this chapter, the conditions of the license, and the licensee's operating, safety, and emergency procedures at intervals not to exceed six months.

(iv) A list of permanent radiographic installations, descriptions of permanent storage and use sites, and the location(s) where all records required by this section and other sections of this chapter will be maintained. If records are to be maintained at a headquarters office in Texas and no use or storage is authorized for the site, this site will be designated as the main site. Radioactive material shall not be stored or used at a permanent use site unless such site is specifically authorized by the license. Any licensee conducting radiographic operations or storing radioactive material at any location not listed on the license for a period in excess of 90 days in a calendar year, shall notify the agency prior to exceeding the 90 days. A storage site is permanent if radioactive material is stored at that location and if any one or more of the following applies:

(I) the licensee establishes telephone service that is used for contracting or providing industrial radiographic services for the licensee;

(II) industrial radiographic services are advertised for or from the site;

(III) radioactive material stored at that location is used for industrial radiographic operations conducted at other sites; or

(IV) any licensee conducting radiographic operations or storing radioactive material at any location not listed on the license for a period in excess of 90 days in a calendar year.

(v) A description of the organization of the industrial radiographic program, including delegations of authority and responsibility for operation of the radiation safety program.

(vi) A description of the program for inspection and maintenance of radiographic exposure devices and transport and storage containers (including items in subsection (y)(2) of this section and the applicable items in subsection (i) of this section).

(vii) If a license application includes underwater radiography, as a minimum a description of:

(I) radiation safety procedures and radiographer responsibilities unique to the performance of underwater radiography;

(II) radiographic equipment and radiation safety equipment unique to underwater radiography; and

(III) methods for gas-tight encapsulation of equipment.

(viii) If a license application includes offshore platform and/or lay-barge radiography, as a minimum a description of:

(I) transport procedures for radioactive material to be used in industrial radiographic operations;

(II) storage facilities for radioactive material; and

(III) methods for restricting access to radiation areas.

(C) Procedures for verifying and documenting the certification status of radiographers and for ensuring that the certification of individuals acting as radiographers remains valid.

(D) If a licensee intends to perform leak testing of sealed sources or exposure devices containing DU shielding, the licensee shall describe the procedures for performing the leak test.

(E) If the licensee intends to analyze its own wipe samples, the application shall include a description of the procedures to be followed. The description shall include at least the following:

(i) instruments to be used;

(ii) methods of performing the analysis; and

(iii) pertinent experience of the person who will analyze the wipe samples.

(F) If the licensee intends to perform "in-house" calibrations of survey instruments, the licensee shall describe methods to be used and the relevant experience of the person(s) who will perform the calibrations.

(G) A license will be issued if the requirements of this paragraph of this subsection and §289.252 of this title are met.

(w) Record keeping requirements.

(1) Records of receipt, transfer, and disposal of sources of radiation and devices using DU for shielding.

(A) Each licensee and registrant shall maintain records showing the receipt, transfer, and disposal of sources of radiation and devices using DU for shielding as required by subsection (e) of this section for agency inspection until disposal is authorized by the agency.

(B) These records shall include the following, as appropriate:

(i) date of receipt, transfer, or disposal;

(ii) name of the individual making the record;

(iii) radionuclide;

(iv) number of curies (becquerels) or mass (for DU); and

(v) manufacturer, model, and serial number of each source of radiation and/or device.

(2) Records of radiation survey instruments. Each licensee and registrant shall maintain records of the calibrations required by subsection (f)(2) of this section for agency inspection for two years after the calibration date.

(3) Records of quarterly inventory.

(A) Each licensee and registrant shall maintain records of the quarterly inventory of sources of radiation, including devices containing DU as required by subsection (g) of this section for agency inspection for two years from the date of the inventory.

(B) The record shall include the following for each source of radiation, as appropriate:

(i) manufacturer, model, and serial number;

(ii) radionuclide;

(iii) number of curies (except for depleted uranium);

(iv) location of each source of radiation;

(v) date of the inventory; and

(vi) name of the individual making the inventory.

(4) Records of inspection and maintenance of radiation machines, radiographic exposure devices, transport and storage containers, associated equipment, source changers, and survey instruments.

(A) Each licensee and registrant shall maintain records specified in subsection (i)(3) of this section of equipment problems found in daily checks and quarterly inspections of:

(i) radiographic exposure devices;

(ii) transport and storage containers;

(iii) associated equipment;

(iv) source changers;

(v) survey instruments; and

(vi) radiation machines.

(B) The record shall include the following:

(i) date of check or inspection;

(ii) name of inspector;

(iii) equipment involved;

(iv) any problems found; and

(v) what repairs or maintenance, if any, were done.

(C) Each record shall be maintained for agency inspection for two years from the date of the inspection.

(5) Records of alarm systems and entrance control tests at permanent radiographic installations. Each licensee and registrant shall maintain records of alarm system and entrance control device tests required by subsection (j) of this section for agency inspection for two years from the date of the test.

(6) Records of operating and internal audit requirements.

(A) Records of operating and internal audit requirements for the use of radiation machines specified by subsection (u)(4) of this section shall be maintained by the registrant for agency inspection for two years from the date of the audit.

(B) Records of operating and internal audit requirements for the use of sealed sources specified by subsection (v)(7) of this section shall be maintained by the licensee for agency inspection for two years from the date of the audit.

(7) Records of training and certification.

(A) Each licensee and registrant shall maintain for agency inspection the following clear and legible training and certification records that demonstrate that the applicable requirements of subsections (m)(1)(A) and (2)(A) and (n) of this section are met for all industrial radiographic personnel for agency inspection. A copy of the trainee status card will satisfy the documentation requirements of subsection (m)(1)(A) of this section. A copy of the certification ID card will satisfy the documentation requirements of subsection (m)(2)(A) of this section.

(i) Records of training shall include the following:

(I) radiographer certification documents and verification of certification status;

(II) copies of written tests administered by the licensee or registrant;

(III) dates of oral and practical examinations and names of individuals conducting and receiving the oral and practical examinations; and

(IV) a list of items tested and the results of the oral and practical examinations.

(ii) Records of annual refresher safety training and audits of job performance made in accordance with subsections (u)(4) and (v)(7) of this section shall include the following:

(I) list the topics discussed during the refresher safety training;

(II) dates the annual refresher safety training was conducted;

(III) names of the instructors and attendees; and

(IV) for audits of job performance, the records shall also include a list showing the items checked and any noncompliance observed by the RSO or designee.

(B) Records required by subsections (m)(1)(A) and (2)(A) and (n)(1) of this section shall be maintained for agency inspection for five years after the record is made.

(C) Records of the annual refresher training required by subsections (u)(4)(F) and (v)(7)(F) of this section shall be maintained for agency inspection for two years after the record is made.

(8) Records of personnel monitoring procedures. Each licensee and registrant shall maintain the following exposure records specified in subsection (q) of this section.

(A) Direct-reading pocket dosimeter or electronic personal dosimeter readings and yearly operational checks required by subsection (q) of this section shall be maintained for agency inspection for two years. If the dosimeter readings were used to determine external radiation dose (for example, no individual monitoring device exposure records exist), the records shall be maintained for agency inspection until disposal is authorized by the agency.

(B) Records of alarming ratemeter calibrations shall be maintained for agency inspection for two years.

(C) Reports received from the individual monitoring device processor shall be maintained for agency inspection until disposal is authorized by the agency.

(D) Records of estimates of exposures as a result of off-scale personal direct-reading dosimeters, or lost or damaged individual monitoring devices, shall be maintained for agency inspection until disposal is authorized by the agency.

(9) Records and documents required at additional authorized use/storage sites.

(A) Each licensee or registrant maintaining additional authorized use/storage sites where industrial radiography operations are performed shall have copies of the following records and documents specific to that site available at each site for inspection by the agency:

(i) a copy of the appropriate license or certificate of registration authorizing the use of licensed or registered sources of radiation;

(ii) operating, safety, and emergency procedures in accordance with subsection (y)(4) of this section;

(iii) applicable sections of this chapter as listed in the license or certificate of registration;

(iv) records of receipt, transfer, and disposal of sources of radiation and devices using DU for shielding at the additional site in accordance with subsection (e) of this section;

(v) records of the latest survey instrument calibrations in use at the site in accordance with subsection (f) of this section;

(vi) records of the latest calibrations of alarming ratemeters and operational checks of pocket dosimeters and/or electronic personal dosimeters in accordance with subsection (q) of this section;

(vii) inventories in accordance with subsection (g) of this section;

(viii) utilization records for each radiographic exposure device and radiation machine dispatched from that location in accordance with subsection (h) of this section;

(ix) records of equipment problems identified in daily checks of equipment in accordance with subsection (i) of this section, if applicable;

(x) records of alarm systems and entrance control checks in accordance with subsection (j) of this section;

(xi) training records in accordance with subsection (n) of this section;

(xii) records of direct-reading dosimeter readings in accordance with subsection (q) of this section;

(xiii) audits in accordance with subsections (u)(4)(A)-(C) and (v)(7)(A)-(C) of this section;

(xiv) latest radiation survey records in accordance with subsections (u)(5)(D) and (v)(8)(J) of this section;

(xv) records of interlock testing in accordance with subsections (u)(6)(C)(ii) and (v)(9)(C) of this section;

(xvi) records of annual evaluation of cabinet x-ray systems in accordance with subsection (u)(6)(C)(iii) of this section;

(xvii) records of leak tests for specific devices and sources at the additional site in accordance with subsection (v)(5) of this section;

(xviii) shipping papers for the transportation of sources of radiation in accordance with §289.257 of this title; and

(xix) a copy of the agreement state license or certificate of registration authorizing the use of sources of radiation, when operating under reciprocity in accordance with §289.226 of this title and §289.252 of this title.

(B) Records required in accordance with this subsection shall be maintained for agency inspection for a period of two years.

(C) Records required in accordance with this subsection shall also be maintained at the main authorized site.

(10) Records required at temporary job sites. Each licensee and registrant conducting industrial radiography at a temporary job site shall have the following records available at that site for agency inspection:

(A) a copy of the appropriate license or certificate of registration or equivalent document authorizing the use of sources of radiation;

(B) operating, safety, and emergency procedures in accordance with subsection (y)(4) of this section;

(C) applicable sections of this chapter as listed in the license or certificate of registration;

(D) latest radiation survey records required in accordance with subsections (u)(5)(D) and (v)(8)(I) of this section for the period of operation at the site;

(E) the daily pocket dosimeter records for the period of operation at the site;

(F) utilization records for each radiographic exposure device or radiation machine dispatched from that location in accordance with subsection (h) of this section; and

(G) the latest instrument calibration and leak test records for devices at the site. Acceptable records include tags or labels that are attached to the devices or survey instruments and decay

charts for sources that have been manufactured within the last six months.

(11) Records of leak testing of sealed sources and devices containing DU. Each licensee shall maintain records of leak testing of sealed sources and devices containing DU required by subsection (v)(5) of this section for agency inspection for two years from the date of the leak test.

(12) Records of radiation surveys. Records of the surveys required by subsections (u)(5) and (v)(8) of this section shall be maintained for agency inspection for two years after completion of the survey. If a survey was used to determine an individual's exposure due to loss of personnel monitoring data, the records of the survey shall be maintained for agency inspection until disposal is authorized by the agency.

(13) Records of requirements for radiation machines in enclosed radiography.

(A) Records of evaluations required by subsection (u)(6)(B) of this section shall be maintained for agency inspection for five years from the date of the evaluation.

(B) Records of operating instructions in cabinet x-ray systems required by subsection (u)(6)(C)(i) of this section and interlock tests required by subsection (u)(6)(C)(ii) of this section shall be maintained for agency inspection for five years from the date of the test.

(C) Records of evaluation of certified cabinet x-ray systems required by subsection (u)(6)(C)(iii) of this section shall be maintained for agency inspection for five years from the date of the evaluation.

(14) Records of requirements for sealed sources in enclosed radiography.

(A) Records of evaluations required by subsection (v)(9)(B) of this section shall be maintained for agency inspection for two years after the evaluation.

(B) Records of interlock tests required by subsection (v)(9)(C) of this section shall be maintained for agency inspection for two years from the date of the test.

(15) Records of utilization logs. Records of utilization logs shall be maintained for agency inspection for five years from the date the utilization log is made.

(x) Form of records.

(1) Each record required by this section shall be legible throughout the specified retention period.

(2) The record shall be the original or a reproduced copy or a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of reproducing a clear copy throughout the required retention period.

(3) The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period.

(4) Records, such as letters, drawings, and specifications, shall include all pertinent information, such as stamps, initials, and signatures.

(5) The licensee or registrant shall maintain adequate safeguards against tampering with and loss of records.

(y) Appendices.

(1) Subjects to be included in training courses for radiographer trainees. Training provided to qualify individuals as radiographer trainees in compliance with subsection (m)(1)(A) of this section shall be presented on a formal basis. The training shall include the following subjects.

(A) Fundamentals of radiation safety to include the following:

(i) characteristics of radiation;

(ii) units of radiation dose in rems (sieverts) and quantity of radioactivity in curies (becquerels);

(iii) significance of radiation dose to include:

(I) radiation protection standards;

(II) biological effects of radiation dose;

(III) hazards of exposure to radiation; and

(IV) case histories of radiography accidents;

(iv) levels of radiation from sources of radiation; and

(v) methods of controlling radiation dose to include:

(I) working time;

(II) working distances; and

(III) shielding.

(B) Radiation detection instrumentation to include the following:

(i) use, operation, calibration and limitations of radiation survey instruments;

(ii) survey techniques; and

(iii) use of individual monitoring devices to include as a minimum:

(I) film badges;

(II) TLDs;

(III) OSLs;

(IV) pocket dosimeters;

(V) alarming ratemeters; and

(VI) electronic personal dosimeters.

(C) Radiographic equipment to be used including the following:

(i) remote handling equipment;

(ii) operation and control of radiographic exposure devices and sealed sources, including pictures or models of source assemblies (pigtails);

(iii) storage and transport containers, source changers;

(iv) operation and control of x-ray equipment;

(v) collimators;

(vi) storage, control, and disposal of radioactive material; and

(vii) inspection and maintenance of equipment.

(D) Requirements of pertinent federal and state regulations.

(E) Generic written operating, safety, and emergency procedures (see subsection (y)(4) of this section).

(2) General requirements for inspection of industrial radiographic equipment.

(A) Radiographic exposure devices shall be inspected for:

(i) abnormal surface radiation levels anywhere on camera, collimator, or guide tube;

(ii) condition of safety plugs;

(iii) proper operation of locking mechanism;

(iv) condition of pigtail connector;

(v) condition of carrying device (straps, handle, etc.); and

(vi) proper and legible labeling.

(B) Source tubes shall be inspected for:

(i) rust, dirt, or sludge buildup inside the source tube;

(ii) condition of source tube connector;

(iii) condition of source stop;

(iv) kinks or damage that could prevent proper operation; and

(v) presence of radioactive contamination.

(C) Control cables and drive mechanisms shall be inspected for:

(i) proper drive mechanism with camera, as appropriate;

(ii) changes in general operating characteristics;

(iii) condition of connector on drive cable;

(iv) drive cable flexibility, wear, and rust;

(v) excessive wear or damage to crank assembly parts;

(vi) damage to drive cable conduit that could prevent the cable from moving freely;

(vii) proper connector mating between the drive cable and the pigtail;

(viii) proper operation of source position indicator, if applicable; and

(ix) presence of radioactive contamination.

(D) Pipeliners shall be inspected for:

(i) abnormal surface radiation;

(ii) changes in the general operating characteristics of the unit;

(iii) proper operation of shutter mechanism;

(iv) chafing or binding of shutter mechanism;

(v) damage to the device that might impair its operation;

(vi) proper operation of locking mechanism;

(vii) proper drive mechanism with camera, as appropriate;

(viii) condition of carrying device (strap, handle, etc.); and

(ix) proper and legible labeling.

(E) X-ray equipment shall be inspected for:

(i) change in the general operating characteristics of the unit;

(ii) wear of electrical cables and connectors;

(iii) proper and legible labeling of console;

(iv) proper console with machine, as appropriate;

(v) proper operation of locking mechanism;

(vi) proper operation of timer run-down cutoff; and

(vii) damage to tube head housing that might result in excessive radiation levels.

(3) Time requirements for record keeping. The following are time requirements for record keeping.
Figure: 25 TAC §289.255(y)(3)

(4) Operating, safety, and emergency procedures. The licensee's or registrant's operating, safety, and emergency procedures shall include instructions in at least the following:

(A) handling and use of sources of radiation for industrial radiography such that no individual is likely to be exposed to radiation doses that exceed the limits established in §289.202 of this title;

(B) methods and occasions for conducting radiation surveys, including lock-out survey requirements;

(C) methods for controlling access to industrial radiography areas;

(D) methods and occasions for locking and securing sources of radiation;

(E) personnel monitoring and the use of personnel monitoring equipment, including steps to be taken immediately by industrial radiographic personnel in the event a pocket dosimeter is found to be off-scale (see subsection (q)(2)(F) of this section);

(F) methods of transporting equipment to field locations, including packing of sources of radiation in the vehicles, placarding of vehicles, and controlling of sources of radiation during transportation (including applicable DOT requirements);

(G) methods or procedures for minimizing exposure of individuals in the event of an accident, including procedures for a disconnect accident, a transportation accident, and loss of a sealed source;

(H) procedures for notifying proper personnel in the event of an accident;

(I) specific posting requirements;

(J) maintenance of records (see subsection (y)(3) of this section);

(K) inspection, maintenance, and operational checks of radiographic exposure devices, source changers, storage containers,

transport containers, source guide tubes, crank-out devices, and radiation machines;

(L) method of testing and training in accordance with subsections (m) and (n) of this section; and

(M) source recovery procedures if the licensee is authorized to perform source recovery.

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 March 22, 1999.

TRD-9901709
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: April 11, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 458–7236

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Subchapter C. Texas Regulations for Control of Radiation

25 TAC §289.125

The Texas Department of Health (department) adopts the repeal of §289.125 concerning licensing requirements for near-surface land disposal of radioactive waste without changes to the proposed text as published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12145). Therefore, the section will not be republished. The section for repeal adopts by reference Part 45, titled "Licensing Requirements for Near-Surface Land Disposal of Radioactive Waste" of the *Texas Regulations for Control of Radiation*.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, 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). Section 289.125 has been reviewed and the department has determined that the reasons for adopting the section no longer exist.

The regulation of the disposal of radioactive waste is under the jurisdiction of the Texas Natural Resource Conservation Commission (TNRCC). TNRCC has now adopted rules for near-surface land disposal of radioactive waste.

The department published a Notice of Intention to Review for §289.125 as required by Rider 167 in the *Texas Register* (23 TexReg 9079) on September 4, 1998. No comments were received by the department on this section.

No comments were received on the proposal during the comment period.

The repeal is adopted under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The General Appropriations Act, Article IX, Rider 167, passed by the 75th Legislature is implemented by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 22, 1999.

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Susan K. Steeg
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Texas Department of Health
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For further information, please call: (512) 458–7236

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Chapter 289. Radiation Control

The Texas Department of Health (department) adopts the repeal of existing §289.127, without changes and new §289.259, concerning licensing requirements for naturally occurring radioactive material (NORM) with changes to the proposed text as published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12145), as a result of comments received during the 30-day comment period. The repeal of §289.127 is adopted without changes and therefore will not be republished.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, 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). Section 289.127 has been reviewed and the department has determined that the reasons for adopting the section continue to exist; however, a new rule was proposed. The department published a Notice of Intention to Review the section as required by Rider 167 in the *Texas Register* (23 TexReg 9079) on September 4, 1998. No comments were received by the department on this section.

The repealed section adopts by reference Part 46, titled "Licensing of Naturally Occurring Radioactive Material (NORM)" of the *Texas Regulations for Control of Radiation*. The new section incorporates language from Part 46 that has been rewritten into *Texas Register* format and includes the addition and revision of subsections of the section. The repeal and new section are part of the renumbering phase in the process of rewriting the department's radiation rules in the *Texas Register* format. The new section reflects the new numbering. The revision is part of the department's ongoing review of the radiation rules to update them in accordance with current practices and technologies.

The new section includes new definitions that support the changes in the rule. It redefines exemptions for oil and gas NORM waste and clarifies exemptions for pipe (tubulars) and other downhole or surface equipment contaminated with NORM. Specific licensing requirements for spinning pipe gauge operations that perform NORM decontamination and for persons receiving NORM waste from other persons for processing or storage are added. Other minor grammatical changes are made to the section for clarification.

The department is making the following change due to staff comments to clarify the intent and improve the accuracy of the section.

Change: Concerning §289.259(d)(3), the department added the words "downhole or surface" to clarify the intent of the rule.

Change: Concerning §289.259(h)(2), the department reworded the paragraph to read "records of transfers for disposal shall be maintained for inspection by the agency" to clarify the intent of the rule.

Change: Concerning §289.259(u), the department deleted the words "any agreement state, or" since NORM is not covered under the Atomic Energy Act and NORM licenses are not necessarily issued by agreement states.

The following comments were received concerning the proposed section. Following the comments are the department's responses.

Comment: Concerning the rule in general, the commenter stated that his company did not agree with the estimate of the cost of implementing the proposed regulations. The commenter has found NORM, primarily radon and its daughters, to be ubiquitous in pipelines and chemical plants on the Gulf Coast. Most maintenance activities will involve handling of materials contaminated with this NORM, and thus will create additional pathways for exposure than are found in daily operations.

The commenter believes that there would be a significant cost to bring in a person specifically licensed to decontaminate equipment and facilities and potential ancillary cost to the delay in proceeding with the maintenance. The commenter suggested permitting this activity by the general licensee's employees and contractors who are appropriately trained and monitored.

Response: The department's responsibility is to protect public health and safety and the department is concerned about the radiation exposure risk associated with certain activities that are considered "routine maintenance" by the persons affected by this rule. The affected industry has indicated that they consider "routine maintenance" to be the repair and maintenance of equipment for the purpose of restoring it to its intended use or efficiency, regardless of the presence of oil and gas NORM. Decontamination of equipment contaminated with NORM above the exempt limits may occur incidental to the routine maintenance. The department acknowledges, however, that not all routine maintenance activities result in a significant increase in radiation exposure risk. Simple routine maintenance tasks such as replacing or repairing a valve, changing filters, or "pigging" a pipe are such activities.

The wording in subsection (f)(2), "Maintenance that provides a different pathway for exposure than is found in daily operations and that increases the potential for additional exposure is not considered routine," was proposed in order to further define the risk the department is concerned about. In discussions with the industry, the department determined that the activity that presents the most concern is vessel entry. The industry considers this to be routine maintenance. However, this is the type of operation that the department believes presents a significantly increased risk from an enclosed environment where an inhalation risk (a different pathway for exposure than is found in daily operations) from NORM can be present.

The department acknowledges that unlike the employees of a company specifically licensed to perform decontamination, the employees or contractors of a general license would be performing vessel entry on an infrequent basis and thus, the radiation exposure risk is lowered due to a time factor.

The department plans to draft language that will outline radiation safety precautions that must be followed when vessel entry is conducted during the course of routine maintenance, but wishes to seek further input from the industry on that draft language. However, in order for several of the revisions of this section supported by commenters to become effective and for the section to be reformatted in *Texas Register* format, no change was made at this time as a result of the comment.

Comment: Concerning §289.259(a), the commenter stated that the term "disposal," as is used throughout the section, seems to be misleading and the commenter believes that it may confuse the average reader regarding the agency's statutory jurisdictional authority over NORM. The commenter suggested that subsection (a) be rewritten to clearly state that the regulations do not apply to operators of disposal facilities and that they apply only to generators. The regulated public should be referred to the applicable regulations of the Texas Natural Resource Conservation Commission (TNRCC) and the Railroad Commission of Texas (RCT) for disposal requirements.

Response: This section is not intended to regulate the disposal of radioactive substances and this subsection states that. To further clarify the jurisdiction, a sentence was added to the end of this subsection to read, "The Texas Natural Resource Conservation Commission (TNRCC) has the jurisdiction to regulate disposal of NORM, other than oil and gas NORM, which is under the jurisdiction of the Railroad Commission of Texas (RCT)."

Comment: Concerning §289.259(b)(2), the commenter stated that criteria are needed to define when NORM is not contained in a product at a significant level. Some natural gas extracted in Texas contains radon gas. Components of the natural gas are separated and used in chemical industries, inadvertently enhancing the concentration of radon in the natural gas product which would then be considered NORM as defined in these regulations. Anything derived from this natural gas product then potentially contains NORM. These materials are used in a variety of products, some of which are consumed by humans and livestock. The commenter is concerned that by the wording used, production of these products would not be permitted. The commenter suggested a permissible concentration be defined at which the NORM is not considered a significant risk for any use of the material. The commenter cited the United States Environmental Protection Agency (EPA) criteria for radioisotopes in drinking water as an example.

Response: The natural gas and natural gas products are exempted from the requirements of this section as stated in subsection (d)(7). No change was made as a result of the comment.

Comment: Concerning §289.259(c), the commenter stated that even though the department has dropped the definition of "technologically enhanced," it is still used in subsection (c)(4) of this section and also in subsection (d)(1)(A)(i), (d)(1)(B)(i) and (ii) of this section. The commenter questioned the reason for dropping this definition.

Response: The department deleted the words "technologically enhanced" from subsection (c)(4) and replaced them with the word "concentrated" to clarify the definition. The words "technologically enhanced" were deleted from subsection (d)(1)(A)(i) and (d)(1)(B)(i) and (ii) because they were unnecessary.

Comment: Concerning §289.259(c), the commenter questioned the deletion of the definition of technologically enhanced naturally occurring radioactive material (TENORM). The commenter stated that the agency has chosen to define TENORM as NORM and naturally occurring radioactive material as not NORM, and found this confusing.

Response: The department deleted the words "technologically enhanced" from subsection (c)(4) and replaced them with the word "concentrated" to clarify the definition. The words "technologically enhanced" were deleted from subsection (d)(1)(A)(i) and (d)(1)(B)(i) and (ii) because they were unnecessary.

Comment: Concerning §289.259(c), the commenter suggested adding a definition for "spinning pipe gauge."

Response: A spinning pipe gauge licensee is one who uses gauges containing radioactive material for measuring the thickness of pipe. Those licensees have already been made aware of this requirement through notification letters and license condition amendments. No change was made as a result of the comment.

Comment: Concerning §289.259(c), the commenter suggested adding definitions for "contractor" and "pipe" as to their meaning in this section. The commenter stated that some contractors are hired to perform a function and the contractor's employees are not under the direct supervision of the principal organizations. In another use of contractor, a contractor is an individual working for the principal organizations in much the same sense as an employee, except the term of service is usually limited and the contractor is not subject to the usual employee benefits.

Response: The general licensee has the responsibility for ensuring NORM requirements for decontamination are met whether the work is performed by its employees or contractors. No change was made as a result of the comment.

Comment: Concerning §289.259(c)(3), the commenter suggested the word "person" be defined. The commenter questioned whether the definition meant that a corporation can intentionally remove contamination from their equipment and it would not be considered decontamination; whether the employee is permanent or temporary and what about if the employee is hired through an intermediary (e.g. temporary service providers such as Kelly Services).

Response: The word "person" as used in this section is defined in §289.201(b)(68) of this chapter. The agency added a new paragraph (c)(6) to address the definition of person. The subsequent paragraphs are renumbered. Change is reflected in §289.259(c)(6)-(8).

Comment: Concerning §289.259(c)(3), the commenter is concerned with this definition because the rule implies that any contract worker must be specifically licensed to perform NORM decontamination and remediation. The commenter suggested the definition be reworded so that it is clear that decontamination relates to the removal of NORM because of its radioactivity and does not apply to the removal of NORM scale or sludge for the purpose of returning that equipment to its intended use or for efficiency.

Response: The department's responsibility is to protect public health and safety and the department is concerned about the radiation exposure risk associated with certain activities that are considered "routine maintenance" by the persons affected by this rule. The affected industry has indicated that they consider "routine maintenance" to be the repair and maintenance of equipment for the purpose of restoring it to its intended use or efficiency, regardless of the presence of oil and gas NORM. Decontamination of equipment contaminated with NORM above the exempt limits may occur incidental to the routine maintenance. The department acknowledges, however, that not all routine maintenance activities result in a significant increase in radiation exposure risk. Simple routine maintenance tasks such as replacing or repairing a valve, changing filters, or "pigging" a pipe are such activities.

The wording in subsection (f)(2), "Maintenance that provides a different pathway for exposure than is found in daily operations and that increases the potential for additional exposure is not considered routine," was proposed in order to further define the risk the department is concerned about. In discussions with the industry, the department determined that the activity that presents the most concern is vessel entry. The industry considers this to be routine maintenance. However, this is the type of operation that the department believes presents a significantly increased risk from an enclosed environment where an inhalation risk (a different pathway for exposure than is found in daily operations) from NORM can be present.

The department acknowledges that unlike the employees of a company specifically licensed to perform decontamination, the employees or contractors of a general license would be performing vessel entry on an infrequent basis and thus, the radiation exposure risk is lowered due to a time factor.

The department plans to draft language that will outline radiation safety precautions that must be followed when vessel entry is conducted during the course of routine maintenance, but wishes to seek further input from the industry on that draft language. However, in order for several of the revisions of this section supported by commenters to become effective and for the section to be reformatted in *Texas Register* format, no change was made at this time as a result of the comment.

Comment: Concerning §289.259(d), the commenter suggested that a statement be added that prohibits the use of dilution to exempt radioactive materials from regulation. The commenter was not clear whether the agency intends these exemption limits to also exempt waste from TNRCC radioactive material disposal requirements.

Response: The department does not allow dilution of materials in order to meet exemption limits. The memorandum of understanding between the TNRCC and the Texas Department of Health, §289.101, specifies the regulatory jurisdiction of each department. Specifically, §289.101(o) states, "Once a source of radiation is exempted from regulation by the Texas Board of Health in accordance with the code, §401.106, or meets release criteria for unrestricted use in accordance with the provisions of the *Texas Regulations for Control of Radiation* (TRCR), its disposal as a radioactive substance is not subject to further regulation by the TNRCC." No change was made as a result of the comment.

Comment: Concerning §289.259(d)(1)(A), the commenter supports the agency's revision of the exemption language in this subsection. The proposed exemption levels and removal of the requirement to evaluate the radon emanation level associated with a particular sample increases the ease of sampling and reduces the cost of analysis.

Response: The department acknowledges the comment. No change was made as a result of the comment.

Comment: Concerning §289.259(d)(1)(A), the commenter supports the exemption on oil and gas NORM waste if the material contains, or is contaminated at, concentrations of 30 picocuries per gram (pCi/gm) or less of technologically enhanced radium-226 or radium-228 in soil or other media.

Response: The department acknowledges the comment. No change was made as a result of the comment.

Comment: Concerning §289.259(d)(1)(A), the commenter noted that the 5 pCi/gm limit was dropped. The commenter questioned whether the department intended to drop the 5 pCi/gm limit for oil and gas NORM waste or if it was dropped inadvertently.

Response: The department has reviewed studies that show oil and gas NORM scale typically does not exceed the 20 picocuries per square meter per second (pCi/m^2/sec) radon emanation rate, but is generally in the range of 2 to 4 pCi/m^2/sec. No change was made as a result of the comment.

Comment: Concerning §289.259(d)(1)(A)(ii)(I) and (II), the commenter stated that the words "...provided that these concentrations are not exceeded at any time..." are confusing because such sampling is not a time function. The commenter suggested the words "...provide that these concentrations are not exceeded in any individual sample of the soil (media)."

Response: The department deleted the words "at any time" from both subclauses to clarify the intent of the section. The concentrations should not be exceeded in any sample at any time.

Comment: Concerning §289.259(d)(1)(B), the commenter suggested the paragraph be amended to specify "non-oil and gas NORM" to make it analogous to the wording of §289.259(d)(1)(A).

Response: The department added the words "other than oil and gas NORM waste" before "NORM" to clarify the intent of the rule.

Comment: Concerning §289.259(d)(1)(B), the commenter suggested that the subsection be clarified so that the exemption concentrations for soil are limited to undisturbed soil. The commenter stated that once soil is removed or otherwise disturbed, it should be considered "other media."

Response: Regardless whether the soil is disturbed or not, it does not become "other media." No change was made as a result of the comment.

Comment: Concerning §289.259(d)(1)(B)(iii)(II), the commenter stated that the words "...provided that these concentrations are not exceeded at any time..." are confusing because such sampling is not a time function. The commenter suggested the words "...provided that these concentrations are not exceeded in any individual sample of the soil (media)."

Response: The department deleted the words "at any time" from both subclauses to clarify the intent of the section. The concentrations should not be exceeded in any sample at any time.

Comment: Concerning §289.259(d)(2) and (3), the commenter stated that these paragraphs do not address contamination with alpha and beta emitting radionuclides. The commenter suggested the release criteria in subsection (w) be referenced here. Also, the commenter stated that the unit "roentgen" is archaic and should be changed to "rem."

Response: The paragraphs do not address alpha and beta emitting radionuclides because these radionuclides will not generally be detected through the wall thickness of tubulars and equipment. The department added the words, "(tubulars) and other downhole or surface equipment used in oil production" after the word "Pipe" in paragraph (3) to clarify the intent of the exemption. Therefore facilities that are contaminated with NORM alpha and beta emitting radionuclides are general licensees and must follow the general license requirements for worker protection in subsection (g) and the requirements for release for unrestricted use in subsection (w). The term "roentgen" is the correct term. No change was made as a result of the comment.

Comment: Concerning §289.259(d)(3), the commenter was concerned with the wording as it appears to remove the existing exemption applicable to equipment that has a radiation exposure level of 50 microroentgens per hour (μR/hr). This removes from the current exemptions heater treaters, filters, pumps, vessels and other equipment that contain NORM. The commenter suggested that the words "and other equipment" be added.

Response: The words "(tubulars) and other downhole or surface equipment used in oil production" were added after the word "Pipe" to clarify the intent of the exemption.

Comment: Concerning §289.259(d)(3), the commenter suggested the term "pipe" as used in this section be defined. The commenter questioned whether the word "pipe" means any tubular equipment or just tubular used to transport gases and liquids. The commenter stated that many parts of chemical processing equipment could be called "pipe." There should be a requirement for minimally acceptable alpha and beta contamination levels. The gamma ray criteria should specify whether the pipe is in-service or empty since some NORM-contaminated natural gas gives off gamma rays that disappear when the pipe is empty. The commenter also questioned if it is acceptable to check contamination in the ends of small diameter pipe and assume that the measurement is representative of the entire joint of pipe.

Response: The words "(tubulars) and other downhole or surface equipment used in oil production" were added after the word "Pipe" to clarify the intent of the exemption. The word "pipe" means "tubulars" as that term is used by the oil and gas industry. This paragraph does not address alpha and beta emitting radionuclides. The rule allows the determination of the 50 μR/hr limit to be measured at any accessible point.

Comment: Concerning §289.259(d)(5), the commenter supports the proposed rule and commends the agency for their efforts in crafting a proposal that recognizes the storage of fossil fuel combustion byproducts does not need a specific license. Texas coal-fired units produced over 12.7 million tons of coal combustion byproducts in 1996. Of that amount, 2.7 million tons of coal ash was used for additives in cement, drilling mud, bricks, shingles, and road construction. Obtaining a specific license would have a chilling effect on these recycling efforts. The commenter's customers receive the benefits of the revenues from the sale of these materials. More importantly, they benefit from the avoided disposal costs of landfilling ash as a waste material. This in turn reduces the amount of land utilized

for disposal. The commenter believes that this conserves our natural resources while being protective of the environment.

Response: The department acknowledges the comment. No change was made as a result of the comment.

Comment: Concerning §289.259(d)(7), the commenter stated that while this exemption is appropriate, there should be requirements applicable to NORM-contaminated shipping vessels and equipment. The commenter further explained that there is significant contamination of vessels and facilities used in the transportation and storage of materials containing NORM. The commenter also noted that the first sentence could lead an organization to not realize this and thus permit individuals access to NORM contaminated equipment and facilities.

Response: Transportation means the actual conveyance of products. The exemption does not include the use of NORM-contaminated shipping vessels and equipment. No change was made as a result of the comment.

Comment: Concerning §289.259(e), the commenter noted that this subsection completely ignores measuring alpha and beta radiation. The commenter suggested that requirements for these survey meters need to be specified including a minimum detectable (MDA) for instruments used such as "having an MDA less than 25% of the release criteria." (There is such a requirement in the footnotes to the old appendix (289.259(w)) but it is easily overlooked).

Response: Subsection (e)(2) states that survey instruments shall be, "...calibrated, appropriate, and operable." "Appropriate" means the correct type of survey instrument (meter and probe) for measuring the expected types of radiation. The reference to the footnote concerns the efficiency of the detector used for the analyzes of wipes, not for a survey meter. No change was made as a result of the comment.

Comment: Concerning §289.259(e)(3), the commenter suggested that there should be a provision in this paragraph for generally licensed persons to calibrate their own alpha and beta survey instruments, provided they use calibration sources with an adequate accuracy, traceable to the National Institute of Standards and Technology (NIST), or equivalent, and also provided that the counters will be checked for counting accuracy annually, on all ranges, using a suitable electronic pulse generator.

Response: The rules in §289.252 of this title require that a person using a source to calibrate survey meters must be specifically licensed. Determination of efficiencies using an exempt source is not considered calibration. No change was made as a result of the comment.

Comment: Concerning §289.259(f), the commenter stated that the requirements for a general licensee should contain language that would make them have to perform the same health and safety program as a specific licensee. The fact that a specific licensee must submit plans, notify the agency when work is to be performed, and have their procedures reviewed should be carried over to the general licensee. There is no system in place to ensure that the work is performed correctly or that the workers are protected. The commenter also stated that there should be a requirement for a mandatory survey of equipment like that required in both Louisiana and New Mexico.

Response: General licensees are required to meet the worker and general population protection requirements specified in subsection (g). Exposure to NORM-contaminated equipment is incidental to other activities being performed and is infrequent for general licensees. Specific licensees perform decontamination on a commercial basis. General licensees cannot release facilities or equipment unless specified limits are met. The agency believes these requirements are adequate to protect public health and safety when risk from radiation exposure is compared to the cost of requiring surveys at a specified interval. No change was made as a result of the comment.

Comment: Concerning §289.259(f)(1), the commenter questioned whether the words "...or of NORM in any food, beverage, cosmetic, drug, or other commodity designed for ingestion or inhalation by, or application to, a human being" means that 149 pCi/gm is an acceptable level in food products. The commenter stated that this meaning could be interpreted from the current text and that maximum permissible activity levels need to be established for these products. (See §289.259(b)(2).)

Response: Subsection (f)(1) clearly states that a general license does not authorize the manufacture or commercial distribution of products containing NORM in concentrations greater that those specified in subsection (d)(1)(B). The paragraph does not allow any NORM in any food, beverage, cosmetic, drug, or commodity designed for ingestion or inhalation by, or application to, a human being. No change was made as a result of the comment.

Comment: Concerning §289.259(f)(2), the commenter stated that this paragraph eliminates a general licensee's ability to expedite "routine maintenance" activities themselves when exposure pathways change and increase radiation exposure. Such activities cannot be considered "routine" in the proposed section. The commenter noted that the management options are engineering to reduce exposure or securing the services of a specific licensee to conduct the work. Depending on the maintenance task and its frequency, the latter option would become burdensome and cost prohibitive to the oil and gas industry.

The commenter further stated that worker protection plans providing protective measures that reduce radiation exposure while conducting activities in the presence of NORM are already required for oil and gas companies by the agency. Executing routine maintenance tasks implementing these protective controls would be appropriate where engineering is not viable and provides an alternative to contracting the services of a specific licensee.

Response: The department's responsibility is to protect public health and safety and the department is concerned about the radiation exposure risk associated with certain activities that are considered "routine maintenance" by the persons affected by this rule. The affected industry has indicated that they consider "routine maintenance" to be the repair and maintenance of equipment for the purpose of restoring its intended use or efficiency, regardless of the presence of oil and gas NORM. Decontamination of equipment contaminated with NORM above the exempt limits may occur incidental to the routine maintenance. The department acknowledges, however, that not all routine maintenance activities result in a significant increase in radiation exposure risk. Simple routine maintenance tasks such as replacing or repairing a valve, changing filters, or "pigging" a pipe are such activities.

The wording in subsection (f)(2), "Maintenance that provides a different pathway for exposure than is found in daily operations and that increases the potential for additional exposure is not

considered routine," was proposed in order to further define the risk the department is concerned about. In discussions with the industry, the department determined that the activity that presents the most concern is vessel entry. The industry considers this to be routine maintenance. However, this is the type of operation that the department believes presents a significantly increased risk from an enclosed environment where an inhalation risk (a different pathway for exposure than is found in daily operations) from NORM can be present.

The department acknowledges that unlike the employees of a company specifically licensed to perform decontamination, the employees or contractors of a general license would be performing vessel entry on an infrequent basis and thus, the radiation exposure risk is lowered due to a time factor.

The department plans to draft language that will outline radiation safety precautions that must be followed when vessel entry is conducted during the course of routine maintenance, but wishes to seek further input from the industry on that draft language. However, in order for several of the revisions of this section supported by commenters to become effective and for the section to be reformatted in *Texas Register* format, no change was made at this time as a result of the comment.

Comment: Concerning §289.259(f)(2), the commenter questioned what the department considers a "different pathway for exposure" and suggested that clarification of the phrase and an example would be beneficial. The commenter also suggested including definitions of "routine maintenance" and "maintenance" in §289.259(c).

Response: The department's responsibility is to protect public health and safety and the department is concerned about the radiation exposure risk associated with certain activities that are considered "routine maintenance" by the persons affected by this rule. The affected industry has indicated that they consider "routine maintenance" to be the repair and maintenance of equipment for the purpose of restoring its intended use or efficiency, regardless of the presence of oil and gas NORM. Decontamination of equipment contaminated with NORM above the exempt limits may occur incidental to the routine maintenance. The department acknowledges, however, that not all routine maintenance activities result in a significant increase in radiation exposure risk. Simple routine maintenance tasks such as replacing or repairing a valve, changing filters, or "pigging" a pipe are such activities.

The wording in subsection (f)(2), "Maintenance that provides a different pathway for exposure than is found in daily operations and that increases the potential for additional exposure is not considered routine," was proposed in order to further define the risk the department is concerned about. In discussions with the industry, the department determined that the activity that presents the most concern is vessel entry. The industry considers this to be routine maintenance. However, this is the type of operation that the department believes presents a significantly increased risk from an enclosed environment where an inhalation risk (a different pathway for exposure than is found in daily operations) from NORM can be present.

The department acknowledges that unlike the employees of a company specifically licensed to perform decontamination, the employees or contractors of a general license would be performing vessel entry on an infrequent basis and thus, the radiation exposure risk is lowered due to a time factor.

The department plans to draft language that will outline radiation safety precautions that must be followed when vessel entry is conducted during the course of routine maintenance, but wishes to seek further input from the industry on that draft language. However, in order for several of the revisions of this section supported by commenters to become effective and for the section to be reformatted in *Texas Register* format, no change was made at this time as a result of the comment.

Comment: Concerning §289.259(f)(2), the commenter stated that this paragraph mixes requirements for both general and specific licenses. The commenter suggested the requirements be grouped under subsection (f) and (i) respectively, to eliminate confusion from requirements being listed in multiple locations. The commenter further stated that the parenthetical expression implies that non-routine maintenance must be performed by specifically licensed persons. This would place an unnecessary burden and considerable cost on plant maintenance operations. Many operations that are considered to be routine maintenance present a potential for exposure to NORM. Any operation that brings a surface exposed to NORM contaminated process materials into contact with maintenance personnel provides a potential pathway for exposure. This would include simple tasks such as replacing or repairing a valve, changing filters, "pigging" a pipe and the multitude of tasks that require personnel entry into process equipment. Much maintenance requires operations by specialists who are not necessarily versed in the requirements for working with NORM contaminated equipment. However, they can perform the work safely if properly trained, equipped and supervised. Personal protective equipment required for work on NORM contaminated materials is often the same as in already being used because of the presence of chemical and mechanical hazards.

The commenter suggested adding or replacing the last sentence in paragraph (f)(2) with "An organization that owns, possesses or controls buildings, structures, equipment or land may perform non-routine maintenance and decontamination on its facilities and equipment if it has programs and requirements in place equivalent or more comprehensive than those specified and required in §289.259(k)(2) of this title for licensed decontaminators. Actual work may be performed by temporary employees and contractors who have been trained and equipped to perform the work, receive any additional instruction necessary for a specific job and are appropriately monitored by trained radiation safety monitors."

Response: The department's responsibility is to protect public health and safety and the department is concerned about the radiation exposure risk associated with certain activities that are considered "routine maintenance" by the persons affected by this rule. The affected industry has indicated that they consider "routine maintenance" to be the repair and maintenance of equipment for the purpose of restoring its intended use or efficiency, regardless of the presence of oil and gas NORM. Decontamination of equipment contaminated with NORM above the exempt limits may occur incidental to the routine maintenance. The department acknowledges, however, that not all routine maintenance activities result in a significant increase in radiation exposure risk. Simple routine maintenance tasks such as replacing or repairing a valve, changing filters, or "pigging" a pipe are such activities.

The wording in subsection (f)(2), "Maintenance that provides a different pathway for exposure than is found in daily operations and that increases the potential for additional exposure is not

considered routine," was proposed in order to further define the risk the department is concerned about. In discussions with the industry, the department determined that the activity that presents the most concern is vessel entry. The industry considers this to be routine maintenance. However, this is the type of operation that the department believes presents a significantly increased risk from an enclosed environment where an inhalation risk (a different pathway for exposure than is found in daily operations) from NORM can be present.

The department acknowledges that unlike the employees of a company specifically licensed to perform decontamination, the employees or contractors of a general license would be performing vessel entry on an infrequent basis and thus, the radiation exposure risk is lowered due to a time factor.

The department plans to draft language that will outline radiation safety precautions that must be followed when vessel entry is conducted during the course of routine maintenance, but wishes to seek further input from the industry on that draft language. However, in order for several of the revisions of this section supported by commenters to become effective and for the section to be reformatted in *Texas Register* format, no change was made at this time as a result of the comment.

Comment: Concerning §289.259(f)(4), the commenter suggested adding a subparagraph (D) as follows, "The person or organization temporarily transferring material or equipment, contaminated in excess of limits specified in this section, to another person or organization for the purposes such as maintenance, apprises that person or organization of the contamination levels on the transferred material of equipment." The commenter stated that this would permit temporary transfer of contaminated materials for purposes of repair or maintenance.

Response: The department's planned future revision to this section concerning routine maintenance will address the addition of radiation safety precautions. The department will be seeking additional input from the industry on this issue at this time. No change was made as a result of the comment.

Comment: Concerning §289.259(f)(5), the commenter stated that this prohibition could be a problem for oil and gas NORM operators and for land owners in Texas. In the case of oil and gas operators who are ready to release land back to land owners for unrestricted use, it would mean that they would have to assess all of their properties and remediate those areas that are above 50 μR/hr. In today's economic environment for the oil and gas industry, which is at a point of near failure, any increase cost for operators becomes a burden for them. For a land owner, who has all his property abandoned by an oil and gas operator with no responsible party left, that land owner would possess NORM and would be subject to the agency's rules. Therefore, they will not be able to sell the property without assessing and remediating. The commenter also stated that to remediate land can exceed the value of the land. In effect, the state would have taken that land from the land owner.

Response: The words "land contaminated with NORM in excess of the soil concentrations set forth in subsection (d) of this section," were deleted from subsection (f)(2), and subsection (f)(5) was deleted completely. These deletions make the requirement concerning the release of land for unrestricted use the same as it existed prior to adoption of this revised section. The department and the RCT will be resolving a jurisdictional issue concerning land contamination in a planned memorandum of understanding between the two agencies in the near future.

Comment: Concerning §289.259(h)(1)(B), the commenter stated that the agency does not have the statutory authority to allow NORM waste to be disposed of in a facility licensed by the agency for by-product disposal. The commenter stated that to allow NORM waste to be disposed of at such a facility would require a license issued by the TNRCC for NORM disposal.

Response: The department deleted the language, "and which...Facilities" from subparagraph (h)(1)(B) and deleted the language "by transfer...or" in proposed subparagraph (C) because it is not necessary to specify under what requirements a person must be specifically licensed to receive waste containing NORM. Proposed subparagraph (D) was renumbered as subparagraph (C).

Comment: Concerning §289.259(h)(1)(C), the commenter suggested that this subparagraph be revised to remove the reference to the United States Nuclear Regulatory Commission (NRC) and an agreement state. The commenter stated that NRC, and by inference, NRC agreement states, do not have regulatory authority over NORM and therefore should not be listed as an appropriate authorizing bodies. The provision should reference the TNRCC, the RCT, or appropriate jurisdictional agency in another state.

Response: The department deleted this subparagraph because it is not necessary to specify under what requirements a person must be specifically licensed to receive waste containing NORM. Proposed subparagraph (D) was renumbered as subparagraph (C).

Comment: Concerning §289.259(h)(3), the commenter suggested that this paragraph be amended to state "... to a person specifically authorized by the TNRCC, RCT, or the jurisdictional agency in another state, as appropriate, to receive such waste."

Response: The department deleted this paragraph because it is redundant.

Comment: Concerning §289.259(i)(1), the commenter stated that a numerical limit needs to be specified to define when NORM is present, e.g. "...NORM is present at concentrations greater than X pCi/gm." (See comments on §289.259(b)(2).)

Response: Unless otherwise exempted, any level of NORM in a material or product manufactured and commercially distributed must be specifically licensed. No change was made as a result of the comment.

Comment: Concerning §289.259(i)(2), the commenter stated that consideration needs to be given to persons or organizations who have capabilities and procedures equivalent or superior to those required of persons specifically licensed to perform decontamination as a business. These organizations should be permitted to maintain and decontaminate their own facilities and equipment. The commenter suggested that such authorization could be either by regulatory requirement of general licensees, review and approval of their procedures or granting of a special class of specific license for such activities. "Regulatory requirement of general licensees" means a statement in the regulations that general licensees with XYZ capabilities are permitted to maintain and decontaminate their own contaminated facilities and equipment.

Response: Persons specifically licensed to decontaminate NORM are doing so on a commercial basis. The department's

planned future revision to this section concerning routine maintenance will address decontamination incidental to routine maintenance by a general licensee. No change was made as a result of the comment.

Comment: Concerning §289.259(i)(3), the commenter suggested changing the wording to "Unless otherwise exempted in accordance with subsection (d) of this section, persons receiving NORM waste from other persons for commercial storage or processing or persons who commercially process NORM for other persons at temporary job sites. Persons or organizations may consolidate waste from different locations owned or controlled by that organization at one of their sites, for the purpose of efficient waste consolidation prior to disposal at an appropriate disposal site." The commenter stated that as the section is written, the regulation would prohibit an organization with multiple sites such as a pipeline, from consolidating its waste at one site for efficient packaging for proper disposal.

Response: The definition of person as §289.201(b)(68) of this title includes a corporation. Therefore, "other persons" would not include multiple sites under the same general licensee. No change was made as a result of the comment.

Comment: Concerning §289.259(i)(3), the commenter questioned whether any contract worker who is going to be drumming scale or sludge at a licensee's site would have to be specifically licensed. In some cases some of the people at the disposal sites would have to be specifically licensed, for example, RCT allows NORM to be put in wells that are plugged. These contractors would have to be specifically licensed to dispose of NORM. The commenter also questioned if contractors of licensees are supposed to be specifically licensed to perform NORM clean-up. The commenter suggested clarification of the definition of "other persons" for contractors as part of the "person" and not "other persons. Also, the commenter suggested putting in a requirement for notification to contractors of hazard and for basic safety training for NORM handling.

Response: If the contractor is hired specifically to decontaminate, the contractor must be a specific licensee. If the contractor is hired to do maintenance and incidentally decontaminates, then the general licensee is responsible for complying with the rules. The department's planned future revision to this section concerning routine maintenance will address the addition of radiation safety precautions. No change was made as a result of the comment.

Comment: Concerning §289.259(i)(4), the commenter questioned the term "spinning pipe gauge" since pipe is exempted in subsection (d)(3) of this section. Also, the commenter questioned why pipe is given special consideration in these regulations.

Response: The oil and gas and petrochemical industry is prevalent in Texas and pipe is integral to this business. A spinning pipe gauge is a gauge containing radioactive material that is used to measure pipe thickness. A spinning pipe gauge is not included in the exemption in subsection (d)(3). Considering economic factors weighed against risk, screening criteria for pipe was developed. No change was made as a result of the comment.

Comment: Concerning §289.259(k)(3), the commenter questioned the term "spinning pipe gauge" since pipe is exempted in subsection (d)(3) of this section. Also, the commenter questioned why pipe is given special consideration in these regulations.

Response: The oil and gas and petrochemical industry is prevalent in Texas and pipe is integral to this business. A spinning pipe gauge is a gauge containing radioactive material that is used to measure pipe thickness. A spinning pipe gauge is not included in the exemption in subsection (d)(3). No change was made as a result of the comment.

Comment: Concerning §289.259(k)(4)(B), the commenter stated that criteria are needed to define when NORM is not contained in a product at a significant level. Some natural gas extracted in Texas contains radon gas. Components of the natural gas are separated and used in chemical industries, inadvertently enhancing the concentration of radon in the natural gas product which would then be considered NORM as defined in these regulations. Anything derived from this natural gas product then potentially contains NORM. These materials are used in a variety of products, some of which are consumed by humans and livestock. The commenter is concerned that by the wording used, production of these products would not be permitted. The commenter suggested a permissible concentration be defined at which the NORM is not considered a significant risk for any use of the material. The commenter cited the EPA criteria for radioisotopes in drinking water as an example.

Response: Natural gas and natural gas products, are exempted from the requirements of this section as stated in subsection (d)(7). No change was made as a result of the comment.

Comment: Concerning §289.259(l)(2), the commenter questioned the fact that paragraph (l)(1) exempts dose from intake of radon and radon decay products and this paragraph only exempts radon. The commenter suggested that to be consistent, this paragraph should also exempt dose from radon and radon decay products.

Response: The words "and radon decay products" were added to subsection (l)(2) after the words "excluding radon" for consistency.

Comment: Concerning §289.259(l)(3), the commenter is concerned with release of radon gas and releases at average concentrations greater than 0.4 picocuries per liter (pCi/l). The commenter is concerned with the fact that this section's requirement of concentrations greater than 0.4 pCi/l is much lower than the EPA's action level for radon in homes of 4.0 pCi/l. The commenter stated that the definition of average radon concentration needs to be defined as to location, time and spatial averaging.

Response: This paragraph applies to exempt products containing NORM. An individual may receive other contributions to their dose from other radon sources. Therefore, the limit is lower than EPA's action level in order to account for contributions to dose from other sources. No change was made as a result of the comment.

Comment: Concerning §289.259(o)(2)(C), the commenter questioned whether this requirement applies to contaminated materials or equipment, temporarily transferred to another organization for the purpose of maintenance or repair, with subsequent return of the material or equipment and all contaminated materials to the original organization.

Response: This subsection refers to specific licensure of the manufacture and/or commercial distribution of products and

materials containing NORM, and not contaminated materials or equipment. No change was made as a result of the comment.

Comment: Concerning §289.259(p)(4)(B), the commenter stated that the language in this subparagraph is vague and can be interpreted too broadly. The commenter suggested that this provision require that radioactive contamination be cleaned up to the levels specified in §289.202 of this title, and not to the extent practicable.

Response: Subparagraph (B) of paragraph (4) was deleted because paragraph (5) more clearly states the intent of the rule. Subsequent subparagraphs were renumbered to reflect the deletion.

Comment: Concerning proposed §289.259(p)(4)(D), the commenter suggested that the methodology of performing the required survey should be specified, e.g. "As described in NUREG/CR-5849."

Response: Since there are several acceptable methodologies, no specific ones were prescribed. No change was made as a result of the comment.

Comment: Concerning §289.259(u)(2)(A), the commenter suggested that this subparagraph be amended to state "specifically licensed by the TNRCC or RCT, as appropriate, or by the appropriate jurisdictional agency in another state, to receive such material..."

Response: The word "radioactive" was replaced with the word "NORM" to more clearly state the intent of the rule. A sentence that reads, "The Texas Natural Resource Conservation Commission (TNRCC) has the jurisdiction to regulate disposal of NORM, other than oil and gas NORM, which is under the jurisdiction of the Railroad Commission of Texas (RCT)" was added to subsection (a) to further clarify the intent of the section.

Comment: Concerning §289.259(u)(2)(B), the commenter suggested that this subparagraph be amended to clarify that in Texas, exempt non-oil and gas NORM is also regulated as solid waste under the Texas Solid Waste Disposal Act and is subject to the regulations of the TNRCC.

Response: Language was added to subsection (a) to clearly state the TNRCC jurisdiction. Once the department exempts NORM, other than oil and gas NORM, which is under the jurisdiction of the RCT, the department does not attempt to list all of the statutes that the material may then be subject to. No change was made as a result of the comment.

Commenters included representatives from Marathon Oil Company, NORM Decon Services, LLC, Texas Utilities Services, Shell Company, Texas Oil and Gas Association, Texas Natural Resource Conservation Commission, and Union Carbide Corporation. In addition, numerous individuals commented. The commenters were generally favorable of the rule as proposed; however, the commenters had questions or specific concerns, and offered suggestions for changes to the proposal as discussed in the summary of comments.

Subchapter C. Texas Regulations for Control of Radiation

25 TAC §289.127

The repeal is adopted under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The General Appropriations Act, Article IX, Rider 167, passed by the 75th Legislature is implemented by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 22, 1999.

TRD-9901681
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: April 11, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 458–7236

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Subchapter F. License Regulations

25 TAC §289.259

The new section is adopted under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the commissioner of health. The General Appropriations Act, Article IX, Rider 167, passed by the 75th Legislature is implemented by the adoption.

§289.259. Licensing of Naturally Occurring Radioactive Material (NORM).

(a) Purpose. This section establishes radiation protection standards for the possession, use, transfer, transport, and/or storage of naturally occurring radioactive material (NORM) or the recycling of NORM-contaminated materials not subject to regulation under the Atomic Energy Act of 1954, as amended (AEA). This section is not intended to regulate the disposal of radioactive substances. The Texas Natural Resource Conservation Commission (TNRCC) has the jurisdiction to regulate disposal of NORM, other than oil and gas NORM, which is under the jurisdiction of the Railroad Commission of Texas (RCT).

(b) Scope.

(1) This section applies to any person who engages in the extraction, mining, beneficiating, processing, use, transfer, transport, or storage of NORM or the recycling of NORM-contaminated materials.

(2) This section addresses the introduction of NORM into products in which neither the NORM nor the radiation emitted from the NORM is considered to be beneficial to the products. The manufacture and commercial distribution of products containing NORM in which the NORM or its associated radiation(s) are considered to be a beneficial attribute are licensed in accordance with the provisions of §289.252 of this title (relating to Licensing of Radioactive Material).

(3) The requirements of this section are in addition to and not in substitution for other applicable requirements of §289.201

of this title (relating to General Provisions), §289.202 of this title (relating to Standards for Protection Against Radiation), §289.203 of this title (relating to Notices, Instructions and Reports to Workers; Inspections), §289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material(s) Licenses, Emergency Planning and Implementation, and Other Regulatory Services), §289.205 of this title (relating to Hearing and Enforcement Procedures), §289.251 of this title (relating to Exemptions, General Licenses, and General License Acknowledgments), §289.252 of this title, and §289.257 of this title (relating to Packaging and Transportation of Radioactive Material).

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

(1) Beneficial attribute or beneficial to the product - The radioactivity of the product is necessary to the use of the product.

(2) Beneficiating - The processing of materials for the purpose of altering chemical or physical properties to improve the quality, purity, or assay grade.

(3) Decontamination - The cleaning process of removing or reducing residual radioactivity from equipment, buildings, structures, and land owned, possessed, or controlled by other persons to a level that permits release of equipment, buildings, structures and land for unrestricted use or termination of license.

(4) Naturally occurring radioactive material (NORM) - Naturally occurring materials not regulated under the AEA whose radionuclide concentrations have been increased by or as a result of human practices. NORM does not include the natural radioactivity of rocks or soils, or background radiation, but instead refers to materials whose radioactivity is concentrated by controllable practices (or by past human practices). NORM does not include source, byproduct, or special nuclear material.

(5) Other media - Any volumetric material other than soils or liquids (for example: sludge, scale, slag, etcetera).

(6) Person - As defined in §289.201(b)(68) of this title.

(7) Product - Something produced, made, manufactured, refined, or beneficiated.

(8) Recycling - A process by which materials that have served their intended use are collected, separated, or processed and returned to use in the form of raw materials in the production of new products. Recycling shall not include the use of a material in a manner that constitutes disposal.

(d) Exemptions.

(1) Persons who receive, possess, use, process, transfer, transport, store, or commercially distribute:

(A) Oil and gas NORM waste are exempt from the requirements of this chapter if the material contains, or is contaminated at, concentrations of:

(i) 30 picocuries per gram (pCi/gm) or less of radium-226 or radium-228 in:

(I) soil, averaged over any 100 square meters (m^2) and averaged over the first 15 centimeters (cm) of soil below the surface; or

(II) other media; or

(ii) 150 pCi or less per gram of any other NORM radionuclide in:

(I) soil, averaged over any 100 m^2 and averaged over the first 15 cm of soil below the surface, provided that these concentrations are not exceeded; or

(II) other media, provided that these concentrations are not exceeded.

(B) Other than oil and gas NORM waste, NORM is exempt from the requirements of this chapter if the materials contain, or are contaminated at, concentrations of:

(i) 30 pCi/gm or less of radium-226 or radium-228 in:

(I) soil, averaged over any 100 m^2 and averaged over the first 15 cm of soil below the surface, provided the radon emanation rate is less than 20 picocuries per square meter per second ($pCi/m^2/sec$); or

(II) other media, provided the radon emanation rate is less than 20 $pCi/m^2/sec$;

(ii) 5 pCi/gm or less of radium-226 or radium-228 in:

(I) soil, averaged over any 100 m^2 and averaged over the first 15 cm of soil below the surface, in which the radon emanation rate is equal to or greater than 20 $pCi/m^2/sec$; or

(II) other media, in which the radon emanation rate is equal to or greater than 20 $pCi/m^2/sec$; or

(iii) 150 pCi or less per gram of any other NORM radionuclide in:

(I) soil, averaged over any 100 m^2 and averaged over the first 15 cm of soil below the surface, provided that the radon emanation rate is less than 20 $pCi/m^2/sec$; or

(II) other media, provided that these concentrations are not exceeded.

(2) Materials and equipment in the recycling process contaminated with NORM scale or residue not otherwise exempted are exempt from the requirements of this section if the maximum radiation exposure level does not exceed 50 microroentgens per hour (μR/hr) including the background radiation level at any accessible point.

(3) Pipe (tubulars) and other downhole or surface equipment used in oil production contaminated with NORM scale or residue not otherwise exempted is exempt from the requirements of this section if the maximum radiation exposure level does not exceed 50 μR/hr including the background radiation level at any accessible point.

(4) Products or materials containing NORM distributed in accordance with a specific license issued by the agency in accordance with subsection (k)(4) of this section or an equivalent license issued by another licensing state are exempt from the requirements of this section.

(5) The manufacture, commercial distribution, use, or storage of the following products/materials or the recycling of equipment or containers used to produce, contain, or transport these products are exempt from the requirements of this section:

(A) potassium and potassium compounds that have not been isotopically enriched in the radionuclide K-40;

(B) byproducts from fossil fuel combustion (bottom ash, fly ash, and flue-gas emission control byproducts); and

(C) material used for building construction, industrial processing, sand blasting, metal casings, or other NORM in which the radionuclide content has not been concentrated to higher levels than found in its natural state.

(6) The wholesale and retail commercial distribution (including custom blending), possession, and use of the following products/materials or the recycling of equipment or containers used to produce, contain, or transport these products, are exempt from the requirements of this section. The manufacture of phosphate and potash fertilizer is subject to the general license requirements in subsections (f)-(h) of this section:

(A) phosphate and potash fertilizer;

(B) phosphogypsum for agricultural uses if such commercial distribution and uses meet the requirements of 40 Code of Federal Regulations (CFR) 61.204; and

(C) materials used for building construction if the materials contain NORM that has not been concentrated to higher levels than found in its natural state.

(7) The possession, storage, use, transportation, and commercial distribution of natural gas and natural gas products and of crude oil and crude oil products containing NORM are exempt from the requirements of this section. The processing of natural gas and crude oil and the manufacture of natural gas products and crude oil products containing NORM are subject to the general license requirements in subsections (f)-(h) of this section.

(8) Possession of produced waters from crude oil and natural gas production is exempt from the requirements of this section if the produced waters are reinjected in a well approved by the agency having jurisdiction to regulate such reinjection or if the produced waters are discharged under the authority of the agency having jurisdiction to regulate such discharge.

(e) Radiation survey instruments.

(1) Radiation survey instruments used to determine exemptions in accordance with subsection (d)(2) and (3) of this section and radiation survey instruments used to make surveys in accordance with subsection (f) of this section shall be able to measure from 1 μR/hr through at least 500 μR/hr.

(2) Radiation survey instruments used to make surveys required by this section and §289.202(p)(1) of this title shall be calibrated, appropriate, and operable.

(3) Each radiation survey instrument shall be calibrated:

(A) by a person licensed or registered by the agency, another agreement state or licensing state, or the United States Nuclear Regulatory Commission (NRC) to perform such service;

(B) at energies appropriate for the licensee's use;

(C) at intervals not to exceed 12 months, and after each instrument servicing other than battery replacement; and

(D) to demonstrate an accuracy within plus or minus 20% using a reference source provided by a person authorized in accordance with subparagraph (A) of this paragraph.

(4) Records of these calibrations shall be maintained for agency inspection for five years after the calibration date.

(f) General license.

(1) A general license is hereby issued to mine, extract, receive, possess, own, use, process, transport, store, and transfer for disposal NORM or to recycle NORM-contaminated materials not exempted in subsection (d) of this section without regard to quantity. This general license does not authorize the manufacture or commercial distribution of products containing NORM in concentrations greater than those specified in subsection (d)(1)(B) of this section, or of NORM in any food, beverage, cosmetic, drug, or other commodity designed for ingestion or inhalation by, or application to, a human being. The melting of scrap metal is authorized by the general license if the dilution of the NORM in the end-products or melt byproducts is sufficient to reduce any expected average concentration of NORM to levels not to exceed the concentration specified in subsection (d)(1)(B) of this section.

(2) Equipment, buildings, and structures contaminated with NORM in excess of the levels set forth in subsection (w) of this section and equipment not otherwise exempted under the provisions of subsection (d)(2) and (3) of this section shall not be released for unrestricted use. The decontamination of equipment, buildings, and structures as described in subsection (i)(2) of this section shall be performed only by persons specifically licensed by the agency or another licensing state to conduct such work, including contractors of a general licensee, except that a general licensee or a contractor under the control and supervision of a general licensee can perform routine maintenance on equipment, buildings, and structures owned or controlled by the general licensee. (Maintenance that provides a different pathway for exposure than is found in daily operations and that increases the potential for additional exposure is not considered routine.) Persons conducting activities specified in subsection (i)(2) of this section and working as a contractor under the control and supervision of a general licensee must possess a specific license issued by the agency in accordance with subsection (k) of this section.

(3) The handling or processing by a general licensee of NORM-contaminated materials not otherwise exempted from the requirements of this section for the purpose of recycling is authorized by the agency if the radiation level 18 inches from the NORM-contaminated material does not exceed 2 millirem per hour (mrem/hr).

(4) The transfer of NORM not exempt from the requirements of this section from one general licensee to another general licensee is authorized by the agency if the:

(A) equipment, buildings, and structures contaminated with NORM are to be used by the recipient for the same purpose or at the same site;

(B) materials being transferred are ores or raw materials for processing or refinement; or

(C) materials being transferred are in the recycling process.

(g) Protection of workers and the general population. Each person subject to the general license in subsection (f) of this section shall conduct operations in compliance with the standards for radiation protection established in §289.202(f)-(o), (ww)-(zz) of this title, and §289.203 of this title, except for transfer for disposal, which shall be governed by subsection (h) of this section.

(h) Transfer of waste for disposal.

(1) Each person subject to the general license in subsection (f) of this section shall manage and dispose of wastes containing NORM:

(A) in accordance with the United States Environmental Protection Agency's (EPA) applicable requirements for disposal of such wastes;

(B) by transfer of the wastes for disposal to a person specifically licensed to receive waste containing NORM; or

(C) in accordance with alternate methods authorized by the agency having jurisdiction to regulate disposal of such waste.

(2) Records of transfers for disposal shall be maintained for inspection by the agency.

(i) Specific license.

(1) Unless otherwise exempted under the provisions of subsection (d) of this section or licensed under the provisions of §289.252 of this title, the manufacture and commercial distribution of any material or product containing NORM shall be specifically licensed in accordance with this section or in accordance with the equivalent requirements of another licensing state.

(2) Persons conducting deliberate operations to decontaminate the following shall be specifically licensed in accordance with the requirements of this section:

(A) buildings and structures owned, possessed, or controlled by other persons and contaminated with NORM in excess of the levels set forth in subsection (w) of this section; or

(B) equipment or land owned, possessed, or controlled by other persons and not otherwise exempted under the provisions of subsection (d) of this section.

(3) Unless otherwise exempted in accordance with subsection (d) of this section, persons receiving NORM waste from other persons for storage or processing or persons who process NORM for other persons at temporary job sites shall be specifically licensed in accordance with the requirements of this section.

(4) Spinning pipe gauge licensees performing reclamation activities shall obtain specific authorization to perform NORM decontamination on pipe. Alternatively, spinning pipe gauge licensees may survey tubing before reclamation activities are performed. If the exposure rate on the outside of a pipe, measured at any accessible point, is greater than 50 μR/hr, then the spinning pipe gauge licensee shall obtain a NORM decontamination license. If the exposure rate of the pipe measures less than 50 μR/hr, a spinning pipe gauge licensee may perform the scale removal activity without additional authorization on their license.

(j) Filing application for specific licenses.

(1) Applications for specific licenses shall be filed in duplicate on a form prescribed by the agency.

(2) The agency may at any time after the filing of the original application, and before the expiration of the license, require further information in order to determine whether the application should be granted or denied, or whether a license should be modified or revoked.

(3) Each application shall be signed by the applicant or licensee, or a person duly authorized to act for and on the licensee's behalf.

(4) A license application may include a request for a license authorizing one or more activities.

(5) Applications and documents submitted to the agency may be made available for public inspection. The agency may, however, withhold any document or part thereof from public inspection in accordance with §289.201(n) of this title.

(6) Each application for a specific license shall be accompanied by the fee prescribed in §289.204 of this title.

(k) Requirements for the issuance of specific licenses.

(1) A license application will be approved if the agency determines that:

(A) the applicant is qualified by reason of training and experience to use the material in question for the purpose requested, according to this section, and in a manner that minimizes danger to public health and safety, property, or the environment;

(B) the applicant's proposed buildings, structures, and procedures are adequate to minimize danger to public health and safety, property, or the environment;

(C) the issuance of the license will not adversely affect the health and safety of the public;

(D) the applicant satisfies any applicable special requirements in this section; and

(E) the applicant has met the financial security requirements of subsection (v) of this section.

(2) An application for a specific license to decontaminate equipment or land not otherwise exempted under the provisions of subsection (d) of this section or buildings and structures contaminated with NORM in excess of the levels set forth in subsection (w) of this section, as applicable, will be approved if:

(A) the applicant satisfies the requirements specified in paragraph (1) of this subsection; and

(B) the applicant has adequately addressed the following items in the application:

(i) procedures and equipment for monitoring and protection of workers;

(ii) an evaluation of the radiation levels and concentrations of contamination expected during normal operations;

(iii) operating and emergency procedures, and quality assurance of items released for unrestricted use; and

(iv) a method of managing the NORM waste removed from contaminated equipment, buildings, structures, and land for disposal or storage.

(3) An application for a specific license to perform NORM decontamination for spinning pipe gauges not otherwise exempted from the requirements of this section in accordance with subsection (d)(3) of this section will be approved if:

(A) the applicant satisfies the requirements specified in paragraph (1) of this subsection; and

(B) the applicant has adequately addressed the following items in the application:

(i) procedures and equipment for monitoring and protection of workers;

(ii) an evaluation of the radiation levels and concentrations of contamination expected during normal operations;

(iii) operating and emergency procedures, and quality assurance of items released for unrestricted use; and

(iv) a method of managing the NORM waste removed from contaminated pipes for disposal or storage.

(4) An application for a specific license to manufacture and/or commercially distribute products or materials containing NORM to persons exempted from the requirements of this section

in accordance with subsection (d)(4) of this section will be approved if:

(A) the applicant satisfies the requirements specified in paragraph (1) of this subsection;

(B) the NORM is not contained in any food, beverage, cosmetic, drug, or other commodity designed for ingestion or inhalation by, or application to, a human being; and

(C) the applicant submits sufficient information relating to the design, manufacture, prototype testing, quality control procedures, labeling or marking, and conditions of handling, storage, use, and disposal of the NORM material or product to demonstrate that the material or product will meet the safety criteria set forth in subsection (l) of this section. The information shall include:

(i) a description of the material or product and its intended use or uses;

(ii) the type, quantity, and concentration of NORM in each material or product;

(iii) the chemical and physical form of the NORM in the material or product, and changes in chemical and physical form that may occur during the useful life of the material or product;

(iv) an analysis of the solubility in water and human body fluids of the NORM in the material or product;

(v) the details of manufacture and design of the material or product relating to containment and shielding of the NORM and other safety features under normal and severe conditions of handling, storage, use, reuse, and disposal of the material or product;

(vi) the type and extent of human access to the material or product during normal handling, use, and disposal;

(vii) the total quantity of NORM expected to be distributed annually in the material or product;

(viii) the expected useful life of the material or product;

(ix) the proposed method for labeling or marking each unit of the material or product to identify the manufacturer and/or commercial distributor of the product and the radionuclide(s) and quantity of NORM in the material or product;

(x) procedures for prototype testing of the material or product to demonstrate the effectiveness of the containment, shielding, and other safety features under both normal and severe conditions of handling, storage, use, reuse, and disposal;

(xi) results of the prototype testing of the material or product, including any change in the form of the NORM contained in it, the extent that the NORM may be released to the environment, any change in radiation levels, and any other changes in safety features;

(xii) the estimated external radiation doses and dose commitments relevant to the safety criteria in subsection (l) of this section and the basis for such estimates;

(xiii) a determination that the probabilities with respect to doses referred to in subsection (l) of this section meet the criteria;

(xiv) quality control procedures to be followed in assuring each production lot meets agency-approved quality control standards; and

(xv) any additional information, including experimental studies and tests, required by the agency to facilitate a determination of the safety of the material or product.

(5) An application for a specific license for persons who receive NORM waste from other persons for processing or persons who process NORM for other persons at temporary job sites in accordance with subsection (i)(3) of this section will be approved if:

(A) the applicant satisfies the requirements specified in paragraph (1) of this subsection; and

(B) the applicant has adequately addressed the following items in the application:

(i) procedures and equipment for monitoring and protection of workers;

(ii) an evaluation of the radiation levels and concentrations of contamination expected during normal operations; and

(iii) operating and emergency procedures, including quality assurance of items released for unrestricted use.

(6) Notwithstanding the provisions of paragraph (4) of this subsection, the agency may deny an application for a specific license if the end uses of the product are frivolous or cannot be reasonably foreseen through complete technical documentation.

(l) Safety criteria. An applicant for a license under subsection (k)(4) of this section shall demonstrate that the product is designed and will be manufactured so that:

(1) during routine use and disposal, it is unlikely that the external radiation dose in any one year, or the dose equivalent resulting from the intake of radioactive material, excluding radon and radon decay products, in any one year, to a suitable sample of the group of individuals expected to be most highly exposed to radiation or radioactive material from the consumer end-use material or product, will exceed the doses in column I of subsection (m) of this section;

(2) during routine handling and storage of the quantities of the industrial material or product likely to accumulate in one location during marketing, commercial distribution, installation, and servicing of the material or product, it is unlikely that the external radiation dose in any one year, or the dose equivalent resulting from the intake of radioactive material, excluding radon and radon decay products, in any one year, to a suitable sample of the group of individuals expected to be most highly exposed to radiation or radioactive material from the industrial material or product, will exceed the doses in column II of subsection (m) of this section;

(3) during routine use, disposal, handling, and storage, it is unlikely that the radon released from the material or product will result in an increase in the average radon concentration in air of more than 0.4 picocurie per liter (pCi/l); and

(4) it is unlikely that there will be a significant reduction in the effectiveness of the containment, shielding, or other safety features of the material or product from wear and abuse likely to occur in normal handling and use of the material or product during its useful life.

(m) Table of allowable organ doses. The following table describes the doses allowed per specific organ.
Figure: 25 TAC §289.259(m)

(n) Issuance of specific licenses.

(1) When an application meets the requirements of the Act and rules of the agency, the agency will issue a specific license authorizing the proposed activity in such form and containing appropriate or necessary conditions and limitations.

(2) The agency may incorporate in a license at the time of issuance, or thereafter by amendment, any additional requirements and conditions with respect to the licensee's receipt, possession, use, and transfer of NORM subject to this section as it considers appropriate or necessary in order to:

(A) minimize danger to public health and safety, property, or the environment;

(B) require such reports and the keeping of such records, and to provide for such inspections of activities under the license as may be appropriate or necessary; and

(C) prevent loss or theft of material subject to this section.

(o) Conditions of licenses issued under subsection (k) of this section.

(1) General terms and conditions.

(A) Each license issued in accordance with this section shall be subject to all the provisions of the Act, now or hereafter in effect, and to all rules and orders of the agency.

(B) No license issued or granted under this section and no right to possess or utilize NORM granted by any license issued in accordance with this section shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person unless the agency, after securing full information, finds that the transfer is in accordance with the provisions of the Act, and gives its consent in writing.

(C) Each person licensed by the agency in accordance with this section shall use and possess the licensed material at the locations and for purposes authorized in the license.

(D) Each person licensed by the agency in accordance with this section is subject to the general license provisions of subsection (g) of this section.

(E) Each person licensed by the agency in accordance with this section shall manage and dispose of wastes containing NORM:

(i) in accordance with EPA applicable requirements for disposal of such wastes;

(ii) by transfer of the wastes for disposal to a person specifically licensed to receive waste containing NORM and that is licensed under requirements equivalent to those for uranium and thorium byproduct materials in §289.260 of this title;

(iii) by transfer of the wastes for disposal to a facility licensed in accordance with the requirements equivalent to those in the 10 CFR Part 61 by NRC, an agreement state, or a licensing state; or

(iv) in accordance with alternate methods authorized by the agency having jurisdiction to regulate such wastes.

(F) Notification to the agency.

(i) Each licensee shall notify the agency, in writing, immediately following the filing of a voluntary or involuntary petition for bankruptcy by or against:

(I) a licensee;

(II) an entity controlling a licensee or listing the license of the licensee as property of the estate; or

(III) an affiliate of the licensee.

(ii) This notification shall include:

(I) the bankruptcy court in which the petition for bankruptcy was filed;

(II) the name of the entity in bankruptcy; and

(III) the date of the filing of the petition.

(2) Quality control, labeling, and reports of transfer. Each person licensed under subsection (k)(4) of this section shall:

(A) carry out adequate control procedures in manufacturing the material or product to assure that each production lot meets the quality control standards approved by the agency;

(B) label or mark each unit to identify the manufacturer, processor, producer, or commercial distributor of the material or product and the NORM in the material or product; and

(C) maintain records identifying, by name and address, each person to whom NORM is transferred for use under subsection (d)(4) of this section or the equivalent requirements of another licensing state, and stating the kinds, quantities, and uses of NORM transferred. An annual summary report stating the total quantity of each radionuclide transferred under the specific license shall be filed with the agency. Each report shall cover the year ending December 31, and shall be filed within 30 days thereafter. If no transfers of radioactive material have been made in accordance with (k)(4) of this section during the reporting period, the report shall so indicate.

(p) Expiration and termination of licenses.

(1) Except as provided in paragraph (6) of this subsection and subsection (q)(2) of this section, each specific license shall expire at the end of the specified day in the month and year stated in the license.

(2) Each licensee shall notify the agency immediately, in writing, and request termination of the license when the licensee decides to terminate all activities involving materials authorized under the license or when the licensee decides to terminate a licensed location. This notification and request for termination of the license or a licensed location must include the reports and information specified in paragraph (4)(D) of this subsection. The licensee is subject to the provisions of paragraphs (3)-(5) of this subsection, as applicable.

(3) No less than 30 days before the expiration date specified in a specific license, the licensee shall either:

(A) submit an application for license renewal under subsection (q) of this section; or

(B) notify the agency in writing, under paragraph (2) of this subsection, if the licensee decides to discontinue all activities involving NORM.

(4) If a licensee terminates a licensed location or if a licensee does not submit an application for license renewal under subsection (q) of this section, the licensee shall, before a licensed location can be removed from the license, or on or before the expiration date specified in the license:

(A) terminate use of NORM;

(B) properly dispose of NORM; and

(C) submit a record of NORM disposal and radiation survey(s) to confirm the absence of NORM or to establish the levels of residual radioactive contamination. The licensee shall, as appropriate:

(i) submit a record of disposal of radioactive material and radiation survey(s) of the licensee's permanent location of use or storage. Levels of radiation shall be reported in units as required by subsection (w) of this section; and

(ii) specify the instruments(s) used and certify that each instrument is properly calibrated and tested.

(5) If no radioactivity attributable to activities conducted under the license is detected, the licensee shall submit a certification that no detectable radioactive contamination exceeding the levels listed in subsections (d)(1) and (w) of this section was found. If the agency determines that the information submitted under this paragraph and paragraph (4)(D) of this subsection is adequate and surveys conducted by the agency confirm the findings, the agency will notify the licensee in writing that the license is terminated.

(6) If detectable levels of residual radioactivity attributable to activities conducted under the license are found, the requirements of the license continue in effect beyond the expiration date, if necessary, with respect to possession of residual NORM until the agency notifies the licensee in writing that the requirements of the license have been completed. During this time, the licensee is subject to the provisions of paragraph (7) of this subsection. In addition to the information submitted under paragraph (4)(D) of this subsection, the licensee shall submit a plan, if appropriate, for decontaminating the location(s) and disposing of the residual NORM.

(7) Each licensee who possesses residual radioactive material under paragraph (6) of this subsection, following the expiration date specified in the license, shall:

(A) be limited to actions involving NORM related to preparing the location(s) for release for unrestricted use; and

(B) continue to control entry to restricted areas until the location(s) is suitable for release for unrestricted use and the release is approved by the agency in writing.

(q) Renewal of licenses.

(1) Applications for renewal of specific licenses shall be filed in accordance with subsection (j) of this section.

(2) If a licensee has filed the appropriate application form for renewal (or for a new license authorizing the same activities) at least 30 days prior to the expiration date of the existing license, that license shall not expire until final action by the agency.

(r) Amendment of licenses at request of licensee. Applications for amendment of a license shall be filed in writing and in accordance with subsection (j)(2)-(6) of this section and shall specify how the licensee desires the license to be amended and the grounds for such amendment.

(s) Agency action on applications to renew and amend. In considering an application by a licensee to renew, amend, or transfer the license, the agency will apply the criteria set forth in subsection (k) of this section.

(t) Modification and revocation of licenses. Modification, suspension, and revocation of licenses shall be in accordance with §289.205 of this title.

(u) Reciprocal recognition of licenses. Subject to this section, any person who holds a specific license from any licensing state, and issued by the agency having jurisdiction where the licensee maintains an office for directing the licensed activity and at which radiation safety records are normally maintained, is hereby granted a general license to conduct the activities authorized in such licensing document within the state of Texas provided that:

(1) the requirements in §289.252(s) of this title are met; and

(2) the out-of-state licensee shall not transfer or dispose of NORM possessed or used under the general license provided in paragraph (1) of this subsection except by transfer to a person:

(A) specifically licensed by the agency, the Texas agency authorized to regulate disposal of NORM waste, or by another licensing state to receive such material; or

(B) exempt from the requirements for a license for such material under subsection (d) of this section.

(v) Financial security requirements.

(1) Each person specifically licensed in accordance with this section for possession of NORM shall comply with the financial security requirements of §289.252(u) of this title.

(2) On April 11, 1999, current licenses in effect may continue provided that the required security arrangements be submitted to the agency by October 11, 1999.

(3) No later than 90 days after the licensee notifies the agency that decontamination and decommissioning have been completed, the agency shall determine if these have been conducted in accordance with the requirements of this section and the conditions of the license. If the agency finds that the requirements have been met, the Director of the Radiation Control Program shall direct the return or release of the licensee's security in full plus any accumulated interest. If the agency finds that the requirements have not been met, the agency will notify the licensee of the steps necessary for compliance.

(w) Acceptable surface contamination levels for NORM. The following table is to be used in determining compliance with subsections (f)(2) and (p) of this section.
Figure: 25 TAC §289.259(w)

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 March 22, 1999.

TRD-9901682
Susan K. Steeg
General Counsel
Texas Department of Health
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Proposal publication date: December 4, 1998
For further information, please call: (512) 458–7236

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Subchapter E. Registration Regulations

25 TAC §289.230

The Texas Department of Health (department) adopts the repeal of §289.230 without changes and new §289.230 concerning certification of mammography systems and accreditation of mammography facilities with changes to the proposed text as

published in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12153), as a result of comments received during the 30-day comment period. The repeal of §289.230 is adopted without changes and therefore will not be republished.

The existing §289.230 is repealed due to the significant revisions of text to incorporate the final federal Mammography Quality Standards Act (MQSA) requirements published in the October 28, 1997, issue of the *Federal Register*, Volume 62, No. 208, 55860, corrections published in the November 10, 1997, issue of the *Federal Register*, Volume 62, No. 217, 60614, and additional corrections published in the October 22, 1998, issue of the *Federal Register*, Volume 63, Number 204, 56555. The new section adds new and clarifying language on state requirements concerning stereotactic biopsy systems, terminations, and items to be included in operating and safety procedures. The new section also includes additional fees for reevaluation of phantom images and a provision for reimbursement of actual expenses for on-site visits required after three denials of accreditation. Other grammatical changes are made to the section for clarification.

The department is making the following changes due to staff comments to clarify the intent and improve the accuracy of the section.

Change: Concerning new §289.230(c)(56), the department changed the word "advent" to "event."

Change: Concerning §289.230(f)(1)(B)(ii), the department changed the reference to (A)(iii) instead of (A)(iv).

Change: Concerning §289.230(f)(1)(C), the department reformatted the subparagraph to more clearly delineate the continuing education and experience requirements and the time frame for completing them.

Change: Concerning §289.230(f)(2)(A), the department replaced the word "General" with the word "Initial" to be consistent with similar subparagraph titles in this subsection.

Change: Concerning §289.230(f)(2)(B), the department replaced the word "general" with the word "initial" to be consistent with the title in §289.230(f)(2)(A).

Change: Concerning §289.230(f)(2)(C), the department reformatted the subparagraph to more clearly delineate the continuing education and experience requirements and the time frame for completing them.

Change: Concerning §289.230(f)(3), the department replaced the words "systems in accordance with this section" with the word "equipment" to be consistent with the definition of "medical physicist." This change clarifies that physicians and medical radiologic technologists are not included.

Change: Concerning §289.230(f)(3)(A), the department replaced the word "system" with the word "equipment" to be consistent with the definition of "medical physicist." This change clarifies that physicians and medical radiologic technologists are not included.

Change: Concerning §289.230(f)(3)(C), the department reformatted the subparagraph to more clearly delineate the continuing education and experience requirements and the time frame for completing them.

Change: Concerning §289.230(i)(1)(D), the department added the words, "using the final assessment categories" prior to the words, "as defined in subsection..." for clarification. The department corrected the reference from subsection (b) to subsection (c).

Change: Concerning §289.230(k)(1)(C)(i), the department changed "(l)(5)-(6)" to "(l)(5) and (7)" to be consistent throughout the section and to correct the reference change because of renumbering in subsection (l).

Change: Concerning §289.230(k)(1)(C)(ii), the department changed the reference from "(l)(10)" to "(l)(11)" because of renumbering in subsection (l).

Change: Concerning new §289.230(k)(1)(C)(iv), the department changed the reference from "(l)(9)" to "(l)(10)" because of renumbering in subsection (l).

Change: Concerning §289.230(k)(1)(D), the department changed the reference from "(l)(6), (8), and (11)" to "(l)(7), (9), and (12)" because of renumbering in subsection (l) and added the reference to "(l)(14)". The reference to (l)(14) reflects the addition of the new paragraph on infection control.

Change: Concerning §289.230(l)(1)(D), the department moved this subparagraph because the paragraph addresses daily quality control tests and densitometer and sensitometer tests are not performed at that frequency. Change is reflected in §289.230(l)(6). The subsequent subparagraph was renumbered to reflect the deletion.

Change: Concerning §289.230(l)(4)(B), the department changed the second sentence to read "The entire area of the cassette that may be clinically exposed shall be tested." A third sentence was added to read, "This shall include all cassettes used for mammography in the facility." These changes were made to clarify the intent.

Change: Concerning §289.230(l)(6), the department moved the subparagraph on densitometer and sensitometer calibration to this paragraph in order to correctly reflect the frequency of calibration. Paragraphs (l)(6) through (l)(12) were renumbered to reflect this change.

Change: Concerning new §289.230(l)(8), the department changed the reference from "(l)(6)" to "(l)(7)" to reflect the renumbering in this subsection.

Change: Concerning new §289.230(l)(9), the department changed the reference from "(l)(7)" to "(l)(8)" to reflect the renumbering in this subsection.

Change: Concerning new §289.230(l)(9)(B)(x), the department changed the reference from "(6)" to "(7)" to reflect the renumbering in this subsection.

Change: Concerning new §289.230(l)(9)(B)(xi), the department changed the reference from "(7)" to "(8)" to reflect the renumbering in this subsection.

Change: Concerning new §289.230(l)(10)(A)(i), the department changed the reference from "(5) and (6)" to "(5) and (7)" to reflect the renumbering in this subsection. The department added the words, "and (8) (if applicable)" to indicate that reports on mobile services must be included if the facility has or is a mobile service.

Change: Concerning §289.230(q)(9), the department changed the reference from "(l)(7)" to "(l)(8)" to reflect the renumbering in subsection (l).

Change: Concerning §289.230(q)(10), the department changed the reference from "(l)(8)" to "(l)(9)" to reflect the renumbering in subsection (l).

Change: Concerning §289.230(q)(11), the department changed the reference from "(l)(9)" to "(l)(10)" to reflect the renumbering in subsection (l).

Change: Concerning §289.230(t)(5)(A), the department deleted this subparagraph because the requirements for a quality assurance program are delineated in rule and do not need to be submitted with the application for departmental review. The subsequent subparagraphs were renumbered to reflect the deletion.

Change: Concerning §289.230(w)(2)(F), the department deleted this subparagraph because the requirements for a quality assurance program and operating and safety procedures are delineated in rule and do not need to be submitted for departmental review.

Change: Concerning §289.230(w)(4)(B), the department changed the reference from "(l)(9)" to "(l)(10)" to reflect the renumbering in subsection (l).

Change: Concerning §289.230(w)(4)(C), the department added the sentence, "If the use period will exceed 60 days, the facility shall add the unit to their certification and a prorated fee will be assessed" following the words "period of use" for clarification.

Change: Concerning §289.230(w)(4)(D), the department deleted the word "loaner" to clarify that this subparagraph is addressing units used for clinical trial evaluations.

Change: Concerning §289.230(dd)(1), the department changed the reference "(f)-(g)" to "(f) and (g)" to be consistent throughout the section. The department corrected the references by adding "(hh)" following the reference "(ee)".

Change: Concerning §289.230(dd)(2)(E)(iii)(I), the department changed the reference from "(l)(9)" to "(l)(10)" to reflect the renumbering in subsection (l).

Change: Concerning §289.230(dd)(2)(E)(iii)(II), the department changed the reference from "(l)(10)" to "(l)(11)" to reflect the renumbering in subsection (l).

Change: Concerning §289.230(nn)(3), the department changed references to the paragraphs in subsection (l) to reflect the renumbering in subsection (l).

Change: Concerning §289.230(nn)(4)(K), the department changed the reference from (l)(11) to (l)(12) to reflect the renumbering in subsection (l).

The following comments were received concerning the proposed section. Following each comment is the department's response and any resulting change(s).

Comment: Concerning §289.230 in general, the commenter stated that the proposed changes in large part incorporate the quality mammography standards of the MQSA. Subsequent to the publication of those rules and in response to the large number of questions raised by their publication, the United States Food and Drug Administration (FDA) has begun the drafting of compliance guidance documents. The commenter questioned if it is the intention of the State of Texas to allow registrants to follow the guidance provided by the FDA when it affects an MQSA rule that was incorporated into the Texas Regulations for Control of Radiation.

Response: Registrants will be allowed to follow guidance provided by the FDA if the guidance is not in conflict with Health and Safety Code, Chapter 401. No change was made as a result of the comments.

Comment: Concerning §289.230 in general, the commenter stated that all the detail in the present proposed mammography rules is unnecessary and causes major difficulties for users because of subtle differences with the FDA rules. The commenter suggested simplifying the whole process by simply stating the following: "All mammography facilities will abide by rules of the FDA Quality Mammography Standards." The commenter further stated that this would greatly simplify the process and be just as effective. The commenter indicated making users plow through state rules as well as FDA rules is totally unnecessary, confusing, costly and burdensome, and nothing but bureaucratic fussing.

Response: Although they differ from the MQSA, certain aspects of the Health and Safety Code, Chapter 401, concerning mammography certification, have to be followed by the department and implemented through these rules. No change was made as a result of the comments.

Comment: Concerning §289.230 in general, the commenter stated that there doesn't seem to be any provision for provisional accreditation.

Response: Provisional certification is issued by the FDA, not the state. Provisional accreditation is not granted by any accreditation body. No change was made as a result of the comment.

Comment: Concerning §289.230(a), the commenter stated that it is not clear that Texas does not regulate federal agencies and suggested that this be clarified.

Response: A final sentence was added to indicate that this section does not apply to an entity under the jurisdiction of the federal government. Change is reflected in §289.230(b).

Comment: Concerning §289.230(c)(5), the commenter stated that FDA reworded this definition and suggested that the department should also revise the language.

Response: The department deleted the "=" sign between the word "rad" and "114 roentgens" and added the words, "In air, 1 Gy of absorbed dose is delivered by" for clarification.

Comment: Concerning §289.230(c)(12), the commenter stated that not all continuing medical education units (CMEU) approved by medical organizations are classified as Category I. The commenter suggested that this be clarified.

Response: The words "designated as Category I" were added after the words "Educational activities" for clarification.

Comment: Concerning §289.230(c)(13), the commenter stated that it would be useful to add words to this definition or to define MQSA certification to distinguish state certification from MQSA certification as both are required.

Response: The words "state certification" are included in parentheses in this definition. No change was made as a result of the comment.

Comment: Concerning §289.230(c)(16), the commenter stated that the definition of "contact hour" must be brought into agreement with the MQSA definition so that there is no misunderstanding of the meaning.

Response: The MQSA language for this definition was inserted and the previous language deleted.

Comment: Concerning §289.230(c)(21), the commenter stated that if the term "instructor-directed activities" is to be used, it needs to be defined in a way as to be no less stringent than the MQSA definition of "direct instruction."

Response: To be consistent with MQSA, the definition of contact hour that contained the term "instructor-directed activities" was revised. This is reflected in §289.230(c)(16). A definition for "direct instruction" has been added. This change is reflected in the new §289.230(c)(21). Proposed paragraphs (c)(21) through (c)(27) were renumbered to reflect this change.

Comment: Concerning new §289.230(c)(24), the commenter stated that it is not clear that Texas does not regulate federal agencies and suggested that this be clarified.

Response: A final sentence was added to indicate that this section does not apply to an entity under the jurisdiction of the federal government. Change is reflected in §289.230(b).

Comment: Concerning new §289.230(c)(27), the commenter stated that this definition is more stringent than MQSA as it bars acceptance of all self-study programs. MQSA regulations do allow acceptance of those that meet certain conditions. The commenter further stated that if the term "instructor-directed activities" is to be used, it needs to be defined in a way as to be no less stringent than the MQSA definition of "direct instruction."

Response: The term "formal training" is used in the MQSA and Texas regulations to address training by interpreting physicians to read and interpret mammograms. Texas does not allow self-study training for "formal training" of physicians. Self-study is allowed for physicians, technologists, and physicists for continuing education. To be consistent with MQSA rules, this definition was revised to include the words "direct instruction." MQSA regulations allows state rules to be more stringent. No other change was made to the rule as a result of this comment.

Comment: Concerning proposed §289.230(c)(28), the commenter stated that the term "interpreting physician" is out of order.

Response: The definition was placed in correct alphabetical order. Change is reflected in new §289.230(c)(32). Proposed paragraphs (c)(32) through (c)(63) were renumbered to reflect this change.

Comment: Concerning §289.230(c)(30), the commenter stated that the Mammography Quality Standards Reauthorization Act used the term "review interpreting physicians" for doctors performing these reviews. The commenter further stated that FDA will be using this new term and suggested that the rule be changed to be consistent with MQSA.

Response: The definition was revised to include the word "review" prior to the word "physicians," to be consistent with MQSA rules.

Comment: Concerning §289.230(c)(31), the commenter stated that this term, "institutional review board," applies in other areas besides mammography. The commenter suggested that it should be in a more general location in the regulations.

Response: The term is defined in another section that addresses all radiography other than mammography. The department has included it in this section because of its importance and significance. No change was made as a result of the comment.

Comment: Concerning new §289.230(c)(37), the commenter suggested deleting "on film, paper, or digital display" and stated that it is fruitless to attempt to anticipate all technological evolutions. The commenter further stated that the essence of the definition is that mammography is a means of imaging the breast based on using x-radiation and the means of image presentation does not enhance the definition.

Response: The department deleted the words, "on film, paper, or digital display" from the definition.

Comment: Concerning new §289.230(c)(37)(B), the commenter suggested that the second "investigation" should be "investigational."

Response: The department made the grammatical correction.

Comment: Concerning new §289.230(c)(38), the commenter suggested changing "or" to "and" to be consistent with the MQSA definition and with the use of the plural form "Examples are," that starts the sentence.

Response: The department changed the language to be consistent with the MQSA definition.

Comment: Concerning new §289.230(c)(40), the commenter questioned if the term "mammography system" is used anywhere else in the regulations and if not, is it needed. The commenter further questioned that if it is used, why aren't physicists included along with doctors and technologists as part of the system.

Response: The term is used throughout the rule. "Mammography system" is defined in the Texas Radiation Control Act and does not include the word "physicist." No change was made as a result of the comment.

Comment: Concerning new §289.230(c)(44), the commenter stated that it is assumed that the words "medical radiologic technologist" is a term used elsewhere in the Texas regulations and is used in this section to be consistent. The commenter suggested that if this is not the case, the term "radiologic technologist" might be used for consistency and to avoid confusion with the MQSA rules.

Response: The term, "medical radiologic technologist," is defined by Texas Civil Statutes, Article 4512. No change was made as a result of the comment.

Comment: Concerning new §289.230(c)(60), the commenter questioned if it truly is the intent to use the word "system" as it puts the medical physicist in the position of evaluating the technologist as well as the interpreting physician.

Response: The department deleted the words, "mammography system and" and replaced them with "facility" to be consistent with the FDA MQSA definition.

Comment: Concerning §289.230(d)(1), the commenter questioned putting this prohibition in this section away from the equipment requirements as registrants will have to look in two places for equipment regulations. The commenter further stated that the citations for the Texas equipment regulations are just one number off from the citations for the equivalent MQSA requirement. The commenter questioned if the advantage of having it in this section outweighs the disadvantages.

Response: The department puts prohibitions in one subsection of each section. There have been no disadvantages noted with this practice. No change was made as a result of the comment.

Comment: Concerning §289.230(d)(3), the commenter suggested it would be helpful to define the term, "useful beam."

Response: This term has been used in regulation for many years and there has been no question as to the meaning from the registrants in this state. No change was made as a result of the comment.

Comment: Concerning §289.230(e)(3), the commenter suggested that the term "unique mammographic imaging modalities" needs to be defined or possibly changed to "research or investigation" to make it clear what devices are being discussed and thus show that this requirement is not less stringent than MQSA rules.

Response: The department deleted the words "or other unique mammographic imaging modalities." For clarification, another paragraph was added to indicate that mammography systems used exclusively for research or investigation are exempt from the requirements of this section. Change is reflected in new §289.230(e)(4). The subsequent paragraphs were renumbered to reflect the change.

Comment: Concerning new §289.230(f)(1)(A)(i), the commenter stated that this requirement is more stringent than FDA by omitting the Canadian Board.

Response: The department's language is the same as that in the MQSA rules that allow other boards approved by the FDA. The FDA approved boards are not necessarily delineated in rule. No change was made as a result of the comment.

Comment: Concerning §289.230(f)(1)(A)(ii), the commenter stated that the requirement that 15 of the 60 hours must be earned within the three years immediately prior to meeting the initial requirements must be added to be compatible with FDA.

Response: The department added the words, "At least 15 of the 60 hours shall have been acquired within three years immediately prior to the date that the physician qualified as an interpreting physician."

Comment: Concerning §289.230(f)(1)(B)(i), the commenter stated that it appeared that physicians who were from out of state could never meet the grandfathering requirements in §289.230(f)(1)(A) the way it was written, thereby making these rules much more stringent than the MQSA regulations. The commenter further stated that language needed to be added to clarify what requirements physicians were required to meet prior to April 28, 1999, in order to be exempt from the initial requirements in §289.230(f)(1)(A).

Response: Language was added to (f)(1)(B)(i) to clarify the requirements physicians were required to meet prior to April 28, 1999, in order to be exempt from the initial requirements delineated in §289.230(f)(1)(A). The requirement to hold a current Texas license was moved from §289.230(f)(1)(A)(i) to §289.230(f)(1) to allow grandfathering of physicians compatible with MQSA regulations. Subclauses I and II were combined into new clause §289.230(f)(1)(A)(i) to reflect the change.

Comment: Concerning §289.230(f)(1)(C)(i) and (ii), the commenter stated that these requirements give the physician a 24 month period for continuing experience and 36 month period for continuing education after meeting their initial requirements before they have to start meeting the continuing requirements. The commenter further stated that these rules to not give a facility the option of choosing which of the alternatives to be used to determine the end date of the 24 or 36 months as do the MQSA rules.

Response: The language for time periods for continuing experience and education were revised to require physicians to begin meeting the continuing experience and education requirements upon completion of their initial requirements. Language was also added to give a facility the option of choosing one of the alternatives listed to determine the end date of the 24 and 36 month period for consistency with the MQSA rules. This change is reflected in §289.230(f)(1)(C).

Comment: Concerning new §289.230(f)(2)(A)(ii), the commenter stated that the wording of this subparagraph permits individuals who have met the initial technologist requirements, but not the continuing requirements, to provide direct supervision of trainees doing the 25 examinations. The commenter further stated that the MQSA rules include the 25 examinations in the 40 hours of training and these rules seem to require them separately.

Response: The words, "subparagraph (A) of" were deleted and the words, "the qualifications of" were added to clarify that technologists who provide direct supervision must meet the requirements including the continuing requirements. Language was added to allow the 25 mammographic examinations to be obtained concurrently with the 40 hours of contact training. The hours for the examinations are not to exceed 16 hours.

Comment: Concerning §289.230(f)(2)(B), the commenter stated that it appeared that technologists who were from out of state could never meet the grandfathering requirements in §289.230(f)(2)(A) the way it was written, thereby making these rules much more stringent than the MQSA regulations. The commenter further stated that language needed to be added to clarify what requirements technologists were required to meet prior to April 28, 1999, in order to be exempt from the initial requirements in §289.230(f)(2)(A).

Response: The requirement to hold a current Texas certification was moved from §289.230(f)(2)(A)(i) to §289.230(f)(2) for clarification. Language was added to (f)(2)(B) to clarify the requirements technologists were required to meet prior to April 28, 1999, in order to be exempt from the initial requirements delineated in §289.230(f)(2)(A). Subsequent clauses were renumbered to reflect the change.

Comment: Concerning §289.230(f)(2)(C)(i) and (ii), the commenter stated that these requirements give the technologist a 24 month period for continuing experience and 36 month period for continuing education after meeting their initial requirements before they have to start meeting the continuing requirements. The commenter further stated that these rules to not give a facility the option of choosing which of the alternatives to be used to determine the end date of the 24 or 36 months as do the MQSA rules.

Response: The language for time periods for continuing experience and education were revised to require technologists to begin meeting the continuing experience and education requirements upon completion of their initial requirements. Language was also added to give a facility the option of choosing one of the alternatives listed to determine the end date of the 24 and

36 month period for consistency with the MQSA rules. This change is reflected in §289.230(f)(2)(C).

Comment: Concerning §289.230(f)(2)(C)(ii), the FDA issued corrections to the final MQSA rules on the continuing experience requirements for a radiologic technologist to include adding the words "preceding the facility's annual inspection" after "last day of the calender quarter," changing the October 27, 1997, date to April 28, 1999, and adding the words "whichever is later."

Response: The department added the FDA language on continuing experience requirements for radiologic technologists. Change is reflected in §289.230(f)(2)(C) and §289.230(f)(2)(C)(ii).

Comment: Concerning new §289.230(f)(3)(A)(iii), the commenter stated the requirement must be added that after April 28, 1999, experience conducting surveys must be acquired under the direct supervision of a physicist who meets all the requirements of subparagraphs (A) and (C) to make the rules consistent with the MQSA rules.

Response: The department revised the language to include physicists who supervise must meet the requirements of §289.230(f)(3)(A) and (C).

Comment: Concerning §289.230(f)(3)(B), the commenter stated that it appeared that physicists who were from out of state could never meet the grandfathering requirements in §289.230(f)(3)(A) the way it was written, thereby making these rules much more stringent than the MQSA regulations. The commenter further stated that language needed to be added to clarify what requirements physicists were required to meet prior to April 28, 1999, in order to be exempt from the initial requirements in §289.230(f)(3)(A) or to meet the alternative initial qualifications in §289.230(f)(3)(B). The commenter stated that as written, this subparagraph allows the physicist to complete the requirements in clauses (i), (ii), and (iii) after April 28, 1999. The commenter further stated that under the MQSA regulations, all parts of the alternative initial qualifications must be completed before April 28, 1999.

Response: The requirement to hold a current Texas license and to hold a registration with the agency was moved from §289.230(f)(3)(A)(i) and (ii) to §289.230(f)(3) for clarification. Subsequent clauses were renumbered to reflect the change. Language was added to (f)(3)(B) to clarify requirements physicists were required to meet prior to April 28, 1999, in order to be exempt from the initial requirements delineated in §289.230(f)(3)(A), and to clarify that alternative initial qualifications must be met prior to April 28, 1999.

Comment: Concerning proposed §289.230(f)(3)(C)(ii), the commenter stated that the word "education" on the fourth line of this requirement should actually be "experience."

Response: This clause has been deleted and replaced with new language. No change was made as a result of the comment.

Comment: Concerning §289.230(f)(3)(C)(i) and (ii), the commenter stated that these requirements give the physicist a 24 month period for continuing experience and 36 month period for continuing education after meeting their initial requirements before they have to start meeting the continuing requirements. The commenter further stated that these rules to not give a facility the option of choosing which of the alternatives to be used to determine the end date of the 24 or 36 months as do the MQSA rules.

Response: The language for time periods for continuing experience and education were revised to require physicists to begin meeting the continuing experience and education requirements upon completion of their initial requirements. Language was also added to give a facility the option of choosing one of the alternatives listed to determine the end date of the 24 and 36 month period for consistency with the MQSA rules. This change is reflected in §289.230(f)(3)(C).

Comment: Concerning §289.230(f)(3)(C)(ii), the FDA issued corrections to the final MQSA rules on the continuing experience requirements for a medical physicist to include adding the words "preceding the facility's annual inspection" after "last day of the calender quarter," changing the October 27, 1997, date to April 28, 1999, and adding the words "whichever is later."

Response: The department added the FDA language on continuing experience requirements for physicists. Change is reflected in §289.230(f)(3)(C) and §289.230(f)(3)(C)(ii).

Comment: Concerning §289.230(f)(3)(C)(iii), the commenter stated that the requirement of a specific number of hours goes beyond the MQSA requirements.

Response: The MQSA rules also require 8 hours of training prior to performing mammographic surveys on new mammographic modalities. No change was made as a result of the comment.

Comment: Concerning §289.230(g)(1), the commenter suggested that the words "for mammography" in this requirement be deleted as they make the rule less stringent than the MQSA requirements that require that units meet all of the provisions of the cited parts of the Code of Federal Regulations (CFR), and not just the one or two related to mammography.

Response: The word "and" was added after "for mammography" to make it clear that equipment shall have been specifically designed and manufactured for mammography and in accordance with 21 CFR.

Comment: Concerning §289.230(g)(2), the commenter stated that "although most readers will probably guess what "mechanism" is being referred to here, it would be useful to make it clear.

Response: The only "mechanism" being discussed is the tube-image receptor assembly and that is clear. No change was made as a result of the comment.

Comment: Concerning §289.230(g)(3)(C), the commenter stated that this is more stringent than the MQSA regulations because it seems to require that all film-screen systems be capable of being used for magnification procedures while the MQSA regulations only apply to film-screen systems used for magnification.

Response: Language was added to clarify that this requirement only applies to systems used for magnification procedures.

Comment: Concerning §289.230(g)(3)(D), the commenter stated that this is good advice, but it is a procedural requirement, not an equipment standard. The commenter suggested that if subsection (g) began "Only mammography systems...," then the task could be considered a requirement for the radiological technologist which is considered part of the "mammography system." The commenter indicated that this subsection refers to "x-ray systems," that are not defined in §289.230. The commenter further questioned how this rule

would be enforced as the manufacturers of mammography cassettes have not installed timers that prevent their use until 15 minutes after loading. The commenter further suggested that perhaps it could be part of the technologist training and an attempt could be made to enforce that.

Response: The intent of the rule is to have adequate cassettes available to provide quality images for the patient. No change was made as a result of the comment.

Comment: Concerning §289.230(g)(4), the commenter stated that this requirement is different from the proposed MQSA changes on beam limitation.

Response: This paragraph is the same as those in the MQSA rules. No change was made as a result of the comment.

Comment: Concerning §289.230(g)(6), the commenter stated that this requirement is less stringent than the MQSA rules because it allows either the focal spot or the target material to be indicated instead of both.

Response: Language was added to delineate that both the focal spot and the target material must be selected. The subsequent paragraph was renumbered to reflect the change.

Comment: Concerning §289.230(g)(7), the commenter stated that the requirement for power driven compression devices that are to be effective October 28, 2002 have been left out and suggested that this be added.

Response: The department will consider a revision to the rule to include this language prior to the October 28, 2002 date. No change was made as a result of the comment.

Comment: Concerning §289.230(h), the commenter stated that the final MQSA regulations put no restrictions on who can examine self-referred patients.

Response: The department has required since 1994, that facilities have procedures to recommend to self-referred patients a means of selecting a physician if they do not have one. No change was made to the rule as a result of the comment.

Comment: Concerning §289.230(i)(2), the commenter stated that as worded, this requires that the "results" be sent to patients and physicians, and the report described in paragraph (1) is not required to be sent to anyone.

Response: The words "the following" were deleted after the word "send" and the words "containing the information specified in paragraph (1) of this subsection" were added after the word "examination" in subparagraph (B). The word "to" was added after the word "examination." The word "to" was deleted from subparagraphs (A) and (B).

Comment: Concerning §289.230(i)(2), the commenter stated that as worded, reports in which the assessment is "suspicious" or "highly suggestive of malignancy," are sent in the same time frame as less serious assessments. The commenter suggested that more serious cases be treated with a greater sense of urgency than benign cases.

Response: The MQSA rules state that cases where the assessment is "suspicious" or "highly suggestive of malignancy" be sent "as soon as possible" and other reports be sent "as soon as possible" but no later than 30 days from the date of the mammogram. Because "as soon as possible" is not definitive, Texas rules included the 30 day time limit and uses this language for all reports. No change was made as a result of the comment.

Comment: Concerning §289.230(i)(2)(B), the commenter stated it should be more clearly defined who should get the mammography report.

Response: The word, "referring" was added before the word, "physicians" and the words, "or in the case of self-referral, to the physician indicated by the patient" were added after the word, "physicians" for clarification.

Comment: Concerning §289.230(i)(4)(C), the commenter stated that this requirement seems to say that a permanent transfer can be made only once every five or ten years as once the second physician or institution receives the records, they must keep them for the five or ten years and so must deny any further request for transfer during that period. If this was not intended, the commenter suggested that this be reworded.

Response: The word, "receiving" was inserted before the word, "institution" and the words, "unless permanently transferred or forwarded in accordance with subparagraph (B) of this paragraph" were added after the words "subparagraph (A) of this paragraph."

Comment: Concerning §289.230(j), the commenter stated that it would be useful to define what is meant by "first clinical" image. The commenter questions if this is the first clinical image taken with the unit, or the first one taken with the unit on a given day, or the first one taken with the unit at a given location. The commenter further states that probably what the requirement actually intends is that "all clinical images must be processed within 24 hours of being taken."

Response: The wording in the rule is self-explanatory. No change was made as a result of the comment.

Comment: Concerning §289.230(k)(1)(A)(ii), the commenter stated that the requirement for reviewing and documenting the technologists' quality control test results at least every three months or more frequently if consistency has not yet been achieved is more stringent the MQSA rules.

Response: MQSA rules allow a state to be more stringent in their requirements. It is important that these quality assurance test results be reviewed by the lead interpreting physician. No change was made as a result of the comment.

Comment: Concerning §289.230(k)(1)(A)(iv), the commenter stated that the requirement that the lead interpreting physician shall verify the qualifications of individuals assigned quality assurance tasks must be added to this paragraph to make this subsection as stringent as the MQSA requirements. In addition, the commenter stated that the requirement for assigning the quality assurance tasks is more stringent than the MQSA rules.

Response: The words "and determining the individual's qualifications to perform" were added after the word "assigning." It is important that the lead interpreting physician be involved in assigning the quality assurance tasks. No further change was made as a result of the comment.

Comment: Concerning §289.230(k)(1)(C)(i), the commenter stated that it is not indicated that the physicist must include performance of the phantom image quality test and a review of all the tests performed by the quality control technologists.

Response: The words "and performing an image quality evaluation test in accordance with subsection (l)(2) of this section"

were added. A clause with the words "reviewing the facility's quality assurance program; and" was added. Change is reflected in §289.230(k)(1)(C)(iii). The subsequent clause was renumbered to reflect the change.

Comment: Concerning §289.230(k)(1)(D), the commenter stated that the requirement that it is the responsibility of the quality control technologist to assure that all tasks not assigned to the lead interpreting physician or the physicist are performed properly must be added.

Response: The words "or other personnel qualified to perform the tasks as" were deleted from the first sentence. The words "the quality assurance tasks in accordance with subparagraph (A)(iv) of this paragraph, the quality assurance technologist shall ensure that the requirements of (l)(1)-(4), (7), (9), (12), and (14) are met" were added.

Comment: Concerning §289.230(k)(2), the FDA issued corrections to the final MQSA rules including the section on quality assurance records. In the first sentence, the FDA deleted the word "and" between "safety and protection," added a comma after both "safety" and "protection," added the word "and" after protection, and moved the words "employee qualifications to meet assigned quality assurance tasks."

Response: The department made the suggested changes to this paragraph.

Comment: Concerning §289.230(l)(1), the commenter stated that the second sentence of this introductory paragraph is in conflict with the correction made to this requirement in the FDA amendments of October 22, 1998. The commenter further stated that whether the requirement is more or less stringent than the amended MQSA requirement can be argued both ways but it would probably be best to change it to the amended MQSA wording.

Response: The language in the correction is confusing. The department deleted the words "examinations are," and added the words, "mammography is," from the second sentence for clarification.

Comment: Concerning §289.230(l)(1)(A)(i), several commenters stated that neither the FDA nor the American College of Radiology (ACR) recommends that the base plus fog be allowed to change by plus or minus 0.03 optical density (OD). The commenter suggests deleting "or minus."

Response: The department deleted the words "or minus."

Comment: Concerning §289.230(l)(1)(B), the commenter questioned why the restrictions on the use of the backup processor are more stringent than those on the use of the primary processor. The commenter stated that the primary processor must pass the processor performance test before clinical films are processed, but the backup processor must pass a phantom image test before the first patient is exposed. The commenter further stated that failure of the phantom image test does not necessarily indicate a problem with the processor, but could be related to other equipment problems. The commenter recommended that the primary and the backup processors be treated identically and be required to pass the processor performance tests before processing clinical images.

Response: Since a back-up processor has not been used routinely for mammography images, the facility has to have the capability of determining if the processor would impact an image because of artifacts. This can be determined more readily using a phantom image rather than running unexposed mammography film through the processor. No change was made as a result of the comment.

Comment: Concerning §289.230(l)(1)(B), the commenter stated that the language on the backup processor "other than the one commonly in use" was intended to mean "other than the one commonly in use for mammography." The commenter suggested that the words "for mammography" be added.

Response: The words "for mammography" were added to the sentence after the words "commonly in use" for clarification.

Comment: Concerning new §289.230(l)(1)(D), the commenter stated that this appears to be partially redundant with the introductory statement in §289.230(l)(1) and suggested that this paragraph be deleted.

Response: The paragraph is included for clarification. No change was made as a result of the comment.

Comment: Concerning §289.230(l)(2)(C), the commenter stated that this appears to be partially redundant with the statements on phantom images in §289.230(l)(2)(A) and (B) and suggested that this be revised and the language on the phantom image deleted.

Response: The language is included for clarification. No change was made as a result of the comment.

Comment: Concerning §289.230(l)(3), the commenter stated that by specifying the maximum duration between the performance of the quarterly tests in this subsection, Texas has closed off the option of allowing a little leeway in issuing citations in situations where extenuating circumstances may cause a facility to take a longer time between tests. The MQSA regulations do not specify such maximum durations and Texas itself did not for the weekly test. The commenter suggested that Texas may wish to consider whether their regulations should be changed to provide similar flexibility.

Response: This paragraph addresses quarterly quality control tests and states that these tests shall be performed within the calendar quarter at an interval not to exceed 90 days. The language is standard throughout the regulations and is accepted by our registrants. No change was made as a result of the comment.

Comment: Concerning §289.230(l)(3)(B), several commenters stated that the National Mammography Quality Assurance Advisory Committee struggled with whether or not to impose a limit on repeat rates. One commenter further stated that limits were also proposed in comments to the FDA on the proposed final rules. In response to these comments, FDA observed that it has long been recognized that the parameter with the greatest impact on the repeat or reject rate is the subjective opinion of the physicians doing the interpreting as to what is acceptable. Additionally, one commenter indicated that as noted in the preamble to the proposed FDA rules (see 61 Federal Register 14860), the repeat or reject rate could be reduced by a facility through acceptance of lower quality films. The commenters stated that if a repeat rate of less than 5.0% is required by regulation, it will be achieved, but this does not necessarily mean that the quality of mammography will have improved and there is a good chance that it could have gotten worse.

Response: The department added the MQSA requirement to determine the reason for a change of more than 2.0% of the

total reject rate to avoid confusion between state and federal requirements. The department further clarified the requirement by placing an upper limit on the total repeat or reject rate and specifying when corrective actions are to be taken and documented.

Comment: Concerning §289.230(l)(4), the commenter stated that by specifying the maximum duration between the performance of the semiannual tests in this subsection, that Texas has closed off the option of allowing a little leeway in issuing citations in situations where extenuating circumstances may cause a facility to take a longer time between tests. The MQSA regulations do not specify such maximum durations and Texas itself did not for the weekly test. The commenter suggested that Texas may wish to consider whether their regulations should be changed to provide similar flexibility.

Response: This paragraph addresses semiannual quality control tests and states that these tests shall be performed within the calendar quarter at an interval not to exceed six months. The language is standard throughout the regulations and is accepted by our registrants. No change was made as a result of the comment.

Comment: Concerning §289.230(l)(4)(C), the FDA issued corrections to the final MQSA rules that state effective October 28, 2002, the maximum compression force for the initial power drive shall be between 111 Newtons (25 pounds) and 200 Newtons (45 pounds). Several commenters suggested that this be added to the regulations now.

Response: The department will consider such a change in a future revision of the rule prior to October 28, 2002. No change was made as a result of the comment.

Comment: Concerning §289.230(l)(5), the commenter stated that if Texas wishes to place in regulation a maximum time period between the performance of the "annual test," it would need to be 12 months instead of 13 to be consistent with federal rules.

Response: The time period was changed to 12 months.

Comment: Concerning §289.230(l)(5), the commenter stated that by specifying the maximum duration between the performance of the tests in this subsection, that Texas has closed off the option of allowing a little leeway in issuing citations in situations where extenuating circumstances may cause a facility to take a longer time between tests. The MQSA regulations do not specify such maximum durations and Texas itself did not for the weekly test. The commenter suggested that Texas may wish to consider whether their regulations should be changed to provide similar flexibility.

Response: This paragraph addresses annual quality control tests and states that these tests shall be performed within the calendar quarter at an interval not to exceed 12 months. The language is standard throughout the regulations and is accepted by our registrants. No change was made as a result of the comment.

Comment: Concerning §289.230(l)(5)(A), the commenter stated that the requirement that the optical density of the film in the center of the phantom image shall not be less than 1.2 should be added to make the rules consistent with the MQSA rules. The commenter further stated that the requirements for the AEC will change effective October 28, 2002, and suggested that this be added to the rule.

Response: The requirement that the optical density of the film in the center of the phantom image shall not be less than 1.2 was added. The subparagraph was reformatted for clarity. Change is reflected in §289.230(l)(5)(A)(ii). The department will consider the additional change in a future revision of the rule prior to October 28, 2002. No other change was made as a result of the comment.

Comment: Concerning §289.230(l)(5)(C), the commenter stated that the requirements for evaluating focal spot condition will change effective October 28, 2002, and suggested that this be added to the rule.

Response: The department will consider such a change in a future revision of the rule prior to October 28, 2002. No change was made as a result of the comment.

Comment: Concerning §289.230(l)(5)(C)(i)(I), the commenter indicated that "millimeters" should be "millimeter."

Response: The department made the correction.

Comment: Concerning §289.230(l)(5)(C)(ii), the commenter stated that the "nominal focal spot" is the "dimensionless numerical value having a specific relation to the dimensions of the effective focal spot of an x-ray tube," as stated in the National Electrical Manufacturer's Association Standard XR5-1992. The commenter suggested that the dimensions "(mm)" should be deleted from the first column of the table.

Response: The "mm" unit of dimension is consistent with that being used by the FDA. No change was made as a result of the comment.

Comment: Concerning §289.230(l)(5)(G)(i), the FDA has proposed a change to its final rules that replaces current language with, "All systems shall have beam-limiting devices that allow the entire chest wall edge of the x-ray field to extend to the chest wall edge of the image receptor and provide means to assure that the x-ray field does not extend beyond any edge of the image receptor by more than two percent of the SID."

Response: The department replaced the current language with the proposed FDA language for consistency with the federal requirements.

Comment: Concerning §289.230(l)(5)(G)(i), the commenter stated that the radiation field collimation should be changed to permit the collimators to extend beyond the receptor, but not beyond the cassette platform in the anterior, left, and right sides. The commenter further stated that this is necessary to be consistent with the FDA rules and to avoid making clear borders on the film which can cause visualization problems as well as cut off breast tissue that should be imaged. The commenter indicated that the rule as it currently is written is contrary to the health interests of the patients.

Response: The department replaced the current language with the proposed FDA language for consistency with the federal requirements..

Comment: Concerning §289.230(l)(5)(J), the commenter stated that the requirements for radiation output capabilities will change effective October 28, 2002, and suggested that this be added to the rule.

Response: The department will consider such a change in a future revision of the rule prior to October 28, 2002. No change was made as a result of the comment.

Comment: Concerning §289.230(l)(5)(L), the commenter stated that this measurement condition is located so far after the three tests to which it applies that it increases the chances that it will be overlooked for one or more of the tests. The commenter suggested that this may be a situation where the use of a few extra words to give the condition with each test will be compensated for by a better understanding of the requirements.

Response: Adding the parameters to each of the three tests would be redundant. No change was made as a result of the comment.

Comment: Concerning new §289.230(l)(9)(B), the commenter stated that the addition of darkroom fog to the list of tests whose failure requires correction before the failed component of the system is used for patient films must be added to make the rules as stringent as MQSA. The commenter further stated that the tests for AEC, focal spot condition, and reproducibility are no longer on the MQSA list.

Response: The darkroom fog test was added to the list. Change is reflected in (l)(9)(B)(iii). The department will retain the tests for AEC, focal spot condition, and reproducibility. Subsequent clauses were renumbered to reflect the change.

Comment: Concerning new §289.230(l)(10)(A)(i), the commenter stated that it is not indicated that the physicist must include performance of the phantom image quality test and a review of all the tests performed by the quality control technologists.

Response: The reference to "2" was added before the reference to "5" to indicate that the physicist must perform the phantom image quality test and submit a report. The word "and" was deleted after the first "subsection," and the words, "and a review of the facility's quality assurance program in accordance with subsection (k)(1)(C)(iii) of this section" were added after the last "subsection."

Comment: Concerning new §289.230(l)(11), the FDA issued corrections to the final MQSA rules on mammography equipment evaluations and is replacing the word "dissembled" with "disassembled."

Response: The department made the correction.

Comment: Concerning new §289.230(l)(11)(A), the commenter questions the meaning of the second sentence of this subparagraph and interprets this to mean the dose measurement can wait up to 60 days after the tube or tube insert replacement is performed. If this is the case, it is in conflict with both the MQSA rules and the remainder of §289.230(l)(11). If the intent is that the dose be measured a second time within 60 days, this needs to be reworded for clarification.

Response: The second sentence of this subparagraph on dose measurement has been deleted.

Comment: Concerning new §289.230(l)(14), the commenter stated that the infection control requirements must be covered in some way in the regulations if Texas is to become an FDA approved accreditation body using MQSA authority.

Response: Language on infection control was added in new §289.230(l)(14).

Comment: Concerning §289.230(n), the commenter states that "physician's's" should be "physician's."

Response: The department made the correction.

Comment: Concerning §289.230(p), the commenter stated that the human research requirement applies more generally in areas other than mammography. The commenter suggested that it should be in a more general location in the regulations.

Response: The department has included it in this section as well as in the general radiography section because of its significance. No change was made as a result of the comment.

Comment: Concerning §289.230(q)(3), the commenter stated there is a reference to subsection (e) and no such subsection exists.

Response: The reference is to subsection (d)(2) and (3), which is correct. No change was made as a result of the comment.

Comment: Concerning §289.230(q)(4), the commenter stated there is a reference to subsection (e)(3) and (4) and no such subsection exists.

Response: Subsection (e) is correct; however, the reference to subsection (e)(3) and (4) should be (e)(5) and (6).

Comment: Concerning §289.230(q)(6), the commenter stated there is a reference to subsection (g)(15) and no such paragraph exists.

Response: The reference to subsection (g)(15) is correct. No change was made as a result of the comment.

Comment: Concerning §289.230(t), the commenter stated that it would be helpful to make clear that Texas certificates and inspections against Texas standards are being referred to in this section and that FDA certificates and inspections that have different rules are also needed. The commenter further stated that this was mentioned in §289.230(a)(1) but that was many pages earlier.

Response: Certification as defined in subsection §289.230(c) delineates state certification. FDA certification is issued by FDA. FDA inspections, or inspections against MQSA standards, are not conducted by the state so there is no need to include federal inspection rules within these regulations. No change was made as a result of the comment.

Comment: Concerning §289.230(x) through (dd), the commenter stated that it would be helpful to make clear that what is being discussed here are Texas certificates and inspections against Texas standards and that FDA certificates and inspections that have different rules are also needed. The commenter further stated that this was mentioned in §289.230(a)(1) but that was many pages earlier.

Response: Certification as defined in subsection §289.230(c) delineates state certification. FDA certification is issued by FDA. FDA inspections, or inspections against MQSA standards, are not conducted by the state so there is no need to include federal inspection rules within these regulations. No change was made as a result of the comment.

Comment: Concerning §289.230(dd)(1), the commenter stated that the accreditation mentioned in this paragraph is a prerequisite to receiving an FDA certificate and should be stated in the rules.

Response: FDA will issue the certificate and not the state. No change was made as a result of the comment.

Comment: Concerning §289.230(dd)(2)(E)(iii)(I) and (II), several commenters questioned whether it is necessary to have both a survey and an equipment evaluation within the last six

months. The commenters stated that it would seem that if a survey were performed, an equipment evaluation would not be necessary and if there were no equipment modifications performed, the evaluation would not have been necessary. One commenter further stated that only if new equipment were recently installed is it likely that an evaluation may have been performed rather than a survey. One commenter suggested that either (I) or (II) would be sufficient.

Response: The words "if performed after the survey specified in subclause (I) of this clause" was added after the word "section" in subclause (II) to eliminate duplication and provide clarification.

Comment: Concerning §289.230(jj)(2), the commenter suggested that it might be clearer if written, " ...of the intent to deny and the facts warranting the denial and shall afford the applicant ..." The commenter stated that it seems that there are two elements that are included in the notice, the intent to deny and the facts warranting the denial, and two actions being performed by the agency, giving notice and affording.

Response: The department changed the language in this paragraph to reflect the comment. The department also deleted the words, "by personal service or by certified mail, return receipt requested," from the first sentence and added a new second sentence to more clearly state the intent of the words deleted from the first sentence.

Comment: Concerning §289.230(nn)(5)(B)(v), the commenter suggested "one/" could be deleted or the fraction written as "one-half."

Response: The department corrected the fraction.

Commenters included representatives from General Electric Medical Systems, the University of Texas Houston Medical School, and the United States Food and Drug Administration. The commenters were generally favorable of the rule as proposed; however, the commenters had questions or specific concerns, and offered suggestions for changes to the proposal as discussed in the summary of the comments.

The repeal is adopted under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with the authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, or the commissioner of health.

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 March 22, 1999.

TRD-9901711
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: April 28, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 458-7236

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The new section is adopted under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with the authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, or the commissioner of health.

§289.230. Certification of Mammography Systems and Accreditation of Mammography Facilities.

(a) Purpose.

(1) This section provides for the certification of mammography systems and the accreditation of mammography facilities. No person shall use x-ray producing machines for mammography of humans except as authorized in a state certification of mammography systems issued by the agency in accordance with the requirements of this section and in a certificate issued by the United States Food and Drug Administration (FDA).

(2) The use of all mammography machines certified in accordance with this section shall be by or under the supervision of a physician licensed by the Texas State Board of Medical Examiners with license in good standing.

(b) Scope. In addition to the requirements of this section, all registrants are subject to the requirements of §289.201 of this title (relating to General Provisions), §289.202 of this title (relating to Standards for Protection Against Radiation), §289.203 of this title (relating to Notices, Instructions, and Reports to Workers; Inspections), §289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material(s) Licenses, Emergency Planning and Implementation, and Other Regulatory Services), §289.205 of this title (relating to Hearing and Enforcement Procedures), and §289.226 of this title (relating to Registration of Radiation Machine Use and Services). This section does not apply to an entity under the jurisdiction of the federal government.

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

(1) Accreditation - An approval of a mammography facility by an accreditation body.

(2) Accreditation body - An entity approved by the FDA under 42 United States Code §263b(e)(1)(A) to accredit mammography facilities.

(3) Action limit - The minimum or maximum value of a quality assurance measurement representing acceptable performance. Values less than the minimum or greater than the maximum action limit indicate that corrective action must be taken by the facility.

(4) Adverse event - An undesirable experience associated with mammography activities within the scope of this section. Adverse events include but are not limited to:

(A) poor image quality;

(B) failure to send mammography reports within 30 days to the referring physician or in a timely manner to the self-referred patient; and

(C) use of personnel that do not meet the applicable requirements of subsection (f) of this section.

(5) Air kerma - The kerma in a given mass of air. The unit used to measure the quantity of air kerma is the Gray (Gy). For x-rays with energies less than 300 kiloelectronvolts (keV), 1 Gy =

100 rad. In air, 1 Gy of absorbed dose is delivered by 114 roentgens (R) of exposure.

(6) Automatic exposure control (AEC) - A device that automatically controls one or more technique factors in order to obtain at preselected locations a required quantity of radiation.

(7) Average glandular dose - The value in millirad (mrad) or milligray (mGy) for a given breast or phantom thickness that estimates the average absorbed dose to the glandular tissue extrapolated from free air exposures and based on fixed filter thickness and target material.

(8) Beam-limiting device - A device that provides a means to restrict the dimensions of the x-ray field.

(9) Breast implant - A prosthetic device implanted in the breast.

(10) Calendar quarter - Any one of the following time periods during a given year: January 1-March 31, April 1-June 30, July 1-September 30, or October 1-December 31.

(11) Calibration of instruments - The comparative response or reading of an instrument relative to a series of known radiation values over the range of the instrument.

(12) Category I continuing medical education units (CMEU) - Educational activities designated as Category I and approved by the Accreditation Council for Continuing Medical Education, the American Osteopathic Association, a state medical society, or an equivalent organization.

(13) Certification of mammography systems (state certification) - A form of permission given by the agency to an applicant who has met the requirements for mammography system certification set out in the Act and this chapter.

(14) Clinical image - See the definition for mammogram.

(15) Consumer - An individual who chooses to comment or complain in reference to a mammography examination. The individual may be the patient or a representative of the patient, such as a family member or referring physician.

(16) Contact hour - An hour of training received through direct instruction.

(17) Continuing education - Acquiring contact hours by attendance and/or participation in lectures, conferences, or seminars. Continuing education hours may also be acquired in the following manner:

(A) computer based instruction with a post test; or

(B) reading approved articles with a post test.

(18) Continuing education unit (CEU) - One contact hour of training.

(19) Control panel - That part of the radiation machine control upon which are mounted the switches, knobs, push buttons, and other hardware necessary for manually setting the technique factors.

(20) Dedicated mammographic equipment - Equipment that has been specifically designed and manufactured for mammography.

(21) Direct instruction - Instruction that includes:

(A) face-to-face interaction between instructor(s) and student(s), as when the instructor provides a lecture, conducts demonstrations, or reviews student performance; or

(B) the administration and correction of student examinations by an instructor(s) with subsequent feedback to the student(s).

(22) Direct supervision - Oversight of operations that include the following.

(A) During joint interpretation of mammograms, the supervising interpreting physician reviews, discusses, and confirms the diagnosis of the physician being supervised and signs the resulting report before it is entered into the patient's record.

(B) During performance of a mammography examination, the supervising medical radiologic technologist is present to observe and correct, as needed, the individual who is performing the examination.

(C) During performance of a survey of the registrant's equipment and quality assurance program, the supervising medical physicist is present to observe, and correct, as needed, the individual who is conducting the survey.

(23) Established operating level - The value of a particular quality assurance parameter that has been established as an acceptable normal level by the registrant's quality assurance program.

(24) Facility - A hospital, outpatient department, clinic, radiology practice, mobile unit, an office of a physician, or other person that conducts breast cancer screening or diagnosis through mammography activities, including any or all of the following:

(A) the operation of equipment to produce a mammogram;

(B) processing of film;

(C) initial interpretation of the mammogram; or

(D) maintaining the viewing conditions for that interpretation.

(25) Final assessment categories - The overall final assessment of findings in a report of a mammography examination, classified in one of the following categories:

(A) "negative" indicates nothing to comment upon (if the interpreting physician is aware of clinical findings or symptoms, despite the negative assessment, these shall be explained);

(B) "benign" is also a negative assessment;

(C) "probably benign" indicates a finding(s) that has a high probability of being benign;

(D) "suspicious" indicates a finding(s) without all the characteristic morphology of breast cancer but indicating a definite probability of being malignant;

(E) "highly suggestive of malignancy" indicates a finding(s) that has a high probability of being malignant; or

(F) "incomplete" indicates there is a need for additional imaging evaluation. Reasons why no assessment can be made shall be stated by the interpreting physician.

(26) First allowable time - The earliest time a resident physician is eligible to take the diagnostic radiology boards from an FDA-designated certifying body.

(27) Formal training - Attendance and participation in direct instruction activities. This does not include self-study programs.

(28) Half-value layer (HVL) - The thickness of a specified material that attenuates the beam of radiation to an extent such that the exposure rate is reduced to one-half of its original value. In this definition, the contribution of all scattered radiation, other than any that might be present initially in the beam concerned, is deemed to be excluded.

(29) Image receptor - Any device, such as a fluorescent screen or radiographic film, that transforms incident x-ray photons either into a visible image or into another form that can be made into a visible image by further transformations.

(30) Image review board - a group of qualified review physicians and other individuals approved by FDA who review the clinical and phantom images.

(31) Institutional review board (IRB) - Any board, committee, or other group formally designated by an institution to review, approve the initiation of, and conduct periodic review of biomedical research involving human subjects.

(32) Interpreting physician - A licensed physician who interprets mammographic images and who meets the requirements of subsection (f)(1) of this section.

(33) Kerma - The sum of the initial energies of all the charged particles liberated by uncharged ionizing particles in a material of given mass.

(34) Laterality - The designation of either the right or left breast.

(35) Lead interpreting physician - The interpreting physician assigned the general responsibility for ensuring that a facility's quality assurance program meets all of the requirements of subsections (k), (l), and (m) of this section.

(36) Mammogram - A radiographic image produced through mammography.

(37) Mammography - The use of x-radiation to produce an image of the breast that may be used to detect the presence of pathological conditions of the breast. For the purposes of this section, mammography does not include radiography of the breast performed as follows:

(A) during invasive interventions for localization or biopsy procedures except as specified in subsection (q) of this section; or

(B) with an investigational mammography device as part of a scientific study conducted in accordance with FDA's investigational device exemption regulations.

(38) Mammographic modality - A technology for radiography of the breast. Examples are screen-film mammography and xeromammography.

(39) Mammography medical outcomes audit - A systematic collection of mammography results compared with outcomes data.

(40) Mammography system - A system that includes the following:

(A) an x-ray unit used as a source of radiation in producing images of breast tissue;

(B) an imaging system used for the formation of a latent image of breast tissue;

(C) an imaging processing device for changing a latent image of breast tissue to a visual image that can be used for diagnostic purposes;

(D) a viewing device used for the visual evaluation of an image of breast tissue if the image is produced in interpreting visual data captured on an image receptor;

(E) a medical radiological technologist who performs a mammography; and

(F) a physician who engages in, and who meets the requirements of this section relating to the reading, evaluation, and interpretation of mammograms.

(41) Mammography unit(s) - Components assembled for the production of x-rays for use during mammography. These include, at a minimum, the following:

(A) an x-ray generator;

(B) an x-ray control;

(C) a tube housing assembly;

(D) a beam limiting device; and

(E) supporting structures.

(42) Mean optical density - The average of the optical densities measured using phantom thicknesses of 2, 4, and 6 centimeters (cm) with values of kilovolt peak (kVp) clinically appropriate for those thicknesses.

(43) Medical physicist - An individual who performs surveys and evaluations of mammographic equipment in accordance with this section and who meets the qualifications in subsection (f)(3) of this section.

(44) Medical radiological technologist (operator of equipment) - An individual specifically trained in the use of radiographic equipment and the positioning of patients for radiographic examinations who performs mammography examinations in accordance with this section and who meets the qualifications in subsection (f)(2) of this section.

(45) Mobile services - The use of mammography units in temporary locations for limited time periods. The units may be fixed inside a mobile van or transported to temporary locations.

(46) Multi-reading - Two or more physicians interpreting the same mammogram. At least one physician shall be qualified as an interpreting physician.

(47) Optical density (OD) - A measure of the fraction of incident light transmitted through a developed film and defined by the equation.
Figure: 25 TAC §289.230(c)(47)

(48) Patient - Any individual who undergoes a mammography examination in a facility, regardless of whether the person is referred by a physician or is self-referred.

(49) Phantom - A test object used to simulate radiographic characteristics of compressed breast tissue and containing components that radiographically model aspects of breast disease and cancer. The phantom shall be accepted by FDA.

(50) Phantom image - A radiographic image of a phantom.

(51) Physical science - This includes physics, chemistry, radiation science (including medical physics and health physics), and engineering.

(52) Positive mammogram - A mammogram that has an overall assessment of findings that are either "suspicious" or "highly suggestive of malignancy."

(53) Qualified instructor - An individual whose training and experience prepares him or her to carry out specified training assignments. Interpreting physicians, medical radiologic technologists, or medical physicists who meet the requirements of subsection (f) of this section would be considered qualified instructors in their respective areas of mammography. Other examples of individuals who may be qualified instructors for the purpose of providing training to meet the regulations of this section include, but are not limited to, instructors in a post-high school training institution and manufacturer's representatives.

(54) Quality control technologist - An individual meeting the requirements of subsection (f)(2) of this section who is responsible for those quality assurance responsibilities not assigned to the lead interpreting physician or to the medical physicist.

(55) Self-referral mammography - The use of x-radiation to test asymptomatic women for the detection of diseases of the breasts when such tests are not specifically and individually ordered by a licensed physician.

(56) Serious adverse event - An adverse event that may significantly compromise clinical outcomes, or an adverse event for which a facility fails to take appropriate corrective action in a timely manner.

(57) Serious complaint - A report of a serious adverse event.

(58) Source-to-image receptor distance (SID) - The distance from the source to the center of the input surface of the image receptor.

(59) Standard breast - A 4.2 cm thick compressed breast consisting of 50% glandular and 50% adipose tissue.

(60) Survey - An on-site physics consultation and evaluation of a facility quality assurance program performed by a medical physicist.

(61) Technique chart - A chart that provides all necessary generator control settings and geometry needed to make clinical radiographs.

(62) Technical aspects of mammography - In relation to continuing education, some or all of the following subjects must be included:

(A) anatomy and physiology of the female breast;

(B) mammographic positioning;

(C) technical factors used in mammography;

(D) mammographic film evaluation and critique;

(E) breast pathology; or

(F) mammographic quality assurance procedures.

(63) Time cycle - The film development time in processing.

(64) Traceable to a national standard - Calibrated at either the National Institute of Standards and Technology (NIST) or at a calibration laboratory that participates in a proficiency program with NIST at least once every two years. The results of the proficiency test conducted within 24 months of calibration shall show agreement within plus or minus 3.0% of the national standard in the mammography energy range.

(d) Prohibitions.

(1) Radiographic equipment designed for general purpose or special nonmammography procedures shall not be used for mammography. This includes systems that have been modified or equipped with special attachments for mammography.

(2) The agency may prohibit use of machines that pose significant threat or endanger public health and safety, in accordance with §289.201 of this title and §289.205 of this title.

(3) Individuals shall not be exposed to the useful beam except for healing arts purposes and unless such exposure has been authorized by a licensed physician. This provision specifically prohibits deliberate exposure for the following purposes:

(A) exposure of an individual for training, demonstration, or other non-healing arts purposes;

(B) exposure of an individual for the purpose of healing arts screening (self referral mammography) except as authorized by subsection (h) of this section; and

(C) exposure of an individual for the purpose of research except as authorized by subsection (p) of this section.

(e) Exemptions.

(1) Mammography machines or cabinet x-ray units used exclusively for examination of breast biopsy specimens are exempt from the requirements of this section. These units are required to meet applicable provisions of §289.226 of this title and §289.227 of this title (relating to Use of Radiation Machines in the Healing Arts and Veterinary Medicine).

(2) Xerography systems not used for detection of diseases of the breast are exempt from the requirements of this section. These units are required to meet applicable provisions of §289.226 of this title and §289.227 of this title.

(3) Mammography systems used exclusively for invasive interventions for localization or biopsy procedures are exempt from the requirements of this section except for those listed in subsection (q) of this section.

(4) Mammography systems used exclusively for research or investigation are exempt from the requirements of this section.

(5) All mammography registrants are exempt from the radiation protection program requirements of §289.202(e) of this title.

(6) All mammography registrants are exempt from the posting of radiation area requirements of §289.202(aa)(1) of this title provided that the operator has continuous surveillance and access control of the radiation area.

(f) Personnel qualifications. The following requirements apply to all personnel involved in any aspect of mammography including the production and interpretation of mammograms.

(1) Interpreting physician. Each physician interpreting mammograms shall hold a current Texas license issued by the Texas State Board of Medical Examiners and meet the following qualifications.

(A) Initial qualifications. Before interpreting mammograms independently, the physician shall:

(i) be certified by the American Board of Radiology, the American Osteopathic Board of Radiology, or one of the

other bodies approved by the FDA to certify interpreting physicians or have at least three months of documented formal training in the interpretation of mammograms and in topics related to mammography in accordance with subsection (nn)(2) of this section;

(ii) have had 60 hours of documented category I CMEUs in mammography. At least 15 of the 60 hours shall have been acquired within three years immediately prior to the date that the physician qualified as an interpreting physician. Hours spent in residency specifically devoted to mammography will be equivalent to category I CMEUs and accepted if documented in writing by the appropriate representative of the training institution. The residency program must be approved by the Accreditation Council for Graduate Medical Education or the Council on Postdoctoral Training of the American Osteopathic Association; and

(iii) have interpreted or multi-read, under the direct supervision of an interpreting physician, at least 240 mammographic examinations within the six month period immediately prior to the date that the physician qualifies as an interpreting physician.

(B) Exemptions.

(i) Physicians who qualified as interpreting physicians in accordance with the requirements of §289.230 that were in effect prior to April 28, 1999, or any other equivalent state or federal requirements in effect prior to April 28, 1999, are considered to have met the initial requirements of subparagraph (A) of this paragraph.

(ii) Physicians who have interpreted or multi-read at least 240 mammographic examinations under the direct supervision of an interpreting physician in any six month period during the last two years of a diagnostic radiology residency and who became board certified at the first allowable time, are exempt from subparagraph (A)(iii) of this paragraph.

(C) Continuing education and experience. The time period for completing continuing education is a 36 month period and the time period for completing continuing experience is a 24 month period. These periods begin when a physician completes the requirements to become an interpreting physician in subparagraph (A) of this paragraph. The facility shall choose one of the dates in clause (i) of this subparagraph to determine the 36 month continuing education period and one of the dates in clause (ii) of this subparagraph to determine the 24 month continuing experience period. Each interpreting physician shall maintain qualifications by meeting the following requirements:

(i) participating in education programs by completing at least 15 category I CMEUs in mammography that shall include at least six CMEUs in each modality used by the interpreting physician in his/her practice or by teaching mammography courses. CMEUs earned through teaching a specific course can be counted only once during the 36 month period. The continuing education must be completed in the 36 months immediately preceding:

(I) the date of the registrant's annual inspection; or

(II) the last day of the calendar quarter preceding the inspection; or

(III) any date in between the two;

(ii) interpreting or multi-reading at least 960 mammographic examinations that must be completed during the 24 months immediately preceding:

(I) the date of the registrant's annual inspection; or

(II) the last day of the calendar quarter preceding the inspection; or

(III) any date in between the two; and

(iii) accumulating at least eight hours of CMEUs in any mammography modality in which the interpreting physician has not been previously trained, prior to independently using the new modality.

(D) Reestablishing qualifications. Interpreting physicians who fail to maintain the required continuing education or experience requirements shall reestablish their qualifications before resuming independent interpretation of mammograms as follows:

(i) obtain a sufficient number of additional category I CMEUs to bring their total up to the credits required in the previous 36 months;

(ii) interpret or multi-read the following, within the six months immediately prior to resuming independent interpretation and under the direct supervision of an interpreting physician:

(I) at least 240 mammographic examinations; or

(II) a sufficient number of mammographic examinations to bring the total up to 960 examinations for the prior 24 months, whichever is less; or

(iii) complete both clauses (i) and (ii) of this subparagraph, if an interpreting physician fails to maintain both the continuing education and experience requirements.

(2) Medical radiologic technologists (operators of equipment). Each person performing mammographic examinations shall have current certification as a medical radiologic technologist under Texas Civil Statutes, Article 4512m and shall meet the following qualifications.

(A) Initial requirements. Before performing mammographic examinations, the operator of equipment shall have:

(i) completed a minimum of 40 contact hours of training as outlined in subsection (nn)(1) of this section by a qualified instructor; and

(ii) performed a minimum of 25 mammographic examinations under the direct supervision of an individual qualified in accordance with the qualifications of this paragraph. The 25 mammographic examinations may be obtained concurrently with the 40 contact hours of training specified in clause (i) of this subparagraph but shall not exceed 16 hours of the 40 contact hours.

(B) Exemptions. Equipment operators who qualified as medical radiologic technologists to perform mammography in accordance with the requirements of §289.230 that were in effect prior to April 28, 1999, or any other equivalent state or federal requirements in effect prior to April 28, 1999, are considered to have met the initial requirements of subparagraph (A) of this paragraph.

(C) Continuing education and experience. The time period for completing continuing education is a 36 month period and the time period for completing continuing experience is a 24 month period. The period for continuing education begins when a technologist completes the requirements in subparagraph (A) of this paragraph. The period for continuing experience begins when a technologist completes the requirements in subparagraph (A) of this paragraph, or April 28,1999, whichever is later. The facility shall choose one of the dates in clause (i) of this subparagraph to determine the 36 month continuing education period and one of the dates in clause (ii) of this subparagraph to determine the 24 month

continuing experience period. Each medical radiologic technologist shall maintain qualifications by meeting the following requirements:

(i) participating in education programs by completing at least 15 CEUs in mammography that shall include at least six CEUs in each modality used by the technologist or by teaching mammography courses. CEUs earned through teaching a specific course can be counted only once during the 36 month period. The continuing education must be completed in the 36 months immediately preceding:

(I) the date of the registrant's annual inspection; or

(II) the last day of the calendar quarter preceding the inspection; or

(III) any date in between the two;

(ii) performing a minimum of 200 mammographic examinations that must be completed during the 24 months immediately preceding:

(I) the facility's annual inspection; or

(II) the last day of the calendar quarter preceding the inspection;

(III) or any date in between the two; and

(iii) accumulating at least eight hours of CEUs in any mammography modality in which the medical radiologic technologist has not been previously trained, prior to independently using the new modality.

(D) Requalification. Medical radiologic technologists who fail to maintain the continuing education or experience requirements shall reestablish their qualifications before resuming independent performance of mammograms as follows:

(i) obtaining a sufficient number of additional CEUs to bring their total up to the credits required in the previous 36 months;

(ii) performing a minimum of 25 mammographic examinations under the direct supervision of a qualified medical radiologic technologist; or

(iii) completing both clauses (i) and (ii) of this subparagraph, if a medical radiologic technologist fails to maintain both the continuing education and experience requirements.

(3) Medical physicist. Each medical physicist performing mammographic surveys and evaluating mammographic equipment shall hold a current Texas license under the Medical Physics Practice Act, Article 4512n, in diagnostic radiological physics and be registered with the agency or employed by a business registered with the agency, in accordance with §289.226(e) of this title and the Texas Radiation Control Act, unless exempted by §289.226(b)(6) of this title. Each medical physicist shall meet the following qualifications:

(A) Initial qualifications. Before performing surveys and evaluating mammographic equipment independently, the medical physicist shall:

(i) have a masters degree or higher in a physical science from an accredited institution, with no less than 20 semester hours or equivalent (30 quarter hours) of college undergraduate or graduate level physics. (Certification in an appropriate specialty area by one of the bodies determined by FDA to have procedures and requirements to ensure that medical physicists certified by the body are competent to perform physics surveys is considered an equivalent requirement);

(ii) have 20 contact hours of documented specialized training in conducting surveys of mammography facilities; and

(iii) have experience conducting surveys of at least one mammography facility and a total of at least ten mammography units. After April 28, 1999, experience conducting surveys must be acquired under the direct supervision of a medical physicist who meets the requirements of subparagraphs (A) and (C) of this paragraph. No more than one survey of a specific unit within a period of 60 days can be counted towards the total mammography unit survey requirement; or

(B) Alternative initial qualifications. Individuals who qualified as a medical physicist in accordance with the requirements of §289.230 that were in effect prior to April 28, 1999, or any other equivalent state or federal requirements in effect prior to April 28, 1999, and have met the following additional qualifications prior to April 28, 1999, are determined to have met the initial qualifications of subparagraph (A) of this paragraph:

(i) a bachelor's degree or higher in a physical science from an accredited institution with no less than ten semester hours or equivalent of college undergraduate or graduate level physics;

(ii) 40 contact hours of documented specialized training in conducting surveys of mammography facilities; and

(iii) experience conducting surveys of at least one mammography facility and a total of at least 20 mammography units. No more than one survey of a specific unit within a period of 60 days can be counted towards the total mammography unit survey requirement. The training and experience requirements must be met after fulfilling the degree requirements.

(C) Continuing education and experience. The time period for completing continuing education is a 36 month period and the time period for completing continuing experience is a 24 month period. The period for continuing education will begin when a physicist completes the requirements in subparagraph (A) of this paragraph. The time period for continuing experience will begin when a physicist completes the requirements in subparagraph (A) of this paragraph, or April 28, 1999, whichever is later. The facility shall choose one of the dates in clause (i) of this subparagraph to determine the 36 month continuing education period and one of the dates in clause (ii) of this subparagraph to determine the 24 month continuing experience period. Each medical physicist shall maintain their qualifications by meeting the following requirements:

(i) participating in education programs, either by teaching or completing at least 15 CEUs in mammography that shall include hours of training appropriate to each mammographic modality evaluated by the medical physicist during his or her surveys. CEUs earned through teaching a specific course can be counted only once during the 36 month period. The continuing education must be completed in the 36 months immediately preceding:

(I) the date of the registrant's annual inspection; or,

(II) by the last day of the calendar quarter preceding the inspection; or

(III) any date in between the two;

(ii) performing surveys of two mammography facilities and a total of at least six mammography units. (no more than

one survey of a specific facility within a ten month period on a specific unit within a period of 60 days can be counted towards the total mammography unit survey requirement) The continuing experience must be completed during the 24 months immediately preceding:

(I) the date of the facility's annual inspection; or

(II) by the last day of the calendar quarter preceding the inspection; or

(III) any date in between the two; and

(iii) accumulating at least eight hours of CEUs in any mammography modality in which the medical physicist has not been previously trained, prior to independently using the new modality.

(D) Reestablishing qualifications. Medical physicists who fail to maintain the continuing education or experience requirements shall reestablish their qualifications before resuming independent performance of surveys and equipment evaluations applicable as follows:

(i) obtaining a sufficient number of additional CEUs to bring their total up to the credits required in the previous 36 months;

(ii) performing a sufficient number of surveys under the direct supervision of a qualified medical physicist to bring their total up to the credits required in the previous 24 months; or

(iii) completing both clauses (i) and (ii) of this subparagraph, if a medical physicist fails to maintain both the continuing education and experience requirements.

(4) Retention of personnel records. Records documenting the qualifications, continuing education, and experience of personnel in subsection (f)(1)-(3) shall be maintained for inspection by the agency in accordance with subsection (nn)(3) of this section.

(g) Equipment standards. Only x-ray systems meeting the following standards shall be used.

(1) System design. The equipment shall have been specifically designed and manufactured for mammography and in accordance with 21 Code of Federal Regulations (CFR) 1010.2, 1020.30, and 1020.31.

(2) Motion of tube-image receptor assembly. The assembly shall be capable of being fixed in any position where it is designed to operate. Once fixed in any such position, it shall not undergo unintended motion. In the event of power interruption, this mechanism shall not fail.

(3) Image receptor sizes. Systems using screen-film image receptors shall, at a minimum, provide for the following:

(A) operation with image receptors of 18 x 24 cm and 24 x 30 cm;

(B) moving grids matched to all image receptor sizes provided;

(C) operation with the grid removed for systems used for magnification procedures; and

(D) image receptors to rest, post-loading, 15 minutes between exposures.

(4) Beam limitation. All systems shall have beam-limiting devices that allow the useful beam to extend to or beyond the chest wall edge of the image receptor.

(5) Magnification. Systems used to perform noninterventional problem solving procedures shall have radiographic magnification capability available for use with, at a minimum, at least one magnification value within the range of 1.4 to 2.0.

(6) Focal spot and target material selection. Selection of the focal spot or target material shall be as follows.

(A) When more than one focal spot is provided, the system shall indicate, prior to exposure, which focal spot is selected.

(B) When more than one target material is provided, the system shall indicate, prior to exposure, the preselected target material.

(C) When the target material and/or focal spot is selected by a system algorithm that is based on the exposure or on a test exposure, the system shall display, after the exposure, the target material and/or focal spot actually used during the exposure.

(7) Compression. All mammography systems shall incorporate a compression device.

(A) Systems shall be equipped with different sized compression paddles that match the sizes of all full-field image receptors provided for the system.

(B) Compression paddles for special purposes, including those smaller than the full size of the image receptor (spot compression) may be provided. Such paddles are not subject to the requirements of subparagraphs (E) and (F) of this paragraph.

(C) Except as provided in subparagraph (D) of this paragraph, the compression paddle shall be flat and parallel to the breast support table and shall not deflect from parallel by more than 1.0 cm at any point on the surface of the compression paddle when compression is applied.

(D) Equipment intended by the manufacturer's design to not be flat and parallel to the breast support table during compression shall meet the manufacturer's design specifications and maintenance requirements.

(E) The chest wall edge of the compression paddle shall be straight and parallel to the edge of the image receptor.

(F) The chest wall edge may be bent upward to allow for patient comfort, but shall not appear on the image.

(8) Technique factor selection and display. Technique factor selection and display shall be as follows.

(A) Manual selection of milliampere seconds (mAs) or at least one of its component parts, milliampere (mA) and/or time, shall be available.

(B) The technique factors (peak tube potential in kilovolts (kV) and either tube current in mA and exposure time in seconds or the product of tube current and exposure time in mAs) to be used during an exposure shall be indicated before the exposure begins, except when AEC is used, in which case the technique factors that are set prior to the exposure shall be indicated.

(C) When the AEC mode is used, the system shall indicate the actual kVp and mAs used during the exposure. The mAs may be displayed as mA and time.

(9) Automatic exposure control. Each screen-film system shall provide an AEC mode that is operable in all combinations of equipment configuration provided, for example, grid, nongrid, magnification, non magnification, and various target filter combinations.

(A) The positioning or selection of the detector shall permit flexibility in the placement of the detector under the target tissue.

(i) The size and available positions of the detector shall be clearly indicated at the x-ray input surface of the breast compression paddle.

(ii) The selected position of the detector shall be clearly indicated.

(B) The system shall provide means to vary the selected optical density from the normal (zero) setting.

(10) X-ray film. The registrant shall use x-ray film for mammography that has been designated by the film manufacturer as appropriate for mammography.

(11) Intensifying screens. The registrant shall use intensifying screens for mammography that have been designated by the screen manufacturer as appropriate for mammography and shall use film that is matched to the screen's spectral output as specified by the manufacturer.

(12) Film processing solutions. For processing mammography films, the registrant shall use chemical solutions that are capable of developing the films used by the facility in a manner equivalent to the minimum requirements specified by the film manufacturer.

(13) Lighting. The registrant shall make available special lights for film illumination (hot lights) capable of producing light levels greater than that provided by the view box.

(14) Film masking devices. Registrants shall ensure that film masking devices that can limit the illuminated area to a region equal to or smaller than the exposed portion of the film are available to all interpreting physicians interpreting for the facility.

(15) Equipment variances. Registrants with mammography equipment that has been issued variances by FDA to 21 CFR 1020.2, 1020.30, 1020.31 or meets the requirements for the alternatives to the quality standards for equipment in 21 CFR 900.18(b), shall maintain copies of those variances or alternative standards.

(h) Self-referral mammography. Any person proposing to conduct a self-referral mammography program shall not initiate such a program without prior approval of the agency. When requesting such approval, that person shall submit the following information:

(1) the number and type of views (or projections);

(2) the age of the population to be examined and the frequency of the exam following established, nationally recognized criteria, such as those of the American Cancer Society, American College of Radiology (ACR), or the National Council on Radiation Protection and Measurements;

(3) written procedures to include methods of:

(A) advising patients and private physicians of the results of the mammography examination in accordance with subsection (i)(2) of this section;

(B) follow-up with patients and physicians in accordance with subsection (i)(3) of this section; and

(C) recommending to patients who do not have a physician means of selecting a physician;

(4) methods for educating mammography patients in breast self-examination techniques and on the necessity for follow-up by a physician.

(i) Medical records and mammography reports.

(1) Contents and terminology. Each registrant shall prepare a written report of the results of each mammography examination that shall include the following information:

(A) name of the patient and an additional patient identifier;

(B) date of the examination;

(C) name and signature of the interpreting physician who interpreted the mammogram (electronic signatures are acceptable);

(D) overall final assessment of findings using the final assessment categories as defined in subsection (c) of this section; and

(E) recommendations made to the practitioner about what additional actions, if any, should be taken. All clinical questions raised by the referring physician shall be addressed in the report to the extent possible, even if the assessment is negative or benign.

(2) Communication of mammography results to the patient and physicians. Each registrant shall send reports as soon as possible, but no later than 30 days from the date of the mammography examination to:

(A) patients advising them of the results of the mammography examination and any further medical needs indicated. The report shall include a summary written in language easily understood by a lay person; and

(B) referring physicians, or in the case of self-referral, to the physician indicated by the patient, advising them of the results of the mammography examination, containing the information specified in paragraph (1) of this subsection, and any further medical needs indicated.

(3) Follow-up with patients and physicians. Each registrant shall follow-up to confirm the following:

(A) that patients with positive findings and patients needing repeat exams have received proper notification; and

(B) that physicians have received proper notification of patients with positive findings needing repeat exams.

(4) Retention of clinical images. Each registrant that performs mammograms shall do the following.

(A) Maintain mammography films and reports in a permanent medical record for a minimum of five years and if no additional mammograms of the patient are performed at the facility, they shall be maintained for a minimum of ten years.

(B) Upon request or on behalf of the patient, permanently or temporarily transfer the original mammograms and copies of the patient's reports to a medical institution, a physician, or to the patient directly.

(C) If the medical records are permanently forwarded, the receiving institution or physician shall maintain and become responsible for the original film until the fifth or tenth anniversary, as specified in subparagraph (A) of this paragraph unless permanently transferred or forwarded in accordance with subparagraph (B) of this paragraph.

(5) Mammographic image identification. Each mammographic image shall have the following information indicated on it in a permanent, legible manner and placed so as not to obscure anatomic structures:

(A) name of patient and an additional patient identifier;

(B) date of examination;

(C) view and laterality (this information shall be placed on the image in a position near the axilla);

(D) facility name and location (at a minimum the location shall include city, state, and zip code);

(E) technologist identification;

(F) cassette/screen identification; and

(G) mammography unit identification if there is more than one unit in the facility.

(6) Information shall also be maintained for each clinical image by utilizing a label on each film, recording on the film jacket, or maintaining a log or other means. The information shall include, but is not limited to, compressed breast thickness or degree of compression, and kVp.

(j) Processing of mammographic images. Each registrant shall utilize the same processor for clinical and phantom images. Clinical images shall be processed within an interval not to exceed 24 hours from the time the first clinical image is taken. Facilities utilizing batch processing shall:

(1) use a container to transport clinical images that will protect the film from exposure to light and radiation; and

(2) maintain a log to include each patient name and unique identification number, date, and time of the first exam of each batch, and date and time of batch development.

(k) Quality assurance - general. Each registrant shall establish and maintain a written quality assurance program to ensure the safety, reliability, clarity, and accuracy of mammography services performed at the mammography facility, including corrective actions to be taken if images are of poor quality.

(1) Responsible individuals. Responsibility for the quality assurance program and for each of its elements shall be assigned to individuals who are qualified for their assignments and who shall be allowed adequate time to perform these duties.

(A) Lead interpreting physician. The registrant shall identify a lead interpreting physician who shall have the general responsibility of:

(i) ensuring that the quality assurance program meets all requirements of this subsection and subsections (l) and (m) of this section;

(ii) reviewing and documenting the technologists' quality control test results at least every three months or more frequently if consistency has not yet been achieved;

(iii) reviewing the physicists' results annually or more frequently when needed; and

(iv) assigning and determining the individual's qualifications to perform the quality assurance tasks in subparagraphs (B)-(D) of this paragraph.

(B) Interpreting physicians. All interpreting physicians interpreting mammograms for the registrant shall:

(i) follow the registrant's procedures for corrective action when the images they are asked to interpret are of poor quality. These procedures shall be included in the facility's operating and safety procedures; and

(ii) participate in the medical outcomes audit program.

(C) Medical physicist. Each registrant shall use the services of a licensed medical physicist to survey mammography equipment and oversee the equipment-related quality assurance practices of the facility. At a minimum, the medical physicist shall be responsible for:

(i) performing surveys of the items listed in subsection (l)(5) and (7) of this section and performing an image quality evaluation test in accordance with subsection (l)(2) of this section;

(ii) performing mammography equipment evaluations in accordance with subsection (l)(11) of this section;

(iii) reviewing the facility's quality assurance program; and

(iv) providing the registrant with the reports described in subsection (l)(10) of this section.

(D) Quality control technologist. The quality control technologist, designated by the lead interpreting physician, shall ensure performance of the items designated in subsection (l)(1)-(4), (7), (9), (12), and (14) of this section. If other personnel are assigned the quality assurance tasks in accordance with subparagraph (A)(iv) of this paragraph, the quality assurance technologist shall insure that the requirements of subsection (l)(1)-(4), (7), (9), (12), and (14) of this section are met.

(2) Quality assurance records. The lead interpreting physician, quality control technologist, and medical physicist shall ensure that records concerning mammography technique and procedures, quality control (include monitoring data, corrective actions, and the effectiveness of the corrective actions), safety, protection, and employee qualifications to meet assigned quality assurance tasks are properly maintained and updated. These quality control records shall be kept for subsections (k) and (m) of this section and for each test specified in subsection (l) of this section, in accordance with subsection (nn)(3) of this section.

(l) Quality assurance - equipment. Registrants with screen-film systems shall perform the following quality control tests at the intervals specified. In addition to the intervals specified in (l)(4)(B) and (5)(H), the tests shall be performed prior to initial use.

(1) Daily quality control tests. Film processors used to develop mammograms shall be adjusted and maintained to meet the technical development specifications for the mammography film in use. A processor performance test shall be completed on each day that mammography is performed before any clinical films are processed that day.

(A) Processor performance test. Using mammography film used clinically at the facility, sensitometer tests shall include assessment of the following:

(i) base plus fog density that shall be within plus 0.03 of the established operating level;

(ii) mid-density that shall be within plus or minus 0.15 of the established operating level; and

(iii) density difference that shall be within plus or minus 0.15 of the established operating level.

(B) Backup processor. A processor, other than the one commonly in use for mammography, may be used temporarily provided that the backup processor has been tested and meets the requirements of subparagraph (A) of this paragraph. Prior to the first

patient exposure, a phantom image shall be acquired and run in the backup processor and shall meet the requirements of paragraph (2) of this section.

(C) Film processors being used for mammography at multiple locations, such as a mobile service, shall be subject to the requirements of this paragraph.

(D) Film processors utilized for mammography shall be adjusted to and operated at the specifications recommended by the mammographic film manufacturer, or at other settings such that the sensitometric performance is at least equivalent.

(2) Weekly quality control tests. An image quality evaluation test, using an FDA-accepted phantom, shall meet the following parameters.

(A) The optical density of the film at the center of an image of a standard FDA-accepted phantom shall be at least 1.20 when exposed under a typical clinical condition and shall not change by more than plus or minus 0.20 from the established operating level.

(B) The density difference between the background of the phantom and an added test object, used to assess image contrast, shall be measured and shall not vary by more than plus or minus 0.05 from the established operating level.

(C) The phantom image shall be made on the standard mammographic film in use at the facility with techniques used for clinical images of a standard breast. The phantom image shall meet the requirements in subparagraphs (A) and (B) of this paragraph and clause (i) of this subparagraph. No mammograms shall be taken on patients if any of these minimums are not met.

(i) The mammographic unit shall be capable of producing images of the mammographic phantom in accordance with the phantom image scoring protocol in subsection (nn)(5) of this section.

(ii) Each phantom image and a record of the evaluation of that image shall be maintained at the location where the mammography image was produced or with the radiographic equipment for mobile services.

(3) Quarterly quality control tests. These tests shall be performed within the calender quarter at an interval not to exceed 90 days.

(A) Fixer retention in film. The residual fixer shall be no more than 5 micrograms per square cm.

(B) Repeat analysis. A repeat analysis on clinical images repeated or rejected shall be performed, analyzed, and documented. The total repeat or reject rate shall not exceed 5.0%. If the total repeat or reject rate changes from the previously determined rate by more than 2.0% of the total films included in the analysis, the reason(s) for the change shall be determined. Corrective action shall be taken and documented if the total repeat or reject rate for the facility exceeds 5.0% or changes from the previously determined rate by more than 2.0% of the total films included in the analysis. Test films, cleared films, or film processed as a result of exposure of a film bin are not to be included in the count for repeat analysis. Films included in the repeat analysis are not required to be kept after completion of the analysis.

(4) Semiannual quality control tests. These tests shall be performed within the calender quarter at an interval not to exceed six months.

(A) Darkroom fog. The optical density attributable to darkroom fog shall not exceed 0.05 when a mammography film of the type used in the facility, which has a mid- density of no less than 1.2 OD, is exposed to typical darkroom conditions for two minutes while such film is placed on the counter top, emulsion side up. If the darkroom has a safelight used for mammography film, it shall be on during this test.

(B) Screen-film contact. Testing for screen-film contact shall be conducted using 40 mesh copper screen. The entire area of the cassette that may be clinically exposed shall be tested. This shall include all cassettes used for mammography in the facility.

(C) Compression device performance. The x-ray system shall be capable of compressing the breast with a force of at least 25 pounds and shall be capable of maintaining this compression for at least 15 seconds. For systems with automatic compression, the maximum force applied without manual assistance shall not exceed 40 pounds.

(5) Annual quality control tests. These tests shall be performed within the calender quarter at an interval not to exceed 12 months.

(A) Automatic exposure control performance. The AEC shall be as follows.

(i) The AEC shall be capable of maintaining film optical density within plus or minus 0.30 of the mean optical density when thickness of a homogeneous material is varied over a range of 2 to 6 cm and the kVp is varied appropriately for such thicknesses over the kVp range used clinically in the facility. If this requirement cannot be met, a technique chart shall be developed showing appropriate techniques (kVp and density control settings) for different breast thicknesses and compositions that must be used so that optical densities within plus or minus 0.30 of the average under phototimed conditions can be produced.

(ii) The optical density of the film in the center of the phantom image shall not be less than 1.20.

(B) Kilovoltage peak accuracy and reproducibility. At the most commonly used clinical settings of kVp, the coefficient of variation of reproducibility of the kVp shall be equal to or less than 0.02. The kVp shall be accurate to within plus or minus 5.0% of the indicated or selected kVp at the following:

(i) the lowest clinical kVp that can be measured by a kVp test device;

(ii) the most commonly used clinical kVp; and

(iii) the highest available clinical kVp.

(C) Focal spot condition. Focal spot condition shall be evaluated either by determining system resolution or by measuring focal spot dimensions.

(i) System resolution.

(I) Each x-ray system used for mammography, in combination with the mammography screen-film combination used in the facility, shall provide a minimum resolution of 11 cycles/millimeter (mm) (line-pairs/mm) when a high contrast resolution bar test pattern is oriented with the bars perpendicular to the anode-cathode axis, and a minimum resolution of 13 line-pairs/mm when the bars are parallel to that axis.

(II) The bar pattern shall be placed 4.5 cm above the breast support surface, centered with respect to the chest wall edge

of the image receptor, and with the edge of the pattern within 1 cm of the chest wall edge of the image receptor.

(III) When more than one target material is provided, the measurement in subclause (I) of this clause shall be made using the appropriate focal spot for each target material.

(IV) When more than one SID is provided, the test shall be performed at the SID most commonly used clinically.

(V) Test kVp shall be set at the value used clinically by the facility for a standard breast and shall be performed in the AEC mode, if available. If necessary, a suitable absorber may be placed in the beam to increase exposure times. The screen-film cassette combination used by the facility shall be used to test for this requirement and shall be placed in the normal location used for clinical procedures.

(ii) Focal spot dimensions. Measured values of the focal spot length (dimension parallel to the anode cathode axis) and width (dimension perpendicular to the anode cathode axis) shall be within the tolerance limits specified as follows.
Figure: 25 TAC §289.230(l)(5)(C)(ii)

(D) Beam quality and half-value layer (HVL). The HVL shall meet the specifications of 21 CFR 1020.30(m)(l) for the minimum HVL. These values, extrapolated to the mammographic range, are shown as follows. Values not shown in Table II may be determined by linear interpolation or extrapolation.
Figure: 25 TAC §289.230(l)(5)(D)

(E) Breast entrance air kerma and AEC reproducibility. The coefficient of variation for both air kerma and mAs shall not exceed 0.05.

(F) Dosimetry. The average glandular dose delivered during a single craniocaudal view of an FDA accepted phantom simulating a standard breast shall not exceed 3.0 milligray (mGy) (0.3 rad) per exposure.

(G) X-ray field/light field/image receptor/compression paddle alignment. All systems shall meet the following:

(i) All systems shall have beam-limiting devices that allow the entire chest wall edge of the x-ray field to extend to the chest wall edge of the image receptor and provide means to assure that the x-ray field does not extend beyond any edge of the image receptor by more than 2.0% of the SID.

(ii) If a light field that passes through the x-ray beam limitation device is provided, it shall be aligned with the x-ray field so that the total of any misalignment of the edges of the light field and the x-ray field along either the length or the width of the visually defined field at the plane of the breast support surface shall not exceed 2.0% of the SID.

(iii) The chest wall edge of the compression paddle shall not extend beyond the chest wall edge of the image receptor by more than 1.0% of the SID when tested with the compression paddle placed above the breast support surface at a distance equivalent to standard breast thickness. The shadow of the vertical edge of the compression paddle shall not be visible on the image.

(H) Uniformity of screen speed. Uniformity of screen speed of all the cassettes in the facility shall be tested and the difference between the maximum and minimum optical densities shall not exceed 0.30. Screen artifacts shall also be evaluated during this test.

(I) System artifacts. System artifacts shall be evaluated with a high- grade, defect-free sheet of homogeneous material large enough to cover the mammography cassette and shall be performed for all cassette sizes used in the facility using a grid appropriate for the cassette size being tested. System artifacts shall also be evaluated for all available focal spot sizes and target filter combinations used clinically.

(J) Radiation output. The system shall be capable of producing a minimum output of 4.5 mGy air kerma per second (513 milliroentgen (mR) per second) when operating at 28 kVp in the standard mammography (molybdenum/molybdenum) mode at any SID where the system is designed to operate and when measured by a detector with its center located 4.5 cm above the breast support surface with the compression paddle in place between the source and the detector. The system shall be capable of maintaining the required minimum radiation output averaged over a 3.0 second period.

(K) Decompression. If the system is equipped with a provision for automatic decompression after completion of an exposure or interruption of power to the system, the system shall be tested to confirm that it provides the following:

(i) an override capability to allow maintenance of compression;

(ii) a continuous display of the override status; and

(iii) a manual emergency compression release that can be activated in the event of power or automatic release failure.

(L) The technique settings used for subparagraphs (D) and (F) of this paragraph and paragraph (2) of this subsection shall be those used by the facility for its clinical images of a standard breast.

(6) Densitometer and sensitometer. The calibration of the densitometer and sensitometer must be in accordance with the manufacturer's specifications.

(7) Quality control tests - other modalities. For systems with image receptor modalities other than screen-film, the quality assurance program shall be substantially the same as the quality assurance program recommended by the image receptor manufacturer, except that the maximum allowable dose shall not exceed the maximum allowable dose for screen-film systems in paragraph (5)(F) of this subsection.

(8) Mobile units. The registrant shall verify that mammography units used to produce mammograms at more than one location meet the requirements in paragraphs (1)-(7) of this subsection. In addition, at each examination location, before any examinations are conducted, the registrant shall verify satisfactory performance of such units by using a test method that establishes the adequacy of the image quality produced by the unit. Processor performance shall be in accordance with paragraph (1) of this subsection.

(9) Use of test results. After completion of the tests specified in paragraphs (1)-(8) of this subsection, the registrant shall do the following.

(A) Compare the test results to the corresponding specified action limits; or, for nonscreen-film modalities, to the manufacturer's recommended action limits; or for post- move, preexamination testing of mobile units, to the limits established in the test method used by the facility.

(B) If the test results in the following are outside of the action limits, corrective actions shall be taken before any further examinations are performed or any films are processed using the component of the mammography system that failed the test:

(i) paragraph (1) of this subsection describing processor quality control;

(ii) paragraph (2) of this subsection describing phantom image quality;

(iii) paragraph (4)(A) of this subsection describing darkroom fog;

(iv) paragraph (4)(B) of this subsection describing screen-film contact;

(v) paragraph (4)(C) of this subsection describing compression device performance;

(vi) paragraph (5)(A) of this subsection describing AEC;

(vii) paragraph (5)(C) of this subsection describing focal spot condition;

(viii) paragraph (5)(E) of this subsection describing reproducibility;

(ix) paragraph (5)(F) of this subsection describing dosimetry;

(x) paragraph (7) of this subsection describing quality control tests of other modalities; and

(xi) paragraph (8) of this subsection describing quality control tests for mobile units.

(C) Corrective action for all other tests described in subsection (l) of this section shall be performed within 30 days of the test date.

(D) Documentation of the tests and the corrective actions described in subparagraphs (A)-(C) of this paragraph shall be maintained in accordance with subsection (nn)(3) of this section.

(10) Surveys. At least once a year, each facility shall undergo a survey by a medical physicist or by an individual under the direct supervision of a medical physicist.

(A) The medical physicist shall provide the following to the facility:

(i) a written report of the results of the tests listed in paragraphs (2), (5), (7), and (8) (if applicable) of this subsection, a review of the weekly phantom image test in accordance with paragraph (2) of this subsection, and a review of the facility's quality assurance program in accordance with subsection (k)(1)(C)(iii) of this section;

(ii) written recommendations for corrective actions according to the test results; and

(iii) a review of the test results with the lead interpreting physician or his/her designee and the technologist(s) performing the quality control.

(B) The survey report shall be sent to the registrant within 30 days of the date of the survey and shall be maintained by the registrant in accordance with subsection (nn)(3) of this section. If deficiencies are noted that involve any of the items listed in paragraph (8)(B) of this subsection, a preliminary oral or written report of the deficiencies shall be given to the facility within 72 hours of the survey.

(C) The survey report shall be dated and signed by the medical physicist performing or supervising the survey. If the survey was performed entirely or in part by another individual under the direct supervision of the medical physicist, that individual and the part of the survey that individual performed shall also be identified in the survey.

(11) Mammography equipment evaluations. Additional evaluations of mammography units or image processors shall be conducted whenever a new unit or processor is installed, a unit or processor is disassembled and reassembled at the same or a new location, major components of a mammography unit are changed or repaired, or a processor is repaired. These evaluations shall be used to determine whether the new or changed equipment meets the requirements of applicable standards in subsections (g) and (l) of this section.

(A) All problems shall be corrected before the new or changed equipment is put into service for examinations or film processing.

(B) The mammography equipment evaluation and dosimetry shall be performed by a medical physicist or by an individual under the direct supervision of a medical physicist.

(12) Facility cleanliness. The registrant shall establish and implement adequate protocols for maintaining darkroom, screen, and view box cleanliness and shall document that all cleaning procedures are performed at the frequencies specified in the protocols.

(13) Calibration of air kerma measuring instruments. Instruments used by medical physicists in their annual survey to measure the air kerma or air kerma rate from a mammography unit shall be calibrated at least once every two years and each time the instrument is repaired. The instrument calibration must be traceable to a national standard and calibrated with an accuracy of plus or minus 6.0% (95% confidence level) in the mammography energy range.

(14) Infection control. Facilities shall establish and comply with a system specifying procedures to be followed by the facility for cleaning and disinfecting mammography equipment after contact with blood or other potentially infectious materials. This system shall specify the methods for documenting facility compliance with the infection control procedures established and shall:

(A) comply with all applicable federal, state, and local regulations pertaining to infection control; and

(B) comply with the manufacturer's recommended procedures for the cleaning and disinfection of the mammography equipment used in the facility; or

(C) if adequate manufacturer's recommendations are not available, comply with generally accepted guidance on infection control, until such recommendations become available.

(m) Quality assurance-mammography medical outcomes audit. Each registrant shall establish and maintain a mammography medical outcomes audit program to follow-up positive, mammographic assessments and to correlate pathology results with the interpreting physician's findings.

(1) General requirements. Each registrant shall establish a system to collect and review outcome data for all mammograms performed, including follow-up on the disposition of all positive mammograms and correlation of pathology results with the interpreting physician's mammography report. Analysis of these outcome data shall be made individually and collectively for all interpreting physicians at the facility. In addition, any cases of breast cancer among women imaged at the facility that subsequently become known to the facility shall prompt the facility to initiate follow-up on surgical and/or pathology results and review of the mammograms taken prior to the diagnosis of a malignancy.

(2) Frequency of audit analysis. The facility's first audit analysis shall be initiated no later than 12 months after the date the facility becomes certified, or 12 months after April 28, 1999, whichever date is the latest. This audit analysis shall be complete within an additional 12 months to permit completion of diagnostic procedures and data collection. Subsequent audit analyses will be conducted at least once every 12 months. These shall be maintained in accordance with subsection (nn)(3) of this section.

(3) Reviewing interpreting physician. Each lead interpreting physician or an interpreting physician designated by the lead interpreting physician shall review the medical outcomes audit data at least once every 12 months. This individual shall analyze the results of the audit and shall be responsible for the following:

(A) recording the dates of the audit period(s);

(B) documenting the results;

(C) notifying other interpreting physicians of their results and the registrant's aggregate results; and

(D) documenting any follow up actions and the nature of the follow up.

(n) Mammographic procedure and techniques for mammography of patients with breast implants. Each registrant shall have a procedure to inquire whether or not the patient has breast implants prior to the mammographic exam. Except where contraindicated, or unless modified by a physician's directions, patients with breast implants shall have mammographic views to maximize the visualization of breast tissue.

(o) Clinical image quality. Clinical images produced by any certified facility must continue to comply with the standards for clinical image quality established by that facility's accreditation body.

(p) Any research using radiation producing devices on humans must be approved by an IRB as required by 45 CFR 46 and 21 CFR 56. The IRB must include at least one licensed physician to direct any use of radiation in accordance with §289.201(a) of this title.

(q) Requirements for mammography systems used exclusively for invasive interventions for localizations or biopsy procedures. Mammography systems used exclusively for invasive interventions for localizations or biopsy procedures are exempt from this section except for the following:

(1) purpose and scope in accordance with subsections (a) and (b) of this section;

(2) the applicable definitions in subsection (c) of this section;

(3) prohibitions in accordance with subsection (d)(2) and (3) of this section;

(4) exemptions in accordance with subsection (e)(5) and (6) of this section;

(5) personnel requirements in accordance with subsection (f)(2) and (3) of this section;

(6) equipment standards in accordance with subsection (g)(6), (9), and (15) of this section;

(7) having a quality assurance program in accordance with subsection (k) of this section (lead interpreting physician and interpreting physician are not required), and the applicable portions of subsections (k)(1) and (2) of this section;

(8) performing AEC, kVp, focal spot condition, HVL, and dosimetry tests in accordance with subsection (l)(5)(A)-(D) and (F) of this section;

(9) the applicable portions concerning mobile services in accordance with subsection (l)(8) of this section;

(10) the applicable portions of the quality assurance test results in accordance with subsection (l)(9) of this section;

(11) having a medical physicist annual survey in accordance with subsection (l)(10) of this section;

(12) maintaining applicable records in subsection (r)(1)-(3);

(13) operating and safety procedures in accordance with subsection (s)(1) of this section;

(14) occupational dose limits in accordance with subsection (s)(2) of this section;

(15) technique chart in accordance with subsection (s)(3) of this section;

(16) receipt, transfer, disposal, calibration, and maintenance records in accordance with subsection (s)(4) and (7);

(17) viewing system in accordance with subsection (s)(5) of this section;

(18) exposure of individuals other than the patient in accordance with subsection (s)(6) of this section;

(19) certification requirements except for FDA accreditation in accordance with subsection (t) of this section;

(20) issuance of certification and specific terms and conditions of certification in accordance with subsections (u) and (v) of this section;

(21) responsibilities of a registrant in accordance with the applicable portions of subsection (w) of this section;

(22) expiration, termination, renewal, modification and revocation, and reciprocity of certification in accordance with subsections (x)-(vv) of this section;

(23) inspections in accordance with subsection (cc) of this section, except for subsection (cc)(1) of this section;

(24) technologist training in accordance with subsection (nn)(1) of this section;

(25) time requirements for record keeping in accordance with the applicable portions of subsection (nn)(3) of this section; and

(26) operating and safety procedures in accordance with the applicable portions of subsection (nn)(4) of this section.

(r) Records required to be kept with units authorized for mobile services.

(1) Copies of the following shall be kept with units authorized for mobile services:

(A) operating and safety procedures in accordance with subsection (r)(1) of this section;

(B) medical radiologic technologists' credentials;

(C) current quality control records for at least the last 90 calendar days for on-board processors in accordance with subsection (l)(1) of this section;

(D) current §§289.201 of this title, 289.202 of this title, 289.203 of this title, §289.205 of this title, §289.226 of this title, and §289.230 of this title.

(E) copy of certification of mammography system;

(F) certification of inspection or notice of failure from last inspection, if applicable; and

(G) copy of mammography facility accreditation.

(2) All other records required by this section shall be maintained at a specified location for inspection by the agency. Records may be maintained electronically in accordance with §289.201(d)(3) of this title.

(3) Records required at authorized use locations. Copies of the following shall be kept at authorized use locations. Records may be maintained electronically in accordance with §289.201(d)(3) of this title.

(A) operating and safety procedures in accordance with subsection (s)(1) of this subsection;

(B) quality assurance program in accordance with subsections (k), (l), and (m) of this section;

(C) credentials for interpreting physicians operating at that location in accordance with subsection (f)(1) of this section;

(D) credentials for medical radiologic technologists operating at that location in accordance with subsection (f)(2) of this section;

(E) credentials for medical physicists operating at that location in accordance with subsection (f)(3) of this section;

(F) quality control records in accordance with subsection (k)(2) of this section;

(G) continuing education and experience records for interpreting physicians, medical radiologic technologists, and medical physicists operating at that location in accordance with subsection (f)(1)(C), (2)(C), and (3)(C) of this section;

(H) current physicist annual survey of the mammography system;

(I) current §§289.201 of this title, 289.202 of this title, 289.203 of this title, 289.204 of this title, 289.205 of this title, §289.226 of this title, and §289.230 of this title;

(J) copy of certification of mammography system;

(K) certification of inspection or notification of failure, if applicable;

(L) records of receipts, transfers, and disposal in accordance with subsection (s)(4) of this section;

(M) calibration, maintenance, and modification records in accordance with subsection (s)(7) of this section; and

(N) copy of mammography facility accreditation.

(s) Other operating procedures.

(1) Operating and safety procedures. Each registrant shall have and implement written operating and safety procedures that shall be made available to each individual operating x-ray equipment, including any restrictions of the operating technique required for the safe operation of the particular x-ray system. These procedures shall include, but are not limited to, the items in subsection (nn)(4) of this section.

(2) Occupational dose limits and personnel monitoring. Except as otherwise exempted, all individuals who are associated with the operation of a radiation machine are subject to the occupational dose requirements of §289.202(f), (j), (l), and (m) of this title regarding dose limits to individuals and the personnel monitoring requirements of §289.202(q) of this title.

(3) Technique Chart. A chart or manual shall be provided or electronically displayed in the vicinity of the control panel of each machine that specifies technique factors to be utilized versus patient's anatomical size. The technique chart shall be used by all operators.

(4) Receipt, transfer, and disposal of mammographic machines. Each registrant shall maintain records showing the receipt, transfer, and disposal of mammographic machines. These records shall include the date of receipt, transfer, or disposal, the name and signature of the individual making the record, and the manufacturer's model and serial number from the control panel of the mammographic machine. Records shall be maintained for inspection by the agency until the certification of mammography system is terminated.

(5) Viewing system. Windows, mirrors, closed circuit television, or an equivalent system shall be provided to permit the operator to continuously observe the patient during irradiation. The operator shall be able to maintain verbal, visual, and aural contact with the patient.

(6) Exposure of individuals other than the patient. Only the staff and ancillary personnel required for the medical procedure or training shall be in the room during the radiation exposure.

(7) Calibration, maintenance, and modifications. Each registrant shall maintain records showing calibrations, maintenance, and modifications performed on each mammographic machine. These records shall include the date of the calibration, maintenance, or modification performed, the name of the individual making the record, and the manufacturer's model and serial number of the control panel of the mammographic machine. These records may be maintained in electronic format.

(t) Certification requirements. In addition to the requirements of §289.226(c) and if applicable, (g) of this title, each applicant shall comply with the following.

(1) Each person having a mammographic x-ray unit shall apply for and receive certification for the mammography system from the agency before beginning use of the mammographic x-ray unit on humans.

(2) An application for mammography certification shall be signed by a licensed physician. The signature of the applicant and the radiation safety officer (RSO) shall also be required.

(3) An applicant for certification must obtain a certification on each mammography system that is used by the applicant or the applicant's agent (for the purposes of the requirements of this paragraph, the word "used" refers to the entity other than the technologist that directs the application of radiation to humans). An application for mammography system certification may contain information on multiple mammography x-ray units. Each x-ray unit must be identified by referring to the machine's manufacturer, model number, and serial number of the control panel. The registrant shall maintain and provide proof of current accreditation and FDA certification status. If accreditation or FDA certification expires before the expiration of the certification of mammography systems, the registrant shall submit proof of renewed status to the agency.

(4) The applicant shall be qualified by reason of training and experience to use the mammographic machines for the purpose

requested in accordance with this chapter in such a manner as to minimize danger to public health and safety.

(5) Each applicant shall submit documentation of the following:

(A) personnel qualifications, including dates of licensure or certification, in accordance with subsection (f) of this section;

(B) model and serial number of each mammographic unit control panel;

(C) evidence of the following by a physicist meeting the requirements of subsection (f)(3) of this section:

(i) that each unit meets the equipment standards in subsection (g) of this section; and

(ii) the average glandular dose for one craniocaudal-caudal view for each unit does not exceed the value in subsection (l)(5)(F) of this section; and

(D) self-referral program information in accordance with subsection (h) of this section, if the facility offers self-referral mammography.

(6) Applications shall be processed in accordance with the following time periods.

(A) The first period is the time from receipt of an application by the Division of Licensing, Registration and Standards to the date of issuance or denial of the certification or a written notice outlining why the application is incomplete or unacceptable. This time period is 60 days.

(B) The second period is the time from receipt of the last item necessary to complete the application to the date of issuance or denial of the certification. This time period is 30 days.

(C) These time periods are exclusive of any time period incident to hearings and post-hearing activities required by the Government Code, Chapters 2001 and 2002.

(7) Notwithstanding the provisions of §289.204 of this title, reimbursement of application fees may be granted in the following manner.

(A) In the event the application is not processed in the time periods as stated in paragraph (6) of this subsection, the applicant has the right to request of the director of the Radiation Control Program full reimbursement of all application fees paid in that particular application process. If the director does not agree that the established periods have been violated or finds that good cause existed for exceeding the established periods, the request will be denied.

(B) Good cause for exceeding the period established is considered to exist if:

(i) the number of applications for certification to be processed exceeds by 15% or more the number processed in the same calendar quarter the preceding year;

(ii) another public or private entity utilized in the application process caused the delay; or

(iii) other conditions existed giving good cause for exceeding the established periods.

(C) If the request for full reimbursement authorized by subparagraph (A) of this paragraph is denied, the applicant may then request a hearing by appeal to the Commissioner of Health for a resolution of the dispute. The appeal will be processed in accordance with Formal Hearing Procedures, Chapter 1, §§1.21-1.34 of this title (relating to the Texas Board of Health).

(u) Issuance of certification of mammography systems. Issuance of certification of mammography systems shall be in accordance with §289.226(k) of this title.

(v) Specific terms and conditions of certification of mammography systems. Specific terms and conditions of certification of mammography systems shall be in accordance with §289.226(l) of this title.

(w) Responsibilities of registrant.

(1) In addition to the requirements of §289.226(m)(2) and (4)-(7) of this title, a registrant shall notify the agency in writing prior to any changes that would render the information contained in the application or the certification of mammography systems inaccurate. These include but are not limited to the following:

(A) name and mailing address;

(B) street address where machine(s) will be used; and

(C) mammographic x-ray units.

(2) Prior to employing the individuals listed in subparagraphs (A)-(E) of this paragraph, the registrant is required to verify and maintain copies of their qualifications. Registrants utilizing relief interpreting physicians or technologists from a temporary service do not need to notify the agency unless these personnel will be at the facility for a period exceeding four weeks. Documentation of qualifications of individuals listed in subparagraphs (A)-(E) of this paragraph and notification of a change in any of the following is required within 30 days of such change:

(A) radiation safety officer;

(B) lead interpreting physician;

(C) interpreting physicians;

(D) operators of equipment; or

(E) licensed medical physicist.

(3) Prior to operating mammography equipment at an additional use location, the registrant shall submit an application to the agency for approval and receive an amendment to the certification of mammography systems.

(4) The following criteria applies to new, replacement, or loaner units and units used for clinical trial evaluations.

(A) All mammography units shall have either current accreditation or have submitted an application to an accreditation body for review. If accreditation expires, mammograms shall cease to be performed until such time as the accreditation application is received by the accreditation body and approval is given. Mammography units that are loaner units as described in subparagraph (C) of this paragraph or units involved in clinical trial evaluations as described in subparagraph (D) of this paragraph are exempt from accreditation requirements.

(B) A facility with an existing certification of mammography system may begin using a new or replacement unit before receiving an updated certification if the paperwork regarding the unit has been submitted to the agency with a licensed medical physicist's report in accordance with subsection (l)(10) of this section verifying compliance of the new unit with the regulations. The physicist's report is required prior to using the unit on patients.

(C) Loaner units may be used on patients for 60 days without adding the unit to the certification. A licensed medical physicist's report verifying compliance of the loaner unit with this section shall be completed prior to use on patients. The results of the survey must be submitted to the agency with a cover letter indicating period of use. If the use period will exceed 60 days, the facility shall add the unit to their certification and a prorated fee will be assessed.

(D) Units involved in clinical trial evaluations may be used on patients for 60 days without adding the unit to an existing certification. A licensed medical physicist's report verifying compliance of the unit with this section shall be completed prior to use on patients. The results of the survey must be submitted to the agency with a cover letter indicating period of use. If the use period will exceed 60 days, the facility shall add the unit to their certification and a prorated fee will be assessed.

(E) No fees will be assessed for loaner units or evaluation periods of 60 days or less.

(F) Loaner units or units involved in clinical trial evaluations are exempt from the inspection requirement in subsection (cc)(1) of this section.

(5) Records of training and experience and all other records required by this section shall be maintained for review in accordance with subsection (nn)(3) of this section.

(x) Expiration of certification of mammography systems.

(1) Except as provided by subsection (z) of this section, each certification of mammography systems expires at the end of the day in the month and year stated on the certificate of registration on the expiration date specified. Expiration of the certification of mammography systems does not relieve the registrant of the requirements of this chapter.

(2) If a registrant does not submit an application for renewal of the certification of mammography systems under subsection (z) of this section, as applicable, the registrant shall on or before the expiration date specified in the certification of mammography systems:

(A) terminate use of all mammography machines;

(B) submit a record of the disposition of the mammography units; and

(C) pay any outstanding fees in accordance with §289.204 of this title.

(y) Termination of certification of mammography systems. When a registrant decides to terminate all activities involving mammography machines authorized under the certification of mammography systems, the registrant shall:

(1) notify the agency immediately;

(2) request termination of the certification of mammography systems in writing;

(3) submit a record of the disposition of the mammography units;

(4) pay any outstanding fees in accordance with §289.204 of this title; and

(5) notify the agency of the film storage location of mammography patient's films.

(z) Renewal of certification of mammography systems.

(1) Application for renewal of certification shall be filed in accordance with this subsection and §289.226(c) and (g) of this title, as applicable.

(2) If a registrant files an application in proper form at least 30 days before the existing certification expires, such existing certification shall not expire until the application status has been determined by the agency.

(3) A certification for a mammographic unit is valid for three years from the date of issuance unless the certification of the facility is revoked prior to such deadlines. This is effective for certificates issued after September 1, 1997.

(A) If a registrant fails to renew the certification by the required date, the registrant may renew the certification on payment of the annual fee and a late fee. If the certification is not renewed before the 181st day after the date on which the certification expired, the registrant must apply for an original certification under this section.

(B) A mammography system may not be used after the expiration date of the certification unless the holder of the expired certification has made a timely and sufficient application for renewal of the certificate as provided in this subsection and §289.226(c) and (g) of this title, as applicable.

(aa) Modification and revocation of certification of mammography systems. Modification and revocation of certification of mammography systems shall be in accordance with §289.226(q) of this title.

(bb) Reciprocal recognition of out-of-state certificates of registration. Mammographic x-ray units will not be granted reciprocal recognition and must comply with the requirements of this section.

(cc) Inspections. In addition to the requirements of §289.201(e) of this title, the following applies to inspections of mammography systems.

(1) The agency shall inspect each mammography system that receives a certification in accordance with this chapter not later than the 60th day after the date the certification is issued.

(2) The agency shall inspect, at least once annually, each mammography system that receives a certification.

(3) To protect the public health, the agency may conduct more frequent inspections than required by this subsection.

(4) The agency shall make reasonable attempts to coordinate inspections in this section with other inspections required in accordance with this chapter for the facility where the mammography system is used.

(5) After each satisfactory inspection, the agency shall issue a certificate of inspection for each mammography system inspected. The certificate of inspection shall be posted at a conspicuous place on or near the place where the mammography system is used. The certificate of inspection shall include the following:

(A) specific identification of the mammography system inspected;

(B) the name and address of the facility where the mammography system was used at the time of the inspection; and

(C) the date of the inspection.

(6) Any Severity Level I violation involving a mammography system, found by the agency, in accordance with §289.205 of

this title, constitutes grounds for posting notice of failure of the mammography system to satisfy agency requirements.

(A) Notification of such failure shall be posted:

(i) on the mammography x-ray unit at a conspicuous place if the violation is machine-related; or

(ii) near the place where the mammography system practices if the violation is personnel-related; and

(iii) in a sufficient number of places to permit the patient to observe the notice.

(B) The notice of failure shall remain posted until the facility is authorized to remove it by the agency. A facility may post documentation of corrections of the violations submitted to the agency along with the notice of failure until approval to remove the notice of failure is received from the agency.

(7) The agency shall require registrants who receive a severity Level I violation to notify patients on whom the facility performed a mammogram during the 30 days preceding the date of the inspection that revealed the failure. The facility shall:

(A) inform the patient that the mammography system failed to satisfy the agency's certification standards;

(B) recommend that the patient have another mammogram performed at a facility with a certified mammography system; and

(C) list the three facilities closest to the original testing facility that have a certified mammography system.

(8) In addition to the requirements of paragraph (7) of this subsection, the agency may require a facility to notify a patient of any other failure of the facility's mammography system to meet the agency's certification standards.

(9) The patient notification shall include the following:

(A) explanation of the mammography system failure to the patient; and

(B) the potential consequences to the mammography patient.

(10) The registrant shall maintain a record of the mammography patients notified in accordance with paragraphs (7) and (8) of this subsection for inspection by the agency. The records shall include the name and address of each mammography patient notified, date of notification, and a copy of the text sent to the individual.

(dd) Accreditation of mammography facilities.

(1) All mammography facilities shall be accredited by an authorized FDA accreditation body. All facilities applying for and receiving accreditation through the agency shall comply with §289.201(c), (h)-(j) and (l)-(n) of this title, §289.203 of this title, §289.205 of this title, and subsections (f) and (g), (i)-(o), (s), (w), (cc), (ee), (hh) and (nn)(1)-(4) of this section.

(2) In order to be accredited by the agency, the applicant shall submit an application for accreditation on forms and in accordance with accompanying instructions prescribed by the agency.

(A) Each application shall be signed by a licensed physician.

(B) The agency may at any time after the filing of the original application, require further statements in order to enable the agency to determine whether the accreditation document should be issued, denied, modified, or revoked.

(C) Applications and documents submitted to the agency may be made available for public inspection except that the agency may withhold any document or part thereof from public inspection in accordance with §289.201(n) of this title.

(D) Each application for accreditation shall be accompanied by the fee prescribed in subsection (ee) of this section.

(E) Each applicant shall submit documentation of the following:

(i) personnel qualifications, training, and experience in accordance with subsection (f) of this section;

(ii) model and serial number of each mammographic unit control panel; and

(iii) evidence that no earlier than six months before the date of application for accreditation by the facility, a medical physicist performed the following:

(I) a survey in accordance with subsection (l)(10) of this section; and

(II) a mammography equipment evaluation in accordance with subsection (l)(11) of this section if performed after the survey specified in subclause (I) of this clause.

(F) Upon notification by the agency, each applicant shall directly submit clinical and phantom images to the image review board in accordance with their procedures.

(ee) Fees for accreditation of mammography facilities.

(1) Each new and renewal application for accreditation of a mammography facility shall be accompanied by a nonrefundable fee. No application will be accepted for filing or processed prior to payment of the full amount specified in paragraph (4) of this subsection.

(2) The nonrefundable fee in accordance with paragraph (4) of this subsection shall be paid every three years for each accredited mammography unit.

(3) Fee payments shall be in cash or by check or money order made payable to the Texas Department of Health. The payments may be mailed or made by personal delivery to the Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189.

(4) Fees for accreditation of mammography facilities are as follows.

(A) The accreditation fee for the first mammography unit is $720.

(B) The accreditation fee for each additional mammography unit is $345.

(C) The fee for re-evaluation of clinical images due to failure during the accreditation process is $220 per unit.

(D) The fee for re-evaluation of phantom images due to failure during the accreditation process is $110 per unit.

(E) The fee for an additional required mammography review is $250 per unit.

(F) Each facility for which an on-site visit due to three denials of accreditation is required will be charged for actual expenses

to the agency arising from such visit. Payment of this fee shall be made within 60 days following the date of invoice.

(ff) Issuance of accreditation of a mammography facility. An accreditation document will be issued when the mammography facility meets the requirements of subsections (dd) and (ee) of this section and becomes accredited by the agency. In order for an accreditation to be issued, the agency must be notified by the image review board that the applicant met the criteria for clinical images, phantom images, and processor quality control.

(gg) Specific terms and conditions of accreditation of mammography facilities.

(1) Each accreditation document issued in accordance with this section shall be subject to the applicable provisions of the Act, now or hereafter in effect, and to the applicable requirements and orders of the agency.

(2) No accreditation document issued by the agency under this section shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, to any person.

(hh) Responsibilities of an accredited facility. A facility shall notify the agency of any changes that would render the information contained in the application inaccurate.

(ii) Expiration and renewal of accreditation of mammography facilities.

(1) The accreditation shall expire on the date specified on the accreditation document.

(2) Application for renewal of accreditation shall be filed in accordance with subsections (dd) and (ee) of this section.

(3) If a mammography facility files an application for renewal in proper form at least 30 days before the existing accreditation expires, the facility may continue to perform mammography under approval by the FDA until the review process is complete and accreditation status has been determined by the agency.

(4) Accreditation for a mammographic facility is valid for three years from the date of issuance, unless accreditation of the facility is revoked prior to such deadline.

(5) Issuance of renewal of accreditation shall be in accordance with subsection (ff) of this section.

(jj) Denial of accreditation of mammography facilities.

(1) Any application for accreditation may be denied by the agency when the applicant fails to meet established criteria for accreditation or fails to respond to requests for information. Agency action on an application will be abandoned due to lack of response by the applicant. Abandonment of such actions does not provide an opportunity for a hearing; however, the applicant retains the right to resubmit the application at any time.

(2) Before the agency denies an application for accreditation, the agency shall give notice of the intent to deny, and the facts warranting the denial, and shall afford the applicant an opportunity for a hearing. The notice shall be given by personal service or by certified mail, return receipt requested. If no request for a hearing is received by the director of the Radiation Control Program within 30 days of personal service or the date of mailing, the agency may proceed to deny. The applicant shall have the burden of proof showing cause why the application should not be denied.

(kk) Modification and revocation of accreditation of mammography facilities. Modification and revocation of accreditation of mammography facilities shall be in accordance with §289.205 of this title.

(ll) On-site facility visit and random film checks. Each accredited facility shall:

(1) afford the agency, at all reasonable times, opportunity to audit the facility where mammography equipment or associated equipment is used or stored;

(2) make available to the agency for inspection, upon reasonable notice, records maintained in accordance with this chapter; or

(3) make available to the image review board, random clinical images upon request by the agency.

(mm) Complaints. Each registrant shall do the following:

(1) establish a written procedure for collecting and resolving consumer complaints;

(2) maintain a record of each serious complaint received by the facility in accordance with subsection (nn)(3) of this section;

(3) report unresolved serious complaints to the agency within (30) days of receiving the complaint; and

(4) post the following address where complaints may be filed with the Texas Department of Health, Bureau of Radiation Control, Mammography Accreditation Program, 1100 West 49th Street, Austin, Texas 78756-3189;

(nn) Appendices.

(1) Subjects to be included in mammography training for medical radiologic technologists shall include, but not be limited to, the following:

(A) anatomy and physiology of the female breast that shall include:

(i) mammary glands;

(ii) external anatomy;

(iii) retromammary space;

(iv) central portion;

(v) Cooper's ligament;

(vi) vessels, nerves, lymphatics; and

(vii) breast tissue:

(I) fibro-glandular;

(II) fibro-fatty;

(III) fatty; and

(IV) lactating;

(B) mammography positioning that shall include actual positioning of patients and/or models as follows:

(i) craniocaudal;

(ii) mediolateral oblique;

(iii) supplemental;

(iv) magnification;

(v) errors in positioning;

(vi) postoperative breast and the augmented breast;

(vii) breast localization and specimen radiography; and

(viii) use of compression;

(C) technical factors;

(D) film evaluation and critique;

(E) pathology; and

(F) quality assurance program.

(2) Subjects to be included in mammography training for interpreting physicians shall include, but not be limited to, the following:

(A) radiation physics, including radiation physics specific to mammography;

(B) radiation effects;

(C) radiation protection; and

(D) interpretation of mammograms. This shall be under the direct supervision of a physician who meets the requirements of subsection (f)(1) of this section.

(3) Time requirements for record keeping. Time requirements for record keeping shall be in accordance with the following chart.

Figure: 25 TAC §289.230(nn)(3)

(4) Operating and safety procedures. The registrant's operating and safety procedures shall include, but are not limited to, the following procedures as applicable:

(A) ordering x-ray exams in accordance with §289.201(a) of this title; and

(B) occupational dose requirements in accordance with §289.202(f), (j), and (l)-(n) of this title;

(C) posting of a radiation area in accordance with §289.202(g) of this title;

(D) personnel monitoring requirements in accordance with §289.202(p)-(r) of this title;

(E) posting notices to workers in accordance with §289.203(b) of this title;

(F) instructions to workers in accordance with §289.203(c) of this title;

(G) notifications and reports to individuals in accordance with §289.203(d) of this title;

(H) credentialing requirements for lead interpreting physicians, interpreting physicians, medical radiologic technologists, and medical physicists in accordance with subsection (f) of this section;

(I) self-referral mammography in accordance with subsection (h) of this section;

(J) retention of clinical images in accordance with subsection (i)(4) of this section;

(K) quality assurance program in accordance with subsections (k), (l)(12) and (14), and (m) of this section;

(L) image quality and corrective action for images of poor quality in accordance with subsection (k)(1)(B)(i) of this section;

(M) repeat analysis in accordance with subsection (l)(3)(B) of this section;

(N) procedures and techniques for mammography patients with breast implants;

(O) use of a technique chart in accordance with subsection (s)(3) of this section;

(P) exposure of individuals other than the patient in accordance with subsection (s)(6) of this section; and

(Q) procedure to handle complaints in accordance with subsection (mm) of this section.

(5) Phantom image scoring protocol. Each of the following object groups are to be scored separately. In order to receive a passing score on the phantom image, all three test object groups must pass. A failure in any one of the areas results in a phantom failure.

(A) Fibers. A score of 4.0 for fibers is required to meet the evaluation criteria. The diameter size of fibers are 1.56 mm, 1.12 mm, 0.89 mm, 0.75 mm, 0.54 mm, and 0.40 mm. Score the fibers as follows.

(i) Begin with the largest fiber and move down in size, adding one point for each full fiber until a score of zero or one half is given. Stop counting at the first point where you lose visibility of objects.

(ii) If the entire length of the fiber can be seen and its location and orientation are correct, that fiber receives a score of one.

(iii) If at least half, but not all, of the fiber can be seen and its location and orientation are correct, that fiber receives a score of one half.

(iv) If less than one half of a fiber can be seen or if the location or orientation are incorrect, that fiber receives a score of zero.

(v) After determining the last fiber to be counted, look at the overall background for artifacts. If there are background objects that are fiber-like in appearance and are of equal or greater brightness than the last visible half or full fiber counted, subtract the last half or full fiber scored.

(B) Speck groups. A score of 3.0 for speck groups is required to meet the evaluation criteria. Diameter sizes of speck groups are 0.54 mm, 0.40 mm, 0.32 mm, 0.24 mm, and 0.16 mm. There are six specks per group. Score the speck groups as follows.

(i) Begin with the largest speck group and move down in size adding one point for each full speck group until a score of one half or zero is given, then stop.

(ii) If at least four of the specks in any group are visualized, the speck group is scored as one.

(iii) If two or three specks in a group are visualized, the score for the group is one half.

(iv) If one speck or no specks from a group are visualized, the score is zero.

(v) After determining the last speck group to receive a full or one-half point, look at the overall background for artifacts. If there are speck-like artifacts within the insert region of the phantom that are of equal or greater brightness than individual specks counted in the last visible half or full speck group counted, subtract the artifact

speck from the observed specks, one by one. Repeat the scoring of the last visible speck group after these deductions.

(C) Masses. A score of 3.0 is required to meet the evaluation criteria. Diameter sizes of masses are 2.00 mm, 1.00 mm, 0.75 mm, 0.50 mm, and 0.25 mm. Score the masses as follows.

(i) Begin with the largest mass and add one point for each full mass observed until a score of one half or zero is assigned.

(ii) Score one for each mass that appears as a minus density object in the correct location that can be seen clearly enough to observe round, circumscribed borders.

(iii) Score one half if the mass is clearly present in the correct location, but the borders are not visualized as circular.

(iv) After determining the last full or half mass to be counted, look at the overall background for artifacts. If there are background objects that are mass-like in appearance and are of equal or greater visibility than the last visible mass, subtract the last full or half point assigned from the original score.

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 March 22, 1999.

TRD-9901710
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: April 28, 1999
Proposal publication date: December 4, 1998
For further information, please call: (512) 458-7236

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part VI. Texas Department of Criminal Justice

Chapter 159. Special Programs

37 TAC §159.13

The Texas Department of Criminal Justice (Department) adopts new §159.13 concerning a memorandum of understanding between the Department and the Texas Education Agency to provide educational services to released offenders without changes to the proposed text as published in the February 5, 1999, issue of the *Texas Register* (24 TexReg 684). The memorandum of understanding is designed to offer releasees choices and opportunities, within the realm of educational services, to remain outside prison and to integrate smoothly and successfully into the community. The new section adopts by reference 19 TAC §89.1311 effective October 1, 1998, (23 TexReg 9341).

Pursuant to the Texas Government Code, §508.318, the Texas Education Agency and the Department shall set forth the respective responsibilities of the board and the agency in implementing a continuing education program to increase the literacy of releasees.

No comments were received regarding adoption of the new section as proposed.

The new section is adopted under Texas Government Code, §492.013, which grants general rulemaking authority and the Texas Government Code, §508.318, as added by the 75th Texas Legislature, 1997, Chapter 165, §12.01, which authorizes the Department and the Texas Education Agency to adopt a memorandum of understanding that establishes the respective responsibilities of the board and the agency in implementing a continuing education program to increase the literacy of releasees.

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 March 22, 1999.

TRD-9901692
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Effective date: April 11, 1999
Proposal publication date: February 5, 1999
For further information, please call: (512) 463–9693

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 48. Community Care for Aged and Disabled

Subchapter J. 1915(c) Medicaid Home and Community-based Waiver Services for Aged and Disabled Adults Who Meet Criteria for Alternatives to Nursing Facility Care

40 TAC §48.6003, §48.6030

The Texas Department of Human Services (DHS) adopts an amendment to §48.6030 with changes to the proposed text published in the January 22, 1999, issue of the *Texas Register* (24 TexReg 377). An amendment to §48.6003 is adopted without changes and will not be republished.

Justification for the amendment to §48.6003 is that currently individuals with greater care needs must enter a nursing facility to have their needs met when their cost of care exceeds greater than 95% of what it would cost in a nursing facility. This amendment would allow such individuals to have the same funding available in the community as available for the individual's care in a nursing facility, 100% of the individual's actual Texas Index for Level of Effort (TILE) payment rate. Additionally, this would divert admissions from nursing facilities and provide the affordability and an available choice for individuals to choose to remain in the community.

The amendment to §48.6003 will function by allowing an individual's service plan in the 1915(c) Medicaid waiver program to have the same cost limits as individuals in nursing facilities, not to exceed 100% of the individual's actual Texas Index for Level of Effort payment rate.

Justification for the amendment to §48.6030 is that home and community support services (HCSS) agencies commented that it would not be cost effective to maintain a parent or branch office under licensure in each region. Additionally, support was received from HCSS agencies for serving CBA clients under the licensed home health category of licensure, as this category of licensure parallels the CBA program expectations. This was clarified by specifying that CBA services must be served under the licensed home health category of licensure in §48.6030(3).

The amendment to §48.6030 will function by establishing HCSS agencies' qualifications for contracting with DHS to provide (CBA) services. The amendment deletes the requirement for HCSS agencies to be licensed and certified. It maintains the requirement that services must be provided through the licensed home health category of licensure and requires the HCSS agency license to cover each county specified in the DHS contract.

The department received the following comments regarding proposed rule §48.6030 from North Central Texas Home Care, Visiting Nurses of Del Rio, Inc., and the Texas Association of Home Care.

Comment: In opposition to having a parent or branch office physically located in each region due to the cost to agencies. Texas Association of Home Care recommended that either this requirement be deleted or that language be replaced with the current handbook language which states that agencies may have a physical location in the region or that records must be made available in the region.

Response: The department agrees and has deleted the requirement, proposed as §48.6030(2), for a parent or branch office in each region.

Comment: In support of the proposed deletion of the requirement that agencies must have a licensed and certified category of licensure.

Response: The department agrees.

The department received the following comment from the Texas Association of Home Care regarding proposed §48.6030(4).

Comment: In support of CBA services being delivered through the "licensed home health" category of licensure.

Response: The department agrees and has clarified in §48.6030(3) the category of licensure needed for HCSS agencies.

The department received the following comment regarding proposed rule §48.6003 from the Texas Association of Home Care.

Comment: In support of raising the CBA client's individual cost ceiling from 95% to 100%. This could actually recognize additional cost savings since a person costing between 95% and 100% could otherwise be denied community care and forced to spend more in the nursing home.

Response: The department agrees and recommends adoption as proposed.

Comment: The department received a letter from an individual in support of the rules as written.

The amendments are adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs; and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendments implement the Human Resources Code, §§22.001- 22.030 and §§32.001-32.042.

§48.6030. Home and Community Support Services Provider Qualifications.

To be qualified as a home and community support services (HCSS) provider to deliver Community Based Alternatives (CBA) services under contract with the Texas Department of Human Services (DHS), a HCSS agency must:

(1) have a separate contract to provide CBA services in each DHS region in which services are to be delivered;

(2) deliver CBA services through the licensed home health category of licensure;

(3) have the counties in the DHS contract for CBA services included in the identified service area on file at the Texas Department of Health (TDH) with the licensed home health category of licensure; and

(4) be authorized by the secretary of state to do business in the State of Texas (if an out-of-state corporation).

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 March 19, 1999.

TRD-9901673
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: April 8, 1999
Proposal publication date: January 22, 1999
For further information, please call: (512) 438–3765

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REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by the 75th Legislature, Regular Session, House Bill 1 (General Appropriations Act) Art. IX, Section 167. 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.

Amended Agency Rule Review Plan

Children's Trust Fund of Texas

Filed: March 23, 1999

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Proposed Rule Reviews

Advisory Commission on State Emergency Communications

Title 1, Part XII

The Advisory Commission on State Emergency Communications proposes to readopt Chapter 251, Regional Plans-Standards, in accordance with the Appropriations Act, Article IX, Section 167. The report of the rule review of this Chapter was presented at the March 12 Commission meeting.

The agency's reasons for adopting the rules contained in this chapter continue to exist.

The Advisory Commission on State Emergency Communications is contemporaneously proposing amendments to §§251.3, 251.5, 251.6 and new §251.10 elsewhere in this issue of the *Texas Register*.

The Advisory Commission on State Emergency Communications will accept comments for 30 days following the publication of this rule review in the *Texas Register*. Comments on the proposal may be submitted to: James D. Goerke, Executive Director, Advisory Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701; phone (512) 306-6911; or fax (512) 305-6937.

This notice is in accordance with the Appropriations Act, Article IX, Section 167.

TRD-9901697
James D. Goerke
Executive Director
Advisory Commission on State Emergency Communications
Filed: March 22, 1999

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Public Utility Commission of Texas

Title 16, Part II

The Public Utility Commission of Texas files this notice of intention to review §23.38 relating to Standards for Granting of Certificates of Operating Authority and Service Provider Certificates of Operating Authority pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167). Project Number 19582 has been assigned to the review of this section.

As part of this review process, the commission is proposing the repeal of §23.38 and is proposing new §§26.109 relating to Standards for Granting of Certificates of Operating Authority (COAs), 26.111 relating to Standards for Granting of Service Provider Certificates of Operating Authority (SPCOAs), and 26.113 relating to Amendment of Certificates of Operating Authority (COAs) or Service Provider Certificates of Operating Authority (SPCOAs) to replace §23.38. The proposed repeal and new sections may be found in the Proposed Rules section of the *Texas Register*. As required by Section 167, the commission will accept comments regarding whether the reason for adopting the rule continues to exist in the comments filed on the proposed new sections.

Any questions pertaining to this notice of intention to review should be directed to Rhonda Dempsey, Rules Coordinator, Office of Regulatory Affairs, Public Utility Commission of Texas, 1701 North Congress Avenue, Austin, Texas 78711-3326 or at voice telephone (512) 936-7308.

16 TAC §23.38. Standards for Granting of Certificates of Operating Authority and Service Provider Certificates of Operating Authority.

TRD-9901678
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 22, 1999

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The Public Utility Commission of Texas files this notice of intention to review §23.131, §23.133, §23.134, §23.136, §23.138, §23.142, §23.143, §23.144, §23.145, §23.147, §23.148 and §23.150 of this title relating to the Universal Service Fund pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167). Project Number 20428 has been assigned to the review of these rule sections.

As part of this review process, the commission is proposing the repeal of §23.131, §23.133, §23.134, §23.136, §23.138, §23.142, §23.143, §23.144, §23.145, §23.147, §23.148 and §23.150 and is proposing new §26.401, §26.403, §26.404, §26.406, §26.408, §26.412, §26.413, §26.414, §26.415, §26.417, §26.418 and §26.420 relating to the Texas Universal Service Fund (TUSF) in Chapter 26, Substantive Rules Applicable to Telecommunications Service Providers in Chapter 26 to replace these sections. The proposed new sections and the proposed repeal may be found in the Proposed Rules section of the *Texas Register*. The commission will accept comments on the Section 167 requirement in the comments filed on the proposed new sections.

Any questions pertaining to this notice of intention to review should be directed to Rhonda Dempsey, Rules Coordinator, Office of Regulatory Affairs, Public Utility Commission of Texas, 1701 N. Congress Avenue, Austin, Texas 78711-3326 or at voice telephone (512) 936-7308.

§23.131. Texas Universal Service Fund (TUSF).

§23.133. Texas High Cost Universal Service Plan (THCUSP).

§23.134. Small and Rural Incumbent Local Exchange Carrier (ILEC) Universal Service Plan.

§23.136. Implementation of the Public Utility Regulatory Act §56.025.

§23.138. Additional Financial Assistance (AFA).

§23.142. Lifeline Service and Link Up Service Programs.

§23.143. Tel-Assistance Service.

§23.144. Telecommunications Relay Service.

§23.145. Specialized Equipment Distribution.

§23.147. Designation of Local Exchange Carriers as Eligible Telecommunications Providers to Receive Texas Universal Service Funds (TUSF).

§23.148. Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds.

§23.150. Administration of Texas Universal Service Fund (TUSF).

TRD-9901657
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 17, 1999

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Teacher Retirement System of Texas

Title 34, Part III

(Editor's Note: Due to an error by the Texas Register, this notice was omitted from the March 19, 1999, issue of the Texas Register (24 TexReg 2033)).

The Teacher Retirement System of Texas (TRS) files this notice of intention to review Title 34, Part III, Texas Administrative Code, Part III, Chapter 25. This review and consideration is in accordance with the General Appropriations Act, House Bill 1, 75th Legislature, Article IX, §167.

In accordance with the agency rule review plan published in the August 21, 1998, issue of the *Texas Register*, the Policy Committee of the Board of Trustees has conducted an initial review of Title 34, Part III, Texas Administrative Code, Chapter 25. The review was conducted in an open meeting and included an assessment of whether the reasons for adopting the rules continues to exist. Now that the initial review is completed by the Policy Committee, the full Board will review Chapter 25 to make a determination as to whether the reasons for adopting or readopting these rules continue to exist. The final review is anticipated to be completed at the Board Meeting scheduled for April 23, 1999.

As part of this review process, TRS proposes amendments to §§25.1, 25.2, and 25.10, concerning service eligible for membership, §25.46 concerning unreported service, §§25.61, 25.64, and 25.66 concerning military service, §25.75, concerning veteran's service credit, §§25.82, 25.84, 25.85, and 25.87 concerning the purchase of credit for out of state service, §25.113 concerning the transfer of credit between TRS and ERS, §§25.121-25.123, concerning the verification of service, §§25.131-25.133, concerning creditable time and school year, §25.151 concerning developmental leave, and §25.183 and §25.185 concerning installment payments to purchase service credit. The proposed amendments may be found in the Proposed Rules section of the March 19, 1999, issue of the *Texas Register* (24 TexReg 1955). TRS will accept comments on the §167 requirement as to whether the reason for adopting these sections continues to exist in the comments filed on the proposed amendments.

TRS is also proposing the repeal of §§25.7, 25.8, 25.51-25.55, 25.62, 25.63, 25.65, 25.83, 25.103-25.105, 25.109-25.112, 25.125, and 25.161. The proposed repeals may be found in the Proposed Rules section of the March 19, 1999, issue of the *Texas Register* (24 TexReg 1955). TRS will accept comments on the §167 requirement as to whether the reason for adopting these sections continues to exist in the comments filed on the proposed repeals. TRS is not proposing any changes to §§25.3-25.6, 25.21, 25.22, 25.25, 25.26, 25.28, 25.30-32, 25.41-25.45, 25.61, 25.64, 25.67, 25.71-25.74, 25.81, 25.86, 25.124, 25.152, 25.171, 25.172, 25.181, 25.182, 25.184, 25.186-25.190. TRS will accept comments regarding the §167 requirement as to whether the reasons for adopting these sections continues to exist.

All comments and/or questions should be directed through Charles L. Dunlap, Executive Director, Teacher Retirement System of Texas, 1000 Red River, Austin, Texas 78701 (512) 397-6400.

TRD-9901368
Charles Dunlap
Executive Director
Teacher Retirement System of Texas
Filed: March 5, 1999

♦ ♦ ♦

Adopted Rule Review

Texas State Soil and Water Conservation Board

Title 31, Part XVII

The State Soil and Water Conservation Board adopts without changes, under Title 31, Part XVII, Chapter 517, Financial Assistance, Chapter 519, Technical Assistance, Chapter 521, Agricultural Water Conservation and Chapter 523, Agricultural and Silvicultural Water Quality Management in accordance with Article IX, section 167 of the Appropriation's Act.

No comments were received regarding the adoption of these chapters.

TRD-9901677
Robert G. Buckley
Executive Director
Texas State Soil and Water Conservation Board
Filed: March 19, 1999

♦ ♦ ♦

TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is 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. Multiple graphics in a rule are designated as “Figure 1” followed by the TAC citation, “Figure 2” followed by the TAC citation.

Figure: 1 TAC 251.5(f)(1)

Advisory Commission on State Emergency Communications (ACSEC)

CAPITAL RECOVERY ASSET DISPOSAL NOTICE

Complete and submit with FSR for each Capital Recovery item removed from the Capital Asset Recovery Schedule.

Description: _____

Identifying Number: _____

Date Disposed: _____

Original Recovery Value: _____

Total Amount Recovered at Date of Disposal: _____

Cost of Item Purchased to Replace this Asset: _____

Surplus/(Shortage) of Recovered Funds: _____

How was asset disposed and were any funds generated by disposal?:

_____

_____

Reason for Disposal (Check One):

___ Scheduled Replacement

____Unscheduled Replacement

___ Damaged/Destroyed

___ Failed prematurely

Completed By: _____

Date: _____

Regional Planning Commission:

Figure: 1 TAC 251.5(i)

Advisory Commission on State Emergency Communications (ACSEC)

ANNUAL CERTIFICATION OF 9-1-1 PROGRAM ASSETS

This form shall be completed once each fiscal year by the Regional Planning Commission (RPC) Executive Director (or their designee) and submitted to the Advisory Commission on State Emergency Communications (ACSEC). Included with the completed form shall be a Capital Asset Recovery Schedule.

By signing below, I certify that to the best of my knowledge the following statements are accurate and true:

1. The RPC has physically accounted for all 9-1-1 Program assets listed on the attached Capital Asset Recovery Schedule (as defined by ACSEC Rule 251.6) or has received certification of a physical accounting from the responsible organization for each asset in their possession.

2. All listed capital assets are in the possession of the listed responsible person and are in working condition.

3. That the attached Capital Asset Recovery Schedule has been corrected to reflect an accurate listing of capital assets as of this date.

Signed: _____

Print Name: _____

Regional Planning Commission: _____

Date: _____

Figure: 4 TAC 17.51(13)

GO TEXAN.

Figure: 4 TAC
17.60(a)(3)

GO TEXAN.
NativeScape

Figure: 22TAC Chapter 309-Preamble.

NARROW THERAPEUTIC INDEX DRUGS - FY98 DATA						
Drug	**Source/ Type**	**Total # of Claims**	**Total Amount Paid**	**Price per Claim**	**Cost Difference per Claim**	**Cost Dif. times # of Generic**
Phenytoin						
	Generic	3,881	$123,946.57	$31.94		
	Brand	172,017	$5,568,743.97	$32.37	$0.44	$1,693.89
Warfarin						
	Generic	16,683	$421,670.46	$25.28		
	Brand	105,364	$2,784,688.56	$26.43	$1.15	$19,248.25
Theophylline						
	Generic	43,748	$552,160.08	$12.62		
	Brand	7,443	$237,963.21	$31.97	$19.35	$846,525.20
Carbamazepine						
	Generic	50,083	$974,485.37	$19.46		
	Brand	87,222	$3,982,801.18	$45.66	$26.21	$1,312,444.89
Lithium						
	Generic	23,517	$224,636.74	$9.55		
	Brand	12,060	$342,596.63	$28.41	$18.86	$443,426.69
Valproic Acid						
	Generic	20,472	$695,686.50	$33.98		
	Brand	4,082	$526,434.50	$128.96	$94.98	$1,944,481.82
					Total estimated increase	**$4,567,820.74**

Figure: 25 TAC §205.4(l)(1)(D)

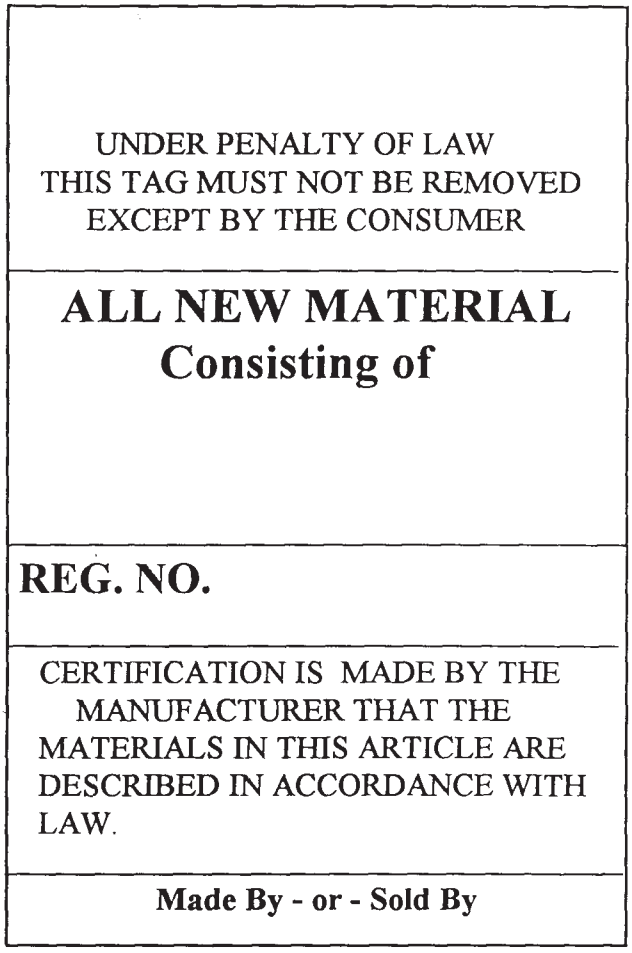

Figure: 25 TAC §205.4(l)(2)(C)

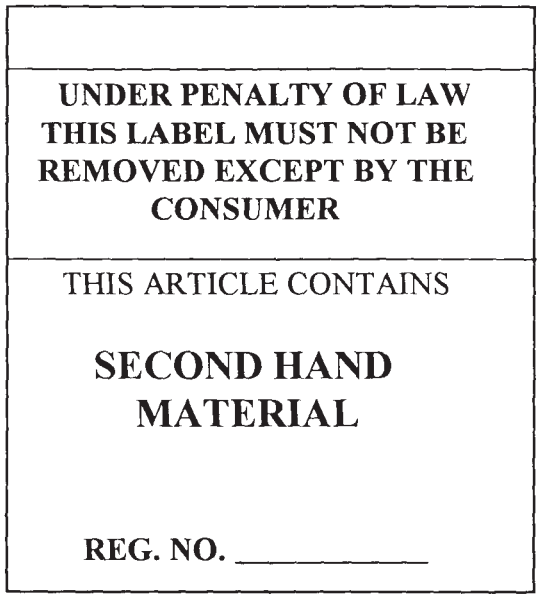

Figure: 25 TAC §205.4(l)(3)(G)

UNDER PENALTY OF LAW THIS TAG SHALL NOT BE REMOVED EXCEPT BY THE CONSUMER

Certification is made that this
SECOND HAND (USED) ARTICLE
SANITIZED

This Article of Bedding Treated by a Germicidal Process Approved by the Texas Department of Health

Lot No._____Label No. _____
Article _____
Method _____
Date _____

Reg No. _____

Figure: 25 TAC §205.4(l)(4)

ALL NEW MATERIAL **Sisal Pads** **Reg. No._____**

ALL NEW MATERIAL **Polyester Fiber** **Reg. No. _____**

Figure: 25 TAC §205.11(b)(1)

Schedule A

Permit Fee:	Number of Articles:
$100	Less than 1,000
$150	1,000 to 4,999
$200	5,000 to 9,999
$300	10,000 to 14,999
$400	15,000 to 24,999
$600	25,000 to 50,000
$600 plus $.03 for each article	Over 50,000

Figure: 25 TAC §205.11(b)(3)

Schedule B

Permit Fee:	Number of Articles:
$100	Less than 1,000
$125	1,000 to 4,999
$150	5,000 to 9,999
$200	10,000 to 14,999
$250	15,000 to 24,999
$350	25,000 to 49,999
$600	50,000 to 100,000
$600 plus $.01 for each article	Over 100,000

gra

Figure: 25 TAC §289.205(j)(3)(B)

TABLE I

BASE ADMINISTRATIVE PENALTIES

Table IA - Base Amounts

Type of User	Amount
All licensees, registrants, or certified industrial radiographers	$ 5,000
Other persons not licensed, registered, or certified	$10,000

Table IB - Percentage of Base Amounts Based on Severity Level of Violation

Severity Level	Percent of Amount Listed In Table IA
I	100
II	80
III	50
IV	15
V	5

Figure: 25 TAC §289.230(c)(47)

$$OD = \log_{10} \frac{lo}{lt}$$

where l_o = light intensity incident on the film and
l_t = light transmitted through the film.

Figure: 25 TAC §289.230(l)(5)(C)(*ii*)

TABLE I

Focal Spot Tolerance Limit

	Maximum Measured Dimensions	
Nominal Focal Spot Size (mm)	Width (mm)	Length (mm)
0.10	0.15	0.15
0.15	0.23	0.23
0.20	0.30	0.30
0.30	0.45	0.65
0.40	0.60	0.85
0.60	0.90	1.30

Figure: 25 TAC §289.230(l)(5)(D)

TABLE II

X-ray Tube Voltage (kilovolt peak) and Minimum HVL

Designed Operating Range (kV)	Measured Operating Voltage (kV)	Minimum HVL (mm of aluminum)
Below 50	20	0.20
	25	0.25
	30	0.30

Specific Subsection	Name of Record	Time Interval for Record Keeping
(k)(2)	Quality Assurance Records	2 years
	Films associated with Quality Assurance	1 year
(f)(1)(A)	Interpreting Physician Qualifications	Until termination of certification or 2 years after physician leaves facility
(f)(1)(C)	Interpreting Physician Continuing Education and Experience	6 years
(f)(2)(A)	Medical Radiologic Technologist Qualifications	Until termination of certification or 2 years after technolgist leaves facility
(f)(2)(C)	Medical Radiologic Technologist Continuing Education and Experience	6 years
(f)(3)(A)	Medical Physicist Qualifications	6 years
(f)(3)(C)	Medical Physicist Continuing Education and Experience	2 years
(g)(15)	FDA Variances	Until termination of certification or equipment is replaced
(l)(10)	Physicist Mammography Survey	7 years
(l)(11)	Physicist Mammography Equipment Evaluation	2 years
(m)(2)	Medical Outcomes Audit	2 years
(s)(4)	Records of Receipts, Transfer, and Disposal	Until termination of certification

Specific Subsection	Name of Record	Time Interval for Record Keeping
(s)(7)	Records of Calibrations, Maintenance, and Modifications Performed on Mammographic Machines	2 years
(cc)(5)	Certification of Inspection	Until termination of certification
(cc)(6)	Notice of Failure	Until termination of certification
(cc)(10)	Patient Notification	Until termination of certification
(mm)(2)	Complaints	2 years

Specific Subsection	Name of Record	Time Interval Required for Record Keeping
(e)	Receipt, Transfer, and Disposal	Until disposal is authorized by the agency
(f)(2)	Survey Instrument Calibrations	2 years
(g)	Quarterly Inventory	2 years
(h)	Utilization Logs	2 years
(i)	Inspection and Maintenance	2 years
(j)	Permanent Radiographic Installation Tests	2 years
(m)(1)(A) and (2)(A) and (n)(1)	Training and Certification Records	5 years
(q)	Individual Monitoring Devices	Until disposal is authorized by the agency
	Estimates of Exposure	Until disposal is authorized by the agency
	Direct-Reading Pocket or Electronic Personal Dosimeter Readings	2 years or until disposal is authorized by the agency if dosimeters were used to determine external radiation dose
	Pocket Dosimeter Calibrations	2 years
	Alarming Ratemeter Calibrations	2 years
(u)(4) and (v)(7)	Internal Audit Program	2 years

Specific Subsection	Name of Record	Time Interval Required for Record Keeping
(u)(4)(F) and (v)(7)(F)	Annual Refresher Training	2 years
(u)(5) and (v)(8)	Radiation Surveys	2 years or until disposal is authorized by the agency if a survey was used to determine an individual's exposure
(u)(6)(B)	Annual Evaluation of Enclosed X-Ray Systems	5 years
(u)(6)(C)(*i*)	Operating Instructions In Cabinet X-ray Systems	5 years
(u)(6)(C)(*ii*)	Tests of X-Ray Interlocks	5 years
(u)(6)(C)(*iii*)	Evaluation of Certified Cabinet X-Ray Systems	5 years
(v)(5)	Leak Tests	2 years
(v)(9)(B)	Annual Evaluation of Enclosed Sealed Source Systems	2 years
(v)(9)(C)	Test of Sealed Source Interlocks	2 years
(w)(10)	Records at Temporary Job Sites	During temporary job site operations

Figure: 25 TAC §289.259(m)

Part of Body	Column I* Dose in Rem	Column II* Dose in Rem
Whole body; head and trunk; active blood-forming organs; gonads; or lens of eye	0.005	0.5
Hands and forearms; feet and ankles; localized areas of skin averaged over areas no larger than 1 square centimeter (cm^2)	0.075	7.5
Other organs	0.015	1.5

* Dose limit is the dose above background from the product.

Figure: 25 TAC §289.259(w)

	AVERAGE[bcf]	MAXIMUM[bdf]	REMOVABLE[bcef]
NORM[a]	5,000 dpm/100 cm^2	15,000 dpm/100 cm^2	1,000 dpm/100 cm^2

[a] Surfaces contaminated with alpha and beta emitting naturally occurring radionuclides may be surveyed with a detector that responds to both types of radiation. The same method may be employed when evaluating wipe samples for removable contamination.

[b] As used in this table, dpm (disintegrations per minute) means the rate of emission by naturally occurring radioactive material as determined by using a ratemeter or scaler and detector appropriate for the type and energy of emissions being monitored. The detector shall be capable of responding to alpha, beta and/or gamma radiations.

[c] Measurements of average contamination level should not be averaged over more than 1 m^2 . For objects of less surface area, the average should be derived for each object.

[d] The maximum contamination level applies to an area of not more than 100 cm^2.

[e] The amount of removable radioactive material per 100 cm^2 of surface area should be determined by wiping that area with dry filter or soft absorbent paper, applying moderate pressure, and assessing the amount of radioactive material on the wipe with an appropriate instrument of known efficiency. When removable contamination on objects of less surface area is determined, the pertinent levels should be reduced proportionally and the entire surface should be wiped.

[f] All surveys and efficiency determinations shall be made with the detector's active surface no greater than one centimeter from the surface being surveyed, wipe being analyzed, or source being used. A scaler must be used when evaluating wipe samples and count times must be sufficient to detect 10% of the applicable limit with 95% confidence that the activity would be detected.

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, changes in interest rate and applications to install remote service units, and consultant proposal requests and awards.

To aid agencies in communicating information quickly and effectively, other information of general interest to the public is published as space allows.

Ark-Tex Council of Governments

Request for Proposals

The Ark-Tex Council of Governments (ATCOG) is soliciting proposals for the Procurement of Area Agency on Aging Computer Equipment and Peripherals.

The service delivery area includes the following counties in Texas: Bowie, Cass, Delta, Franklin, Hopkins, Lamar, Morris, Red River, and Titus.

Potential respondents may obtain a copy of the request for proposal by contacting Bill Moss, Ark-Tex Council of Governments, P.O. Box 5307, Texarkana, Texas, 75505-5307, or call (903) 832-8636. The deadline for proposal submission is April 16, 1999, at 5:00 p.m.

TRD-9901762
James C. Fisher, Jr.
Executive Director
Ark-Tex Council of Governments
Filed: March 24, 1999

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Office of the Attorney General

Texas Health and Safety Code Enforcement Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Health and Safety Code. Before the State may settle a judicial enforcement action under the Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations the indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code.

Case Title and Court: In re: HARRIS COUNTY, TEXAS, Plaintiff and the STATE OF TEXAS, acting by and through the Texas Natural Resource Conservation Commission and the Texas Department of Health, Necessary and Indispensable Parties v. Fred Kenneth Williams, Defendant, IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS, 61ST JUDICIAL DISTRICT

Nature of Defendant's Operations: Fred Kenneth Williams has a rent house from which sewage was discharging.

Proposed Agreed Judgment: The settlement provides that Fred Kenneth Williams will cease discharging waste and will insure any new owner of the property shall install facilities to properly dispose of waste from the house in accordance with State law and Harris County ordinances.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the Agreed Final Judgment and written comments on the Agreed Final Judgment should be directed to Leela R. Fireside, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711- 2548, (512) 463-2012, facsimile (512) 320-0052. Written comments must be received within 30 days of publication of this notice to be considered.

TRD-9901662
Elizabeth Robinson
Assistant Attorney General
Office of the Attorney General
Filed: March 18, 1999

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Center for Rural Health Initiatives

Request for Proposals-Medically Underserved Community-State Matching Incentive Program

The Center for Rural Health Initiatives is issuing a Request for Proposals ("RFP") for the Medically Underserved Community-State Matching Incentive Program. The purpose of this RFP is to provide the applicant with the information necessary to apply for matching state grant funds under the provisions of this program.

The purpose of this program is to increase the number of physicians providing primary care in medically underserved communities, particularly rural.

USE OF FUNDS: The funds can be used to establish a medical office and ancillary facilities for diagnosing and treating patients. The optimum use of funds would be for the purchase of equipment and furnishings that would establish a new practice site. The site will continue to serve the primary care needs of the community beyond the

grant period, and the physician will agree to practice for a minimum of two years.

AMOUNT OF AWARDS: The funding available for support of this program during FY 2000 is $250,000. Approximately ten projects will be funded. Under the requirements of this program the state grants funds of up to $25,000 to match the contributions by community groups to cover start-up costs for new physicians.

ELIGIBLE APPLICANTS: An eligible community must be in an underserved area as determined by the U.S. Department of Health and Human Services or the Texas Department of Health. The community must make a commitment of $15,000-$25,000 in contributions toward the project and contract with a physician eligible to participate in this program.

Eligible physicians include those in family/general practice, general pediatrics, general internal medicine, or general obstetrics/gynecology. The physician must be licensed to practice in the State of Texas, have completed an accredited residency program, and have contracted with the community to provide full-time primary care for at least two years. A physician who completed residency within the last ten years will be given priority consideration.

EVALUATION AND SELECTION: The Center will prioritize the eligible communities to assure that the neediest are provided grants. The prioritization process will quantify indicators of need that may include, but are not limited to, the following: no practicing primary care physicians; only one primary care physician and a population of at least 2,000; no federally or state-funded primary care clinic; no practicing physician assistants or nurse practitioners; the participating physician will be the only physician practicing in one of the primary care specialties; a large minority population, if the participating physician is a member of the same minority group; designation by the United States Department of Health and Human Services as a primary care Health Professional Shortage Area (HPSA) for at least the last five years; a population-to-primary care provider ratio in the top 25% of all counties in the state; poverty rates above the state average; and median family incomes at least 25% below the state average.

DEADLINE: Applications are available April 1, 1999. Completed applications are due by May 21, 1999. Announcement of the selected applicants will be made by June 11, 1999.

CONTRACT PERIOD: The budget period for applications funded under this RFP will be September 1, 1999-August 31, 2000.

CONTACT PERSON: To obtain the application, please contact: Janet Leubner, Program Administrator, Center for Rural Health Initiatives, P.O. Drawer 1708, Austin, Texas, 78767-1708, (512) 479-8891, email jleubner@crhi.state.tx.us.

TRD-9901676
Robt. J. “Sam” Tessen
Executive Director
Center for Rural Health Initiatives
Filed: March 19, 1999

♦ ♦ ♦

Coastal Bend Workforce Development Board

Request for Proposals

The Coastal Bend Workforce Development Board (the Board), which is responsible for the management of workforce development resources in the Coastal Bend region, is soliciting proposals for services funded through the Texas Workforce Commission under Title VI of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) and State matching funds.

Using the Request for Proposals (RFP) method of procurement, the Board is hereby soliciting proposals from qualified organizations for the management and operation of two separate child care contracts. Proposals are being solicited for (1) Direct Child Care Delivery Services (DCCDS) and (2) Quality Development of child care services.

Services under these contracts will be provided in the Coastal Bend region, which consists of twelve area counties, including Aransas, Bee, Brooks, Duval, Jim Wells, Kenedy, Kleberg, Live Oak, McMullen, Nueces, Refugio and San Patricio.

A Pre-Proposal Conference will be held to share information and answer questions concerning the RFP. The conference will be held on April 6, 1999, at the Embassy Suites Hotel, 4337 S. Padre Island Drive, Corpus Christi. The DCCDS RFP will be discussed beginning at 9:00 a.m.. The Quality Development RFP will be discussed beginning at 1:00 p.m..

Interested parties may obtain copies of the RFP package(s) at the Pre-Proposal Conference or by calling Mike Hefley at (512) 889-5330 ext. 106. The RFP package(s) will not be available prior to 8:00 a.m., April 2, 1999, or after April 26, 1999. A $3.00 fee must be paid in advance to cover copying and postage for RFP packages which are mailed.

The deadline for the receipt of proposals is 4:00 p.m., Monday, May 3, 1999. Proposals received after the deadline will not be considered.

For-profit and non-profit entities, community-based organizations, school districts, colleges, universities, as well as other training organizations may submit proposals. The Board is an Equal Opportunity employer/program. Minority, disadvantaged and women’s businesses are encouraged to apply. Auxiliary aids and services are available upon request to individuals with disabilities. Telephone access is available through (TDD) 1-800-RELAY TX.

TRD-9901743
Carlos A. Herrera
President & CEO
Coastal Bend Workforce Develpment Board
Filed: March 23, 1999

♦ ♦ ♦

Coastal Coordination Council

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

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were received for the following projects(s) during the period of March 11, 1999, through March 18, 1999:

FEDERAL AGENCY ACTIONS:

Applicant: Lakewood Yacht Club; Location: The project site is located at the east end of Clear Lake, at 2425 NASA Road 1, in Seabrook, Harris County, Texas; Project Number: 99-0100-F1; Description of Proposed Action: The applicant proposes to construct 480 feet of new breakwater, perform mechanical maintenance dredging,

place riprap along approximately 230 feet of an existing bulkhead, install 120 floating boat slips, and remove 130 existing fixed slips. A designated area in the south basin of the west harbor will be maintenance dredged to a depth of -6.5 feet mean low water. The dredge material, approximately 2,400 cubic yards of silt, will be hauled to an existing upland placement area located near the intersection of FM 518 and Anders Lane in Harris County, Texas; Type of Application: U.S.A.C.E. permit application #14330(11) under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403), and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Agrifos Fertilizer, L.P.; Location: The project is located on the Houston Ship Channel, between Greens Bayou and Hunting Bayou, on the right descending bank of the Houston Ship Channel, at 2001 Jackson Road, in Pasadena, Harris County, Texas; Project Number: 99-0101-F1; Description of Proposed Action: The applicant requests authorization to construct 5 new ship breasting dolphins, 6 new mooring dolphins, and 2 new anchor buoy mooring dolphins. In addition, the applicant proposes to erect a platform with a ship unloader, and a receiving hopper with onshore conveyor. Finally, the applicant proposes to dredge an approximate 56,000-square-foot area in front of the facility. In addition, the applicant requests approval for 10-years of maintenance dredging; Type of Application: U.S.A.C.E. permit application #21554 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403).

Applicant: Rutherford Oil Corporation; Location: The project site is located in adjacent wetlands, near Lake Surprise, approximately 4.5 miles east of Smith Point, Chambers County, Texas. The U.S.G.S. quad map is Lake Stephenson; Project Number: 99-0102-F1; Description of Proposed Action: The applicant proposes to construct a well for the production of gas. The impact area for the well site would include a 0.23-acre existing well pad and an additional 2.7 acres of brackish marsh. The well pad would cover 1.32 acres and the reserve pit would cover an additional 1.38 acres. The construction of the well pad would require the placement of approximately 702 cubic yards of fill into the site with an additional 702 cubic yards of boards placed over the fill. Approximately 816 cubic yards of fill would be used to construct the ring levee; Type of Application: U.S.A.C.E. permit application #21576 under §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: 290 Residential, Ltd.; Location: The project site consists of two tracts of land totaling approximately 339 acres, located southwest of the Highway 290 and Cypress Rose-Hill Road intersection in northwest Harris County, Texas. The U.S.G.S. quad map is Cypress. The mitigation site is located north of Jack Road and west of Katy-Hockley Cutoff, north of Katy, Harris County, Texas. The U.S.G.S. quad map for the mitigation site is Warren Lake; Project Number: 99-0103-F1; Description of Proposed Action: The applicant proposes to fill approximately 3.62 acres of isolated wetlands, located in the lower tract of an approximate 339-acre parcel of land proposed for the development of a single-family residential subdivision. A Nationwide Permit 26 was previously issued to authorized the fill of 0.42 acre of isolated wetlands in the upper tract and 1.88 acres of isolated wetlands/headwaters in the lower tract. As mitigation for the impacts to the wetlands, the applicant proposes to construct 3.62 acres of wetlands in a 7.24-acre tract in the 300-acre Jack Road Mitigation Complex. In addition to the creation of the 3.62 acres of wetlands, another 3.62 acres of upland/fringe area would be preserved and enhanced. The created wetlands would consist of shallow depressions excavated at 6-inch contours to create a varying depth of 0 to 18 inches; Type of Application: U.S.A.C.E. permit application #21564 under §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Royal Oaks Limited Partnership; Location: The project is located in isolated wetlands on a 550-acre tract located southeast of the Richmond Road and Old Westheimer Road intersection in west Harris County, Texas; Project Number: 99-0104-F1; Description of Proposed Action: The applicant is requesting to place fill material into 27.5 acres of isolated wetlands on the 550-acre tract to facilitate the development of the tract as a residential development and golf course. As mitigation for the project impacts, the applicant proposes to create 27.5 acres of depressional wetlands within a 55-acre tract in the Ley Lowlands Wetland Mitigation Area located northwest of the Katy Hockley Road and Longenbaugh intersection, north of Katy, in Harris County, Texas. The remainder of the mitigation site will consist of upland buffer; Type of Application: U.S.A.C.E. permit application #21583 under §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

FEDERAL AGENCY ACTIVITIES:

Applicant: Corps of Engineers-Trinity River and Tributaries, Texas; Project Number: 99-0105-F2; Description of Proposed Activity: The applicant proposes to Maintenance Dredge the Trinity River and Tributaries, Texas Project. One new option for beneficial use of dredged material was evaluated and does not appear to have reasonable costs in proportion to the benefits. All placement areas were identified and used as described in an Environmental Impact Statement or Environmental Assessment issued prior to the acceptance of the CMP. The applicant has identified Coastal Natural Resource Areas (CNRAs) in the project area and determined the project activities will not adversely impact these CNRAs.

Applicant: Corps of Engineers-Gulf Intracoastal Waterway from Brazos River to Port O'Connor; Project Number: 99-0106-F2; Description of Proposed Activity: The applicant proposes to Maintenance Dredge the Gulf Intracoastal Waterway from the Brazos River to Port O'Connor. Five options for beneficial use of dredged material were evaluated and one appears to have reasonable costs in proportion to its benefits. All placement areas were identified and used as described in an Environmental Impact Statement or Environmental Assessment issued prior to the acceptance of the CMP. The applicant has identified Coastal Natural Resource Areas (CNRAs) in the project area and determined the project activities will not adversely impact these CNRAs.

Applicant: Gulf of Mexico Fishery Management Council; Project Number: 99-0107-F2; Description of Proposed Activity: Pursuant to the Magnuson Stevens Fishery Conservation and Management Act, the applicant proposes actions that are contained in the Generic Sustainable Fisheries Act Amendment to the Council's seven Fishery Management Plans. The applicant proposes the four (4) following actions: bycatch reporting measures, measures minimizing bycatch in the stone crab fishery off Florida, modifying the current overfishing criteria for each stock, identifying communities that may be classified as fishing communities.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is, or is not consistent with the Texas Coastal Management Program goals and policies, and whether the action should be referred to the Coastal Coordination Council for review. Further information for the applications listed above may be obtained from Ms. Janet Fatheree, Council Secretary, Coastal Coordination Council, 1700 North Congress Avenue, Room 617, Austin, Texas 78701-1495, or janet.fatheree@glo.state.tx.us. Persons are encouraged to submit written comments as soon as possible within 30 days of publication

of this notice. Comments should be sent to Ms. Fatheree at the above address or by fax at 512/475-0680.

TRD-9901745
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: March 24, 1999

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Comptroller of Public Accounts

Certification of Crude Oil Prices

The Comptroller of Public Accounts, administering agency for the collection of the Oil Production Tax, has determined that the price of West Texas Intermediate crude oil as recorded on the New York Mercantile Exchange (NYMEX) is below $15.00 per barrel for the three-month period beginning on November 1, 1998, and ending January 31, 1999. Therefore, pursuant to the Tax Code, §202.060, crude oil produced during the month of February 1999 from a qualifying lease, as determined by the Railroad Commission of Texas, is exempt from the crude oil tax imposed by the Tax Code, Chapter 202.

The Comptroller of Public Accounts has determined that the price of West Texas Intermediate crude oil as recorded on the New York Mercantile Exchange (NYMEX) is below $15.00 per barrel for the three-month period beginning on December 1, 1998, and ending February 28, 1999. Therefore, pursuant to the Tax Code, §202.060, crude oil produced during the month of March 1999 from a qualifying lease, as determined by the Railroad Commission of Texas, is exempt from the crude oil tax imposed by the Tax Code, Chapter 202.

Inquires should be directed to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas, 78711-3528.

TRD-9901713
Martin Cherry
Special Counsel
Comptroller of Public Accounts
Filed: March 22, 1999

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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 Articles 1D.003, 1D.009, and 1E.003, Title 79, Revised Civil Statutes of Texas, as amended (Articles 5069-1D.003, 1D.009, and 1E.003, Vernon's Texas Civil Statutes).

The weekly ceiling as prescribed by Art. 1D.003 and 1D.009 for the period of 03/29/99 - 04/04/99 is 18% for Consumer [1]/Agricultural/ Commercial [2]/credit thru $250,000.

The weekly ceiling as prescribed by Art. 1D.003 and 1D.009 for the period of 03/29/99 - 04/04/99 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by Art. 1E.003 for the period of 04/01/99 - 04/30/99 is 10% for Consumer/Agricultural/Commercial/ credit thru $250,000.

The judgment ceiling as prescribed by Art. 1E.003 for the period of 04/01/99 - 04/30/99 is 10% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-9901750
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: March 24, 1999

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Texas Department of Health

Designation of UT Tyler Campus Health Clinic as a Site Serving Medically Underserved Populations

The Department of Health (department) is required under Texas Civil Statutes, Article 4495b, §3.06, to designate sites serving medically underserved populations. In addition, the department is required to publish notice of its designations in the *Texas Register* and to provide an opportunity for public comment on the designations.

Accordingly, the department has designated the following as a site serving medically underserved populations: UT Tyler Campus Health Clinic located at 3900 University Boulevard, Tyler, Texas 75799. Designation is based on proven eligibility as a site serving a disproportionate number of clients eligible for federal, state, or locally funded health care programs.

Oral and written comments on this designation may be directed to Bruce Gunn, Bureau of State Health Data and Policy Analysis, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756; (512) 458-7261. Comments will be accepted for 30 days from the publication date of this notice.

TRD-9901728
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 23, 1999

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Notice of Cancellation for Request for Proposals for Medical Transportation Services for Medicaid-eligible Individuals to and from Allowable Medicaid Services

INTRODUCTION: The Texas Department of Health (department) requested proposals for medical transportation services for state fiscal year 2000, published in the February 19, 1999, issue of the *Texas Register* (24 TexReg 1275). The department is withdrawing the request for proposals (RFP) as of April 2, 1999.

Cancellation is in accordance with the Request for Proposals (RFP) released, which states the "Texas Department of Health (department) reserves the right to alter, amend, or modify any provision of this RFP or to withdraw this RFP at any time prior to the execution of a contract pursuant thereto if it is in the best interest of the department and the State of Texas. The decision of the department will be administratively final in this regard."

AFFECTED AREA: Region 3, Texas Department of Health, Contact: Barbara Columbus, Arlington, Texas (817) 264-4583.

TRD-9901727
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 23, 1999

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Texas Department of Housing and Community Affairs

Announcement of the Opening of the Public Comment Period for the 1999 State of Texas Consolidated Plan Annual Performance Report - Reporting on Program Year 1998 - *Draft for Public Comment*

The Texas Department of Housing and Community Affairs ("the Department") announces the opening of a fifteen day public comment period for the *1999 Consolidated Plan Annual Performance Report - Reporting on Program Year 1998 - Draft for Public Comment* as required by the U.S. Department of Housing and Urban Development (HUD) as part of the overall requirements governing the State's consolidated planning process. The *1999 Consolidated Plan Annual Performance Report - Reporting on Program Year 1998 - Draft for Public Comment* is submitted in compliance with 24 CFR 91.520 Consolidated Plan Submissions for Community Planning and Development Programs made effective on January 5, 1995. The fifteen day public comment period begins April 12, 1999, and continues until 5:00 p.m., April 26, 1999.

The *1999 Consolidated Plan Annual Performance Report - Reporting on Program Year 1998 - Draft for Public Comment* is only one part of the Consolidated Planning process. In 1996, the Department completed the *1996 State of Texas Consolidated Plan,* which is the main planning document guiding the Department's administration of several programs over the following five years. The *1996 State of Texas Consolidated Plan* covers four HUD-funded programs: the Community Development Block Grant (CDBG) program; the HOME Investment Partnership program; the Emergency Shelter Grant (ESG) program; and the Housing Opportunities for Persons with AIDS (HOPWA) program.

The *1999 Consolidated Plan Annual Performance Report - Reporting on Program Year 1998 - Draft for Public Comment* gives the Department an opportunity to evaluate its accomplishments during the past program year including the following: a summary of resources and programmatic accomplishments for each of the four programs covered in the Consolidated Plan; a series of narrative statements about various aspects of the Department's performance over the past program year; and a qualitative analysis of the Department's actions and experiences. The Department also addresses its success in meeting each of the goals and objectives set forth in the *1996 State of Texas Consolidated Plan* and in the subsequent State of Texas One Year Action Plans.

The *1999 Consolidated Plan Annual Performance Report - Reporting on Program Year 1998 - Draft for Public Comment* will be available on the Texas Department of Housing and Community Affairs 's website at www.tdhca.state.tx.us.

Written comment is encouraged and should be sent to the Texas Department of Housing and Community Affairs, Office of Strategic Planning/Housing Resource Center, P.O. Box 13941, Austin, TX 78711-3941. For more information, to order copies, or to request an accessible format of the *1999 Consolidated Plan Annual Performance Report - Reporting on Program Year 1998 - Draft for Public Comment* please contact the Housing Resource Center at (512) 475-4595 or email at clandry@tdhca.state.tx.us.

TRD-9901758
Daisy Stiner
Executive Director
Texas Department of Housing and Community Affairs
Filed: March 24, 1999

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Notice of Administrative Hearing

Manufactured Housing Division

Wednesday, April 7, 1999, 9:00 a.m.

State Office of Administrative Hearing, Stephen F. Austin Building, 1700 N Congress, 11th Floor, Suite 1100

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the Texas Department of Housing and Community Affairs vs. Juan Guzman to hear alleged violations of the Act, §7(d) and the Rules §80.125(e) regarding obtaining, maintaining or possessing a valid installer's license. SOAH 332-99-0451. Department MHD1997000534D.

Contact: Jerry Schroeder, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589.

TRD-9901760
Daisy Stiner
Executive Director
Texas Department of Housing and Community Affairs
Filed: March 24, 1999

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Houston-Galveston Area Council

Request for Information

Houston-Galveston Area Council (H-GAC) solicits information from organizations and individuals interested in providing short-term planning consulting to H-GAC for workforce services and programs. Prospective proposers may obtain a copy of the Request for Information package by contacting Carol Kimmick at 713-627-3200 or by sending email to ckimmick@hgac.cog.tx.us. Responses are due at H-GAC offices by 5:00 p.m. on Thursday, April 1, 1999. Late proposals will not be accepted. There will be no exceptions.

TRD-9901660
Carol Kimmick
Executive Director
Houston-Galveston Area Council
Filed: March 18, 1999

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Texas Department of Insurance

Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by Great West Casualty Company proposing to use rates that are outside the flexibility band promulgated by the Commissioner of Insurance pursuant to TEX. INS. CODE ANN. art. 5.101, §3(g). They are proposing a rate of +30% above the benchmark for BI, PD, MP, PIP, UM, & UIM and a rate of +43% above the benchmark for SP, COMP, & COLLISION for commercial automobile insurance.

Copies of the filing may be obtained by contacting Gifford Ensey, at the Texas Department of Insurance, Legal and Compliance, P.O. Box 149104, Austin, Texas 78714-9104, extension (512) 475-1761.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to Art. 5.101, §3(h), is made with the Chief Actuary, Mr. Philip Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 within 30 days after publication of this notice.

TRD-9901746
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: March 24, 1999

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Texas Natural Resource Conservation Commission

Implementation of Texas Water Quality Certification Rules

The Texas Natural Resource Conservation Commission (TNRCC) furnishes this notice of availability of a revised draft regulatory guidance document entitled *Implementation of Texas Water Quality Certification Rules* for a 60-day public comment period.

The document is designed to provide assistance, information, and clarity in the state §401 certification review of §404 permit applications and the implementation of related rules contained in 30 TAC Chapter 279. A draft document was originally released for a 60-day comment period from July 3 to September 2, 1998. After the comment period, the commission directed staff to establish an ad hoc work group to provide further input into the draft document. The work group met five times between October 1998 and March 1999. The guidance document has been substantially revised as a result of the public comments received, and input from work group participants.

States have the authority under the Federal Clean Water Act, §401 to review federal licenses and permits that may result in a discharge of pollutants into waters of the United States for compliance with state surface water quality standards. Based upon the review, the state determines whether to certify the permit or license. The procedures and criteria for the application, processing, and review of water quality certifications are found under Chapter 279 of the TNRCC rules.

The document is specifically written to provide guidance for the review of projects requiring a §404 permit for the discharge of dredge or fill material into waters of the United States, including wetlands. It explains how the Chapter 279 rules are implemented by laying out the procedures for acquiring §401 certification and detailing the policies that direct how certification decisions are made. The information contained in the document is intended to assist applicants, provide more predictability and consistency to the §401 certification review, and improve coordination between state and federal agencies involved in the §401 and §404 programs.

The public is invited to submit written comments on the draft regulatory guidance document to TNRCC. Written comments must be received by no later than June 1, 1999. Please address written comments to: Carol Kim, Policy and Regulations Division, TNRCC, MC 204, P.O. Box 13087, Austin, Texas 78711-3087.

Copies of the draft regulatory guidance document can be obtained by downloading the document from TNRCC's website at http://www.tnrcc.state.tx.us/oprd/forum/401guid/revised.html. Copies are also available by contacting Carol Kim in writing at the listed address, or by phone at (512) 239-3670 or email at ckim@tnrcc.state.tx.us.

TRD-9901742
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: March 23, 1999

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Notices of District Petition

The following notices were issued on March 15, 1999 and March 22, 1999 respectively, pursuant to Article XVI, Section 59 of the Constitution of the State of Texas, Chapters 49 and 54 of the Texas Water Code, and 30 TAC Chapter 293.

A petition has been filed for creation of Brazoria County Municipal Utility District No. 17. The petitioners have stated (1) they are owners of a majority in value of the land to be included in the proposed District; (2) there are six lienholders on the land to be included in the proposed district and they have consented to the District creation; (3) the District will contain approximately 293.401 acres located within Brazoria County, Texas; and (4) the proposed District is within the incorporated limits of the City of Pearland, and is not within such jurisdiction of any other city. The petition further states that the proposed District will (1) construct, acquire, maintain and operate a waterworks and sanitary sewer system for residential and commercial purposes; (2) construct, acquire, improve, extend, maintain and operate works, improvements, facilities, plants, equipment and appliances helpful or necessary to provide more adequate drainage for the property in the proposed District; and (3) control, abate and amend local storm waters or other harmful excesses of waters, as more particularly described in an engineer's report filed simultaneously with the filing of the petition. A preliminary investigation by the petitioners, from the information available at present, estimates the cost of the project to be approximately $12,555,000.

R. West Development Company, Incorporated; Laura Massey Arnold; Galantine Associates; Houston Pine Hollow Associates, Limited; Elizabeth A. Nisbet; and Ravenwood Section 2, Limited filed a petition for creation of Brazoria County Municipal Utility District No. 18. The petitioners have stated that: (1) they are owners of a majority in value of the land to be included in the proposed District; (2) all lienholders on the land to be included in the proposed District have consented to the creation of the proposed District; (3) the proposed District will contain approximately 352.23 acres located within Brazoria County, Texas; and (4) the proposed District is within the incorporated limits of Pearland, and is not within such jurisdiction of any other city. The petition further states that the proposed District will (1) construct, acquire, maintain and operate a waterworks and wastewater system for residential and commercial purposes; (2) construct, acquire, improve, extend, maintain and operate works, improvements, facilities, plants, equipment and appliances helpful or necessary to provide more adequate drainage for the property in the proposed District; and (3) control, abate and amend local storm waters or other harmful excesses of waters, as more particularly described in an engineer's report filed simultaneously with the filing of the petition. A preliminary investigation by the petitioners, from the information available at this time, estimates that the cost of said project will be approximately $12,530,000.

The TNRCC may grant a contested case hearing on either of these petitions if a written hearing request is filed within 30 days after the second newspaper publication of the notices. 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) the name of the petitioner and the TNRCC Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed district's boundaries. You may also submit your proposed adjustments to the petition which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below.

The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, 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 TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-9901724
LaDonna Castanuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: March 23, 1999

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The following notices were issued on March 23, 1999, pursuant to Chapter 395 of the Local Government Code, Chapter 49 of the Texas Water Code and 30 Texas Administrative Code Chapter 293.

VARNER CREEK UTILITY DISTRICT of Brazoria County has applied for authority to adopt and impose an annual Operations and Maintenance standby fee of $5 per vacant equivalent single-family connection (ESFC) for calendar years 2000 through 2002 on unimproved property within Sections 1-5 of the District.

BRUSHY CREEK MUNICIPAL UTILITY DISTRICT of Williamson County has filed an application for authority to levy impact fees of $1,875 per equivalent single family connection for new connections for water service, and $950 per equivalent single family connection for new connections for wastewater service within the service area of Brushy Creek Municipal Utility District. New connections for water and or wastewater service are anticipated in the following: (1) Brushy Creek North, Section Three; (2) Cat Hollow, Sections A, B & C; (3) the Corners of Brushy Creek; (4) the Tract of land known as the RRISD Tract; (5) the area known as the Ranch Road 620 Tract, and (6) any other undeveloped areas of the District. The impact fee application and supporting information are available for inspection and copying during regular business hours in the District Administration Section of the Water Utilities Division, Third Floor of Building F (in the TNRCC Park 35 Office Complex located between Yager & Braker Lanes on North IH-35), 12100 Park 35 Circle, Austin, Tex as 78753. A copy of the impact fee application and supporting information, as well as the capital improvement plan, is available for inspection and copying at Brushy Creek Municipal District's offices during regular business hours.

The TNRCC may grant a contested case hearing on either of these petitions if a written hearing request is filed within 30 days after the second newspaper publication of the notices. 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) the name of the petitioner and the TNRCC Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed district's boundaries. You may also submit your proposed adjustments to the petition which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below.

The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, 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 TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-9901723
LaDonna Castanuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: March 23, 1999

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

The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to the Texas Water Code, §7.075. Section 7.075 requires that before the TNRCC may approve the AOs, the TNRCC shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* not later than the 30th day before the date on which the public comment period closes, which in this case is **May 2, 1999**. Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC may withdraw or hold approval of an AO if a comment discloses facts or considerations that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's Orders and permits issued pursuant to the TNRCC'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 of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at

the applicable Regional Office listed as follows. Written comments about the AOs should be sent to the attorney designated for the AO at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on May 2, 1999**. Written comments may also be sent by facsimile machine to the attorney at (512) 239- 3434. The TNRCC attorneys 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 should be submitted to the TNRCC in **writing**.

(1) COMPANY: Chuck Vaiculevich doing business as Cedar Park Fina; DOCKET NUMBER: 1998-0899-PST-E; TNRCC NUMBER: 53512; LOCATION: Williamson County, Texas; TYPE OF FACILITY: three underground storage tanks; RULES VIOLATED: 30 TAC §334.50(a)(1)(A) and Texas Water Code, §26.3475 by failing to have a release detection method capable of detecting a release from any portion of the underground storage tanks system; 30 TAC §334.10(b)(2)(B)(vi) and Texas Water Code, §26.3475 by failing to maintain and provide release detection records; 30 TAC §334.7(d)(3) and Texas Water Code, §26.346 by failing to provide an amended registration for any change or additional information regarding the underground storage tanks; PENALTY: $9,000; STAFF ATTORNEY: Nathan Block, Litigation Division, MC 175, (512) 239-4706; REGIONAL OFFICE: Austin Regional Office, 1921 Cedar Bend, Suite 150, Austin, Texas 78758-5336.

(2) COMPANY: Mr. Randy Collins and Mr. Chris Wise doing business as Randy Collins Sprinklers, doing business as Sprinklers by Randy and Chris, and doing business as Collins and Wise Sprinklers; DOCKET NUMBER: 1996-1927-LII-E; TNRCC ID NUMBER: M-17451; ENFORCEMENT ID NUMBER: 10150 and 3669; LOCATION: Humble, Harris County, Texas; TYPE OF FACILITY: sprinkler installer; RULE VIOLATED: 30 TAC §344.306 by failing to provide the required backflow prevention devices at the following sites: 146 Green Gables, 15 Archbriar, 143 Little Mill, 147 Little Mill, 10 Terra Glen, 14 Terra Glen, 58 Terra Glen, 123 Sterling Pond, 127 Sterling Pond, 143 Sterling Pond, 10 Lantana Trails, 19 Lantana Trails, and 23 Lantana Trails, all in The Woodlands, Montgomery County, Texas; 8011 Pine Green, and 8007 17th Green in Humble, Harris County, Texas; and 2408 Northpark Drive, Kingwood, Harris County, Texas; PENALTY: $6,720; STAFF ATTORNEY: M. Camille Morris, Litigation Division, MC 175, (512) 239-3915; REGIONAL OFFICE: 5425 Polk Street, Avenue H, Houston, Texas 77023-1486.

(3) COMPANY: Felix Escobedo doing business as Felix and Sons Body Shop; DOCKET NUMBER: 1997-0220-AIR-E; TNRCC ID NUMBER: HX-0679-A; LOCATION: 12423 Market Street, Harris, County, Texas; TYPE OF FACILITY: vehicle repair and refinishing operation; RULES VIOLATED: 30 TAC §116.110(a) and the Texas Clean Air Act (the Act), §382.085(b) by failing to have a filter system with at least 90% control efficiency in the paint booth area, as required by Standard Exemption Number 124(g); 30 TAC §116.110(a) and §115.426 and Act, §382.085(b) by failing to maintain on-site and readily available Material Safety Data Sheets for paints and solvents systems used during the previous consecutive 24-month period or currently in use, and by failing to maintain on-site and readily available records of the United States Environmental Protection Agency and TNRCC Office of Waste management registration or identification numbers for each generator, as required by TNRCC Standard Exemption Number 124(p)(1) and (5); PENALTY: $500; STAFF ATTORNEY: Ali Abazari, Litigation Division, MC 175, (512) 239-5915; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1486.

(4) COMPANY: Galveston Environmental Services, Incorporated; DOCKET NUMBER: 1998-0293-IHW-E; ENFORCEMENT NUMBER: 1483; LOCATION: 6038 Farm to Market Road 517 at Highway 146, San Leon, Galveston County, Texas; TYPE OF FACILITY: oil reclaiming facility; RULES VIOLATED: 30 TAC §335.112(a)(7) by failing to adjust the facility closure cost estimate for inflation and to increase the financial assurance mechanism to match the inflated cost estimate by the annual due date, as required by 40 Code of Federal Regulations, §265.142(b) and §265.143(b)(7) as documented during a Records Review; 30 TAC §335.331 by failing to pay hazardous waste facility fees as documented during a Records Review; PENALTY: $3,750; STAFF ATTORNEY: Bill Jang, Litigation Division, MC 175, (512) 239-2269; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: Kashmir, Incorporated doing business as Greenbriar Grocery; DOCKET NUMBER: 1998-0716-PST-E; TNRCC ID NUMBER: 43001; ENFORCEMENT ID NUMBER: 12384; LOCATION: Tyler, Smith County, Texas; TYPE OF FACILITY: convenience store; RULE VIOLATED: 30 TAC §334.7(d)(3) and Texas Water Code, §26.346 by failing to update its underground storage tanks registration for the Facility within 30 days of a change to the underground storage tanks systems. Specifically, failed to update the Facility's registration so as to reflect that two 10,000 gallon tanks were installed in early 1997; 30 TAC §334.50(b)(1)(A) and Texas Water Code, §26.3475(c)(1) by failing to provide for release detection monitoring of the underground storage tanks at the Facility. Specifically, TNRCC investigators documented that there was not a method being utilized to detect releases from the underground storage tanks at the Facility; 30 TAC §334.50(b)(2)(A) and Texas Water Code, §26.3475(a) by failing to provide for release detection monitoring of the underground storage tanks piping at the Facility. Specifically, TNRCC investigators documented that the underground storage tanks piping at the Facility was not being monitored to detect releases; 30 TAC §334.51(b)(2)(C) and Texas Water Code, §26.3475(c)(2) by failing to install overfill prevention equipment on the fill risers of the underground storage tanks; PENALTY: $10,625; STAFF ATTORNEY: Laura Kohansov, Litigation Division, MC 175, (512) 239-2029; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701- 3756.

(6) COMPANY: Technicoat, Incorporated, Felton Havins, Senior and Cytec Industries DOCKET NUMBER: 1998-0723-IHW-E (amending August 19, 1991 Texas Water Commission Agreed Order); TNRCC ID NUMBER: 30068; LOCATION: 301 Northeast 6th Street and 600 North Jones, Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: former coating and anodizing facility; AMENDMENT: allows the respondents to remediate under the commission's Risk Reduction Rules which were promulgated after the issuance of the Agreed Order; STAFF ATTORNEY: Cecily Small Gooch, Litigation Division, MC R-4, (817) 469-6750; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas, MC R-4, (817) 469-6750.

(7) COMPANY: The Pep Boys-Manny, Moe, and Jack; DOCKET NUMBER: 1997-1075-PST-E; TNRCC ID NUMBERS: 47430 and 44031; ENFORCEMENT ID NUMBERS: 11965 and 11966; LOCATION: Arlington, Tarrant County, Texas; TYPE OF FACILITY: underground storage tank; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) by failing to monitor underground storage tanks at its Facility located at 1212 Collins, Arlington, Texas and at its facility located at 2701 South Cooper, Arlington, Texas, for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $20,000; STAFF ATTORNEY: Mary R. Risner, Litigation Division, MC 175, (512) 239-6224; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499.

(8) COMPANY: Lorne Thornbrue; DOCKET NUMBER: 1997-1195-PST-E; TNRCC FACILITY ID NUMBER: 69290; ENFORCEMENT ID NUMBER: 12104; LOCATION: Wichita Falls, Wichita County, Texas; TYPE OF FACILITY: convenience store; RULE VIOLATED: 30 TAC §334.414(c) by acting as an on-site installation supervisor at the Facility during the installation of release detection on the underground storage tanks, without holding an on-site supervisor license and Texas Water Code, §26.121(a)(3) by failing to install a proper line leak detector on the underground storage tanks system at the Facility, which caused an unauthorized discharge into or adjacent to waters in the state; PENALTY: $3,500; STAFF ATTORNEY: Laura Kohansov, Litigation Division, MC 175, (512) 239-2029; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833.

(9) COMPANY: Robert Tomko; DOCKET NUMBER: 1997-0357-IHW-E; ENFORCEMENT NUMBER: 10162; LOCATION: 5101 and 5105 East California Parkway, Forest Hill, Tarrant County, Texas; TYPE OF FACILITY: owns and operates an electro coating and metal finishing business; RULES VIOLATED: 30 TAC §335.4 and Texas Water Code, §26.121 by causing, suffering, or allowing the discharge of industrial solid waste or municipal hazardous waste into or adjacent to a water in Texas, without prior authorization from the commission, 30 TAC §335.2 and §335.43 by storing and disposing of hazardous and class 1 and/or class 2 industrial waste at the Facility without a permit or other authorization from the TNRCC; 30 TAC §335.10 by transporting hazardous and class 1 and/or class 2 industrial waste from former location in Fort Worth to the Facility without any manifests; 30 TAC §335.12 by receiving hazardous and class 1 and/or industrial waste which were not accompanied by manifests; 30 TAC §335.62 by failing to conduct hazardous waste determinations on approximately 108 drums containing various waste; PENALTY: $24,880; STAFF ATTORNEY: Bill Jang, Litigation Division, MC 175, (512)239-2269; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499,(817) 469-6750.

(10) COMPANY: Varco Shaffer, Incorporated; DOCKET NUMBER: 1998-0216-MWD-E; TNRCC ID NUMBER: 11758-001; LOCATION: 1/4-mile northeast of the intersection of Addicks Fairbanks Road and West Little York at 12950 West Little York, Harris County, Texas; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(2) by failing to submit a permit renewal application for Water Quality Permit Number 11758-001 on or before the expiration date of October 16, l997; PENALTY: $2,500; STAFF ATTORNEY: Ali Abazari, Litigation Division, MC 175, (512) 239-5915; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: Yeh's Brothers, Incorporated doing business as Days Inn Intercontinental Airport; DOCKET NUMBER: 1997-0921-MWD-E; TNRCC ID NUMBER: Permit Number 12138- 001; LOCATION: 17607 Highway 59, Houston, Harris County, Texas; TYPE OF FACILITY: waste water collection, treatment, and disposal system; RULES VIOLATED: 30 TAC §305.125(5) and TNRCC Permit Number 12138-001 by failing to maintain all facilities and systems of treatment and controls in proper working order; 30 TAC §305.125(5) and Permit Number 12138-001 by allowing safety hazards and impediments to proper operation, maintenance and inspection by failing to provide adequate upkeep of the waste water treatment plants; 30 TAC §;319.4-319.7 and 305.125 and Permit Number 12138-001 by failing to timely submit monthly effluent report forms; and Texas Water Code, §26.121 and TNRCC Permit Number 12138-001 by failing to meet permitted minimum chlorine concentrations and daily average total suspended solids; Texas Water Code, §26.121 and Permit Number 12138-001 by exceeding the total suspended solids permit level; and Agreed Order, Docket Number 1994-149-IWD-E by failing to pay penalties assessed; Texas Water Code, §26.121 and TNRCC Permit Number 12138-001 by exceeding the total suspended solids permit level and the daily average five-day biochemical oxygen demands permitted concentration limit; TNRCC Permit Number 12138-001 by failing to provide an accurate effluent flow measuring device at the waste water treatment plant; PENALTY: $2,500; STAFF ATTORNEY: Camille Morris, Litigation Division, MC 175, (512) 239-3915; REGIONAL OFFICE: 5425 Polk Avenue Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-9901747
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: March 24, 1999

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Notices of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to Texas Water Code (the Code), §7.075, which requires that the TNRCC may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **May 2, 1999**. Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each of the proposed AOs is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable Regional Office listed as follows. Written comments about these AOs should be sent to the enforcement coordinator designated for each AO at the TNRCC's Central Office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on May 2, 1999**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The TNRCC 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 should be submitted to the TNRCC in **writing**.

(1) COMPANY: U S Cast Products Incorporated dba Ace Marble Incorporated; DOCKET NUMBER: 98-1434-AIR-E; IDENTIFIER: Account Number JH-0111-U; LOCATION: Joshua, Johnson County, Texas; TYPE OF FACILITY: thermoset resin spraying plant; RULE VIOLATED: Permit Number 17419, Special Conditions 10, 11, 12, and 14, by failing to construct the casting area, spray booth, and grinding area stacks to the minimum height of 30 feet above grade and by failing to have the records of the daily resin and gelcoat usage and the daily hours of resin operation immediately available at the request of personnel of the TNRCC; PENALTY: $7,500; ENFORCEMENT COORDINATOR: Michael De La Cruz,

(817) 469-6750; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(2) COMPANY: C & R Distributing, Incorporated; DOCKET NUMBER: 98-1173-AIR-E; IDENTIFIER: Account Number EE-0432-K; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: fuel transport line; RULE VIOLATED: 30 TAC §114.100(a) and the THSC, §382.085(b), by offering for sale gasoline for use as a motor vehicle fuel which failed to meet the minimum oxygen content of 2.7% by weight; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Stacey Young, (512) 239-1899; REGIONAL OFFICE: 7500 Viscount Boulevard, Suite 147, El Paso, Texas 79925-5633, (915) 778-9634.

(3) COMPANY: CBI Na-Con, Inc.; DOCKET NUMBER: 1998-1024-MWD-E; IDENTIFIER: Permit Number 11389-001; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: metal fabrication; RULE VIOLATED: Permit Number 11389-001 and the Code, §26.121, by failing to comply with the daily average ammonia nitrogen permit limit, daily average carbonaceous biochemical oxygen demand limit of ten milligrams per liter (mpl), and total suspended solids limit of 15 mpl; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Mike Meyer, (512) 239 4492; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(4) COMPANY: Impact Christian Youth Camp, Inc. dba Camp of the Hills; DOCKET NUMBER: 98-0636-PWS-E; IDENTIFIER: Public Water Supply Number 0270110; LOCATION: Marble Falls, Burnet County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.39(g), by failing to notify the agency in writing of any improvements which will result in any increase in production, treatment, storage capacity, or a 10% or greater increase in distribution capacity; 30 TAC §290.41(c)(1)(F), by failing to obtain and record at the county courthouse a sanitary easement for the well site; 30 TAC §290.43(c) and paragraph (8), by failing to provide a ground storage tank for potable water which conforms to current American Water Works Association (AWWA) standards and by failing to receive a certification for all newly installed coatings that conforms to AWWA/National Sanitation Foundation Standard 61; 30 TAC §290.46(n), (t), (f)(1)(B), and (p)(1), by failing to maintain an updated map of the distribution system, maintain water storage facilities in a watertight condition, perform a chlorine residual test at representative locations in the distribution system at least once in every seven days and record these tests, and inspect ground storage tanks annually to ensure that the condition of all appurtenances are intact; 30 TAC §290.44(a)(4), by failing to install water transmission and distribution lines below the frost line and at least 24 inches below ground surface; and 30 TAC §290.106(a)(1), by failing to develop a sample siting plan for bacteriological monitoring; PENALTY: $1,688; ENFORCEMENT COORDINATOR: Subhash Jain, (512) 239-5867; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(5) COMPANY: Steve Champion dba Casino Beach Golf; DOCKET NUMBER: 1998-1107-PWS-E; IDENTIFIER: Public Water Supply Number 2200331; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106, paragraph (e)(2), and the Code, §341.033(d), by failing to take routine bacteriological samples from November 1997 to June 1998 and by failing to notify the public that bacteriological samples were not being performed; PENALTY: $1,800; ENFORCEMENT COORDINATOR: Julia McMasters, (512) 239-5839; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(6) COMPANY: Centauri Technologies, JV; DOCKET NUMBER: 98-1334-IHW-E; IDENTIFIER: Solid Waste Registration Number 85189; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: speciality chemicals manufacturing; RULE VIOLATED: 30 TAC §335.6(c), by failing to electronically update the Notice of Registration regarding certain waste and waste management units; 30 TAC §335.9(a), by failing to include on the 1997 Annual Waste Summary the quantity of wastewater from heterocyclimine generated and stored on-site; 30 TAC §335.10(b)(5), by failing to include the state generator's identification in Box B of the Uniform Hazardous Waste Manifest on two manifests; 30 TAC §335.13(d), by failing to submit an exception report when the facility did not receive a copy of the manifest with handwritten signature of the designated facility; 30 TAC §335.431, by failing to include the treatability group, subcategory, and treatment status in Section III of the land disposal restriction notification form; 30 TAC §335.69(a)(3) and (4), by failing to label or mark each tank accumulating hazardous waste on-site for 90 days or less with the words "Hazardous Waste" and by failing to document efforts made by the facility to familiarize local hospitals with the properties of hazardous waste handled at the facility and the types of injuries or illnesses which could result from fires, explosions, or releases; and 30 TAC §335.69(a)(1)(B), by failing to provide secondary containment for the six tanks placed into hazardous waste service in June 1997 and by failing to adequately document in the operating record the tank inspections; PENALTY: $13,590; ENFORCEMENT COORDINATOR: Susan Johnson, (512) 239-2555; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: The City of Goree; DOCKET NUMBER: 1997-1113-MWD-E; IDENTIFIER: Permit Number 10102-001; LOCATION: Goree, Knox County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §325.2(b), by failing to employ a wastewater operator who holds a valid certificate of competency; 30 TAC §305.125(5), by failing to remove trees and cattails from the pond banks; and 30 TAC §319.11(b), by failing to take pH measurements within 15 minutes of sample collection; PENALTY: $6,875; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(8) COMPANY: The City of Pottsboro; DOCKET NUMBER: 98-0817-MWD-E; IDENTIFIER: Permit Number 10591-001; LOCATION: Pottsboro, Grayson County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.126(a), Permit Number 10591-001, and the Code, §26.121, by exceeding 75% and 90% of the permitted daily average flow of 0.21 million gallons per day (mgd) and by failing to comply with the daily average flow permit limit of 0.21 mgd; 30 TAC §319.11(a), by failing to use an approved method to measure chlorine; and 30 TAC §305.125(5), by failing to ensure at all times that the facility and its systems of collection, treatment, and disposal are properly operated; PENALTY: $7,000; ENFORCEMENT COORDINATOR: Pam Campbell, (512) 239-4493; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(9) COMPANY: City of Roma; DOCKET NUMBER: 98-1064-MSW-E; IDENTIFIER: Municipal Solid Waste Permit Number 954; LOCATION: Roma, Starr County, Texas; TYPE OF FACILITY: type 1 landfill with arid exemption; RULE VIOLATED: 30 TAC §330.1(b), by failing to apply for a permit modification to the existing municipal solid waste landfill permit which is necessary to satisfy the paperwork requirements for documenting the implementation requirements for Subtitle "D" prior to the state imposed deadline of April 9, 1998; 30 TAC §330.130, by failing to demonstrate the

operational requirements for landfill gas management and monitoring; 30 TAC §330.114, by failing to develop a site operating plan incorporating the requirements of Subtitle "D" for Arid Exempt Landfills; 30 TAC §330.117, by failing to prevent the unloading of prohibited wastewater treatment plant sludge; and 30 TAC §330.250, by failing to provide certification of compliance with 30 TAC §;330.300, 330.301, and/or 330.305, as applicable, to the executive director for review and approval, thus violating the requirement to complete final closure no later than October 9, 1997; PENALTY: $8,750; ENFORCEMENT COORDINATOR: John Mead, (512) 239-6010; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(10) COMPANY: Continental Cabinet Manufacturing, Incorporated; DOCKET NUMBER: 98-1126-AIR-E; IDENTIFIER: Account Number DB-0621-J; LOCATION: Lancaster, Dallas County, Texas; TYPE OF FACILITY: cabinet manufacturing plant; RULE VIOLATED: 30 TAC §;116.115(a), 115.426(a)(1), 116.116, Permit Number 18054, and the THSC, §382.085(b), by exceeding cleanup solvent emission rate, failing to maintain records for each coating usage and actual hours of operation, and failing to represent the priming operation in the permit application; PENALTY: $3,200; ENFORCEMENT COORDINATOR: Carl Schnitz, (512) 239-1892; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(11) COMPANY: Lightning Metal Specialties, Inc.; DOCKET NUMBER: 1998-1186-AIR-E; IDENTIFIER: Account Number CS-0099-V; LOCATION: New Braunfels, Comal County, Texas; TYPE OF FACILITY: computer chassis manufacturer; RULE VIOLATED: 30 TAC §116.110(a) and the Act, §382.085(b) and §382.0518(a), by failing to qualify for an exemption from permitting or obtain a permit prior to construction; PENALTY: $3,600; ENFORCEMENT COORDINATOR: David D. Turner, (210) 403-4032; REGIONAL OFFICE: 140 Heimer Road, Suite 360, San Antonio, Texas 78232-5042, (210) 490-3096.

(12) COMPANY: Oil Patch Sandblast and Paint, Ltd.; DOCKET NUMBER: 98-1399-AIR-E; IDENTIFIER: Account Number HX-1323-M; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: abrasive blasting and painting; RULE VIOLATED: 30 TAC §116.110(a) and the Act, §382.085(b) and §382.0518(a), by constructing an abrasive blasting and painting operation without first obtaining a permit or satisfying the conditions of an exemption from permitting; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Sheila Smith, (512) 239-1670; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: PETRON Inc.; DOCKET NUMBER: 98-1261-PST-E; IDENTIFIER: Petroleum Storage Tank Facility Identification Number 0070447; LOCATION: Port Arthur, Jefferson County, Texas; TYPE OF FACILITY: gasoline transporter; RULE VIOLATED: 30 TAC §115.221, by failing to use Stage I vapor recovery equipment during a gasoline delivery to a convenience store with retail sales of gasoline; PENALTY: $6,250; ENFORCEMENT COORDINATOR: J. Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(14) COMPANY: Benjamin Jacob and George P. Samuel dba Pine Forest Motel and Maganbhai R. Patel, Bhagubhai B. Patel and Vinubhai B. Patel dba Holiday Motel; DOCKET NUMBER: 98- 1074-MWD-E; IDENTIFIER: Permit Number 12161-001; LOCATION: Cleveland, Liberty County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: Permit Number 12161-001 and the Code, §26.121, by failing to comply with the ammonia nitrogen daily average concentration permit limit of three mpl, ammonia nitrogen individual grab permit limit of 15 mpl, five- day carbonaceous biochemical oxygen demand daily average concentration permit limit of ten mpl, five-day carbonaceous biochemical oxygen demand daily average loading limit of 0.5 pounds per day, and total suspended solids daily average concentration permit limit of 15 mpl; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Pam Campbell, (512) 239-4493; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(15) COMPANY: The Ravago America Corporation; DOCKET NUMBER: 1998-1019-IWD-E; IDENTIFIER: Permit Number 03567; LOCATION: Hempstead, Waller County, Texas; TYPE OF FACILITY: reprocessing plastics operation; RULE VIOLATED: Permit Number 03567 and the Code, §26.121, by failing to meet the permitted effluent limits; PENALTY: $4,375; ENFORCEMENT COORDINATOR: Brian Lehmkuhle, (512) 239-4482; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(16) COMPANY: Douglass W. King Company, Inc. dba Rio Grande Technologies, LLC; DOCKET NUMBER: 1998-1492-AIR-E; IDENTIFIER: Account Number CD-0137-O; LOCATION: Harlingen, Cameron County, Texas; TYPE OF FACILITY: seed corn processing plant; RULE VIOLATED: 30 TAC §116.110(a) and the Act, §382.085(b) and §382.0518(a), by operating without a permit; PENALTY: $800; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(17) COMPANY: Grant Barkey dba Rock-A-Way Park; DOCKET NUMBER: 1998-1109-PWS-E; IDENTIFIER: Public Water Supply Number 1500095; LOCATION: near Burnet, Llano County, Texas; TYPE OF FACILITY: public water system; RULE VIOLATED: 30 TAC §290.46(e)(3)(A), by failing to ensure that the water system is under the supervision of at least a grade "C" groundwater operator; PENALTY: $938; ENFORCEMENT COORDINATOR: Julie Talkington, (512) 239-0439; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(18) COMPANY: San Pedro Canyon Water Company; DOCKET NUMBER: 1998-1324-PWS-E; IDENTIFIER: Public Water Supply Number 2330011; LOCATION: Del Rio, Val Verde County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(a) and (e)(2) and the THSC, §341.033(d), by failing to collect and submit water samples for bacteriological analysis and by failing to provide public notice of the failure to sample; and 30 TAC §291.76 and the Code, §5.235, by failing to pay water regulatory assessment fees; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0884; REGIONAL OFFICE: 140 Heimer Road, Suite 360, San Antonio, Texas 78232-5042, (210) 490-3096.

(19) COMPANY: Alan Shave; DOCKET NUMBER: 1998-1260-PST-E; IDENTIFIER: Petroleum Storage Tank Facility Identification Number 39084; LOCATION: Henrietta, Clay County, Texas; TYPE OF FACILITY: former gasoline station; RULE VIOLATED: 30 TAC §334.55(a)(3), by failing to have the permanent removal of an underground storage tank from service conducted by qualified personnel in a manner designed to minimize the possibility of any threats to human health and safety or the environment; PENALTY: $800; ENFORCEMENT COORDINATOR: Lori R. Haynie, (915) 698-9674; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(20) COMPANY: Southwestern Electric Power Company; DOCKET NUMBER: 98-1116-IWD-E; IDENTIFIER: Permit Number 01331; LOCATION: near Jefferson, Marion County, Texas; TYPE OF

FACILITY: steam electric generating station; RULE VIOLATED: Permit Number 01331 and the Code, §26.121, by failing to comply with the permitted copper limits for the daily average limit of 0.010 mpl, daily maximum limit of 0.018 mpl, average loading limit of 46 pounds per day, and maximum loading limit of 83 pounds per day; PENALTY: $8,250; ENFORCEMENT COORDINATOR: Karen Berryman, (512) 239-2172; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

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Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: March 23, 1999

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The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Default Orders. The TNRCC Staff proposes a Default Order when the Staff has sent an Executive Director's Preliminary Report and Petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance, and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPR. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the TNRCC pursuant to the Texas Water Code, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **May 2, 1999**. The TNRCC will consider any written comments received and the TNRCC may withdraw or withhold approval of a Default Order if a comment discloses facts or considerations that indicate that the proposed Default Orders is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's jurisdiction, or the TNRCC's orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of changes to a proposed Default Order is not required to be published if those changes are made in response to written comments.

A copy of each of the proposed Default Orders is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. Written comments about the Default Order should be sent to the attorney designated for the Default Order at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on May 2, 1999**. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the Default Orders and/or the comment procedure at the listed phone numbers; however, comments on the Default Orders should be submitted to the TNRCC in **writing**.

(1) COMPANY: Preston Allen; DOCKET NUMBER: 1996-1160-OSI-E; TNRCC ID NUMBER: Registration Number 4060; LOCATION: 231 Cedar Lane, Cleburne, Johnson County, Texas; TYPE OF FACILITY: on-site sewage facility; RULE VIOLATED: 30 TAC §285.12 and §285.13 by failing to install an on-site sewage facility that conformed with sewerage and effluent disposal systems design specifications; PENALTY: $2,200; STAFF ATTORNEY: Booker Harrison, Litigation Division, MC 175, (512) 239-4113; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(2) COMPANY: Noble Enloe dba Tanglewood Forest Water System; DOCKET NUMBER: 1997-1723-PWS-E; TNRCC ID NUMBER: 2040054; ENFORCEMENT ID NUMBER: 7092; LOCATION: Oakhurst, San Jacinto County, Texas; TYPE OF FACILITY: public drinking water operator; RULE VIOLATED: 30 TAC §290.106(a)(1) by failing to have a written sample siting plan for the collection of routine bacteriological samples from representative service connections throughout the distribution system; 30 TAC §290.46(n) by failing to have a map of the distribution system so that valves and main could be easily located during emergencies; 30 TAC §290.46(m) by failing to properly maintain the water system by improving the general appearance of all plant facilities; 30 TAC §290.43(d)(2) by failing to provide all pressure tanks with pressure release devices and easily readable pressure gauges; 30 TAC §290.46(p) by failing to either inspect all pressure tanks annually or to record and maintain results of such annual inspections; 30 TAC §290.46(i) by failing to have a service agreement with each customer that would allow an inspection of the individual water facilities prior to providing service in order to ensure that no substandard material was used and to prevent possible cross-connection or other undesirable plumbing practices; 30 TAC §290.44(a)(4) by failing to install water transmission and distribution lines at least 25 inches below the ground surface; 30 TAC §290.44(d)(5) by failing to provide the water system with sufficient valves and blow-offs so that necessary repairs could be made without undue interruption of service over any considerable area and for flushing the system when required; 30 TAC §290.46(f)(2)(B) by failing to perform chlorine residual tests on water collected from various locations within the distribution system at least once every seven days; 30 TAC §290.45(b)(1)(A) by failing to provide a pressure tank capacity of 50 gallons per connection; 30 TAC §290.45(b)(1)(A) by failing to provide a well capacity of 1.5 gallons per minute per connection; 30 TAC §290.41(c)(3)(K) by failing to provide a screened casing vent on each well; 30 TAC §290.41(c)(1)(F) by failing to obtain sanitary easements for all property within 150 feet of each well site; 30 TAC §291.76 and Texas Water Code, §5.235 by failing to pay the Regulatory Assessment Fee for 1996; 30 TAC §290.106 and Texas Health and Safety Code, §34.033(d) by failing to submit water samples from the Facility for bacteriological analysis to a laboratory approved by the Texas Department of Health for the sampling periods of July 1996, August 1996, September 1996, October 1996, November 1996, December 1996, January 1997, February 1997, and March 1997; PENALTY: $11,680; STAFF ATTORNEY: Mary R. Risner, Litigation Division, MC 175, (512) 239-6224; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892.

(3) COMPANY: Joseph McConley doing business as Metro Land and Investments doing business as Martin Creek Estates; DOCKET NUMBER: 1996-1975-PWS-E; TNRCC ID NUMBER 1260122; ENFORCEMENT ID NUMBER: 6719; LOCATION: Johnson County, Texas; TYPE OF FACILITY: public water system; RULE VIOLATED: 30 TAC §290.46(e) by failing to operate the system under the direct supervision of a certified water works operator; 30 TAC §290.106 by failing to collect and submit samples for bacteriological analysis to a laboratory approved by the Texas Department of Health on a regular monthly basis; 30 TAC §290.106(a)(1) by failing to prepare a plan showing the sites at which samples for bacteriological analysis will be collected; 30 TAC §290.41(e) by failing to provide mechanical chlorination equipment to provide continuous disinfection of all water; 30 TAC §290.46(f)(1)(A) by failing to maintain a disinfectant residual of 0.2 milligrams per liter in the far reaches of the distribution systems at all times; 30 TAC §290.46(f)(2) by failing to provide proper chlorination test kit method; 30 TAC §290.45(b)(1)(B) by failing to provide a well capacity of 0.6 gallons per minute per connection; 30 TAC §290.45(B) by failing to provide pressure tank

capacity of 20 gallons per connection; 30 TAC §290.43(c)(6) by failing to provide that all water storage tanks are tight against leakage; 30 TAC §290.43(c)(7) by failing to provide a means of removing accumulated silt and deposits in the bottom of each clear well and potable water tank; 30 TAC §290.43(e) by failing to enclose all potable water storage reservoirs and pressure maintenance facilities in an intruder-resistant fence with lockable gates; 30 TAC §290.43(c) by failing to provide a water storage reservoir in compliance with American Water Works standards; 30 TAC §290.46(p) by failing to inspect ground storage and pressure tanks and maintain records of these inspections on at least an annual basis; 30 TAC §290.43(d)(2) by failing to equip the pressure tank with a pressure release device and an easily readable pressure gauge; 30 TAC §290.46(I) by failing to have an agreement with each customer that would allow an inspection of individual water system facilities prior to providing service and periodically to prevent cross-connections or other undesirable plumbing practices; 30 TAC §290.41(c)(3)(B) by failing to extend the well casing to a point 18 inches above the elevation of the finished floor of the pump house or natural ground surface and a minimum of one inch above the sealing block or pump motor foundation block; 30 TAC §290.41(c)(3)(N) by failing to provide the well with a flow measuring device to measure production yields and provide for the accumulation of water production data; 30 TAC §290.41(c)(3)(K) by failing to seal the well head with gaskets or a pliable crack-resistant caulk; 30 TAC §290.41(c)(3)(K) by failing to provide the well with a casing vent which is faced downward and screened with 16-mesh or finer corrosion-resistant screen; 30 TAC §290.41(c)(1)(F) by failing to protect the system's facilities by establishing a 150-foot radius sanitary control easement prohibiting all septic tanks within 50 feet of the well and open jointed drain fields within a 150-foot radius of each well; 30 TAC §290.41(c)(3)(A) by failing to submit well completion data to the TNRCC; 30 TAC §290.46(w) by failing to post a legible sign at each facility which provides the name of the water supply and an emergency telephone number where a responsible person can be contacted; 30 TAC §290.44(a)(1) by failing to ensure that all chemicals, any additional or replacement process media, all newly installed pipes, and related products conform to American National Standards Institute/National Sanitation Foundation Standards; 30 TAC §290.46(m) by failing to initiate a maintenance program to facilitate cleanliness, improve the general appearance of all plant facilities, and reduce costly repairs due to a lack of proper maintenance; 30 TAC §290.39(d) by failing to submit "as-built" plans of the existing system which have been prepared and sealed by a registered professional engineer; 30 TAC §291.101(a) by failing to obtain a certificate of convenience and necessity; 30 TAC §291.21(a) by failing to file with the commission, tariffs showing all rates that are subject to the original or appellate jurisdiction of the commission. PENALTY: $7,110; STAFF ATTORNEY: John Peeler, Litigation Division, MC 175, (512) 239-3506; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499.

(4) COMPANY: Bill Whitten; DOCKET NUMBER: 1998-0788-OSS-E; CERTIFICATION NUMBER: 5923 and ENFORCEMENT NUMBER: 12694; LOCATION OF VIOLATION: Williamson and Burnet Counties, in Texas; TYPE OF FACILITY: on-site septic installer; RULES VIOLATED: 30 TAC §285.58(a)(10) by abandoning the installation of an on-site sewage facility located at 1499 North Highway 183, Liberty Hill, Williamson County, Texas, without just cause; 30 TAC §285.58(a)(10) by abandoning the installation of an on-site sewage facility located on Lots 24 and 25, Donall Estates, Unit 4, Burnet County, Texas, without just cause, before the final inspection; PENALTY: $750; STAFF ATTORNEY: Kathy Keils, Litigation Division, MC 175, (512) 239-0678; REGIONAL OFFICE: Austin Regional Office, 1921 Cedar Bend, Suite 150, Austin, Texas 78758- 5336.

TRD-9901749
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: March 24, 1999

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Notice of Opportunity to Comment on Shut Down Orders of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Shutdown Orders. Texas Water Code, § 26.3475 authorizes the TNRCC to order the shutdown of any Underground Storage Tank system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the Underground Storage Tank system into compliance with those regulations. The TNRCC staff proposes a shutdown order after the owner or operator of a underground storage tank facility fails by to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. Pursuant to the Texas Water Code, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **May 2, l999**. The TNRCC will consider any written comments received and the TNRCC may withdraw or withhold approval of a Shutdown Order if a comment discloses facts or consideration that indicate that the consent to the proposed Shutdown Order is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the TNRCC's jurisdiction, or the TNRCC's orders and permits issued pursuant to the TNRCC's regulatory authority. Additional notice of changes to a proposed Shutdown Order is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed Shutdown Orders is available for public inspection at both the TNRCC's Central Office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable Regional Office listed as follows. Written comments about the Shutdown Order should be sent to the attorney designated for the Shutdown Order at the TNRCC's Central Office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on May 2, l999**. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The TNRCC attorneys are available to discuss the Shutdown Orders and/or the comment procedure at the listed phone numbers; however, comments on the Shutdown Orders should be submitted to the TNRCC in **writing**.

(1) FACILITY: C. C. Southern; DOCKET NUMBER: 1999-0353-PST-E; TNRCC ID NUMBER: Facility ID Number 19996; LOCATION: 7179 Industrial Avenue, El Paso, El Paso County, Texas; TYPE OF FACILITY: retail gasoline service station with underground storage tanks; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) by failing to monitor the underground storage tanks for releases at a frequency of at least once every month; 30 TAC §334.50(d)(5) by failing to install equipment and implement procedures designed to test or monitor for the presence of vapors from the regulated sub-

stance in the soil gas of the backfilled excavation zone; PENALTY: shutdown order; STAFF ATTORNEY: Scott McDonald, Litigation Division, MC 175 (512) 239-6005; REGIONAL OFFICE: 7500 Viscount Boulevard, Suite 147, El Paso, Texas 79925-5633.

(2) FACILITY: Fiesta Grocery; OWNER: Jet Properties, Incorporated and Amin Mohammed doing business as Fiesta Grocery; DOCKET NUMBER: 1999-0193-PST-E; TNRCC ID NUMBER: Facility ID Number: 0039546; LOCATION: 7208 Brook Valley, San Antonio, Bexar County, Texas; TYPE OF FACILITY: retail gasoline service station with underground storage tanks; RULES VIOLATED: 30 TAC §334.50(b) and §334.50(a)(1)(A) by failing to provide tank and piping release detection for the entire underground storage tanks system and 30 TAC §334.49(a) by failing to provide corrosion protection for the entire underground storage tanks system; PENALTY: shutdown order; STAFF ATTORNEY: Bill Jang, Litigation Division, MC 175, (512) 239-2269; REGIONAL OFFICE: 140 Heimer Road, Suite 360, San Antonio, Texas 78232-5042, (210) 490-3096.

(3) FACILITY: King Mart Number 1; OWNER: Mohammed Razi Niuzi; DOCKET NUMBER: 1999-0274-PST-E; TNRCC ID NUMBER: 0037105; LOCATION: 5800 Almeda Road, Houston, Harris County, Texas; TYPE OF FACILITY: retail gasoline service station with underground storage tanks; RULES VIOLATED: 30 TAC §334.49(a) by failing to have corrosion protection for the underground storage tanks system; 30 TAC §334.50(a)(1)(A) by failing to have a release detection method capable of detecting a release from any portion of the underground storage tanks system, including piping; PENALTY: shutdown order; STAFF ATTORNEY: M. Camille Morris, Litigation Division, MC 175, (512) 239-3915; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(4) FACILITY: Kountry Korner; OWNER: Mr. Young Kwon; DOCKET NUMBER: 1999- 0184-PST-E; TNRCC ID NUMBER: 13393; LOCATION: 111 West Highway 82, Nocona, Montague County, Texas; TYPE OF FACILITY: retail gasoline service station with underground storage tanks; RULES VIOLATED: 30 TAC §334.50(a)(1)(A) by failing to provide a release detection method capable of detecting a release from any portion of the underground storage tank systems; 30 TAC §334.51(b)(2)(C) by failing to equip each tank with a valve or other device designed to automatically shut off the flow of regulated substances into the tank when the liquid in the tank reaches no higher than 95% capacity; and 30 TAC §334.49(a) by failing to install corrosion protection at the facility; PENALTY: shutdown order; STAFF ATTORNEY: Mary R. Risner, Litigation Division, MC 175, (512) 239-6224; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602- 7833 (915) 698-9674.

(5) FACILITY: Mandy's Racing Fuel; OWNER: Gary Scalf; DOCKET NUMBER: 1999-0330-PST-E; TNRCC ID NUMBER: Facility ID Number 0060575; LOCATION: 1313 Sheldon, Channelview, Harris County; TYPE OF FACILITY: retail gasoline service station with underground storage tanks; RULES VIOLATED: 30 TAC §334.50(a)(1) by failing to provide proper release detection for the underground storage tanks at the Facility; 30 TAC §334.49(a) by failing to provide proper corrosion protection for the entire underground storage tank system; 30 TAC §334.51(b)(2)(B) by failing to provide proper spill containment equipment for the entire underground storage tank system; and 30 TAC §334.51(b)(2)(C) by failing to provide proper overfill prevention equipment; PENALTY: shutdown order; STAFF ATTORNEY: Kathy Keils, Litigation Division, MC 175, (512) 239-0678; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(6) FACILITY: Southwood Food Mart; OWNER: Rajni Patel; DOCKET NUMBER: 1999-0198-PST-E; TNRCC ID NUMBER: Facility ID Number 0004821; LOCATION: 702 Southwood, Lufkin, Angelina County, Texas; TYPE OF FACILITY: retail gasoline service station with underground storage tanks; RULES VIOLATED: 30 TAC §334.50(b)(1) by failing to provide a release detection method capable of detecting a release from any portion of the underground storage tanks system, 30 TAC §334.50(b)(2) by failing to monitor piping for releases monthly, 30 TAC §334.50(b)(2)(A)(i)(III) by failing to perform an annual performance test on line leak detector for the suction piping, 30 TAC §334.49(a) by failing to provide corrosion protection for the entire underground storage tanks system, and 30 TAC §334.49(e) by failing to provide appropriate corrosion protection records; PENALTY: shutdown order; STAFF ATTORNEY: John Peeler, Litigation Division, MC 175, (512) 239-3506; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(7) FACILITY: Whistle Stop; OWNER: Habibco Corporation, Incorporated; DOCKET NUMBER: 1999-0295-PST-E; TNRCC ID NUMBER: 4055; LOCATION: 834 East Rundberg, Austin, Travis County; TYPE OF FACILITY: retail and gasoline service station with underground storage tanks; RULE(S) VIOLATED: 30 TAC §334.50(a)(1)(A) by failing to have a release detection method capable of detecting a release from any portion of the underground storage tanks system which contains regulated substances including the tanks, piping, and other ancillary equipment; 30 TAC §334.50(b)(2)(A)(i)(III) by failing to test a line leak detector at least once per year for performance and operational reliability; 30 TAC §334.50(d)(1)(B)(ii) by failing to conduct reconciliation of detailed inventory control records at least once each month, sufficiently accurate to detect a release which equals or exceeds the sum of 1.0% of the total substance flow through for the month plus 130 gallons; PENALTY: shutdown order; STAFF ATTORNEY: Kathy Keils, Litigation Division, MC 175, (512) 239-0678; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-3795.

TRD-9901748
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: March 24, 1999

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Notice of Water Quality Applications.

Notices issued during the period of February 26, 1999 through March 16, 1999.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN 30 DAYS OF THE ISSUE DATE OF THE NOTICE.

SPLENDORA INDEPENDENT SCHOOL DISTRICT, P.O. Box 168, Splendora, Texas 77372, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 11143-002, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The plant site is located at 23411 Farm-to-Market Road 2090, approximately 2.67 miles northwest of the intersection of U.S. Highway 59 and Farm-to-Market Road 2090 in Montgomery County, Texas. The treated effluent is discharged to Gulley Branch; thence to Peach Creek

in Segment No. 1011 of the San Jacinto River Basin. The designated uses for Segment No. 1011 are high aquatic life use, public water supply and contact recreation. No significant degradation of high quality receiving waters is anticipated.

FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT NO. 116, C/O VINSON & ELKINS, L.L.P., 2300 First City Tower, 1001 Fannin, Houston, Texas 77002-6760, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 13976-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The plant site is located along the west side of Crabb River Road approximately 4200 feet south of U.S. Highway 59 in Fort Bend County, Texas. The treated effluent is discharged to Rabbs Bayou; thence to the Brazos River Below Navasota River in Segment No. 1202 of the Brazos River Basin. The unclassified receiving water uses are limited aquatic life use for Rabbs Bayou. The designated uses for Segment No. 1202 are high aquatic life uses, public water supply, and contact recreation. No significant degradation of high quality receiving waters is anticipated.

CITY OF HUNTSVILLE, 1212 Avenue M, Huntsville, Texas 77340, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 10781-004, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 2,500,000 gallons per day. The plant site is located on Farm-to-Market Road 1374, approximately 4 miles south-southwest of the intersection of Interstate Highway 45 and Farm-to-Market Road 1374 in Walker County, Texas. The treated effluent is discharged via pipeline to an unnamed tributary; thence to Robinson Creek; thence to Lake Conroe in Segment No. 1012 of the San Jacinto River Basin. The unclassified receiving water uses are no significant aquatic life use for the unnamed tributary and high aquatic life use for Robinson Creek. The designated uses for Segment No. 1012 are high aquatic life use, public water supply and contact recreation. No significant degradation of high quality receiving waters is anticipated.

CITY OF PEARLAND, 3519 Liberty Drive, Pearland, Texas 77588, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 10134-007, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 2,000,000 gallons per day. The plant site is located approximately 0.25 mile east and 1 miles north of the intersection of County Road 101 (Bailey Road) and County Road 103 (Harkey Road) in the City of Pearland in Brazoria County, Texas. The treated effluent is discharged to Marys Creek; thence to Clear Creek Above Tidal in Segment No. 1102 of the San Jacinto-Brazos Coastal Basin. The unclassified receiving water uses are no significant aquatic life uses for Marys Creek. The designated uses for Segment No. 1102 are contact recreation and high aquatic life uses. No significant degradation of high quality receiving waters is anticipated.

HARRIS COUNTY, P.O. Box 519, Houston, Texas 77446-0519, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 13921-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The plant site is located approximately 4,500 feet west-southwest of the intersection of Katy-Hockley Road and Katy-Hockley Cutoff, 4,600 feet northwest of the intersection of Katy-Hockley Cutoff and Longenbaugh Road or approximately 4.4 miles north of the City of Katy, in Harris County, Texas. The treated effluent is discharged via 4" PVC force main to Harris County Flood Control Ditch U102-14-00; thence to Bear Creek; thence to South Mayde Creek; thence to Buffalo Bayou Above Tidal in Segment No. 1014 of the San Jacinto River Basin. The unclassified receiving waters have no significant aquatic life uses for the Harris County Flood Control Ditch U102-14-00 and Bear Creek downstream to Longenbaum Road and intermediate aquatic life uses for Bear Creek from Longenbaum Road downstream. The designated uses for Segment No. 1014 are contact recreation and limited aquatic life uses. No significant degradation of high quality receiving waters is anticipated.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN 30 DAYS AFTER NEWSPAPER PUBLICATION OF THE NOTICE.

CITY OF SEYMOUR, P.O. Box 31, Seymour, Texas 76380, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, Proposed Texas Pollutant Discharge Elimination System (TPDES) Permit, No. 04004, to authorize the discharge of reverse osmosis reject water at a daily average flow not to exceed 200,000 gallons per day via Outfall 001. The appllicant proposes to operate a water treatment plant. The plant site is located on the west bank of Plants Creek approximately 2,700 feet north of the intersection of West Custer Street and East California Street (U.S. Highway 82), northwest of the City of Seymour, Baylor County, Texas. The effluent is discharged directly to the Brazos River above Possum Kingdom Lake, in Segment No. 1208 of the Brazos River Basin. The designated uses for Segment No. 1208 are high quality aquatic life use and contact recreation. No significant degradation of high quality receiving waters is anticipated.

LOWER COLORADO RIVER AUTHORITY, P.O. Box 220, Austin, Texas 78767-0220, has appllied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 13977-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day. The plant site is located approximately 1,000 feet north of State Highway 71 at a point 11,500 feet northwest (along State Highway 71) of the intersection of State Highway 71 and Farm to Market Road 1209 in Bastrop County, Texas. The treated effluent is discharged to an unnamed tributry; thence to Colorado River Below Town Lake in Segment No.1428 of the Colorado River Basin. The unclassified receiving water uses are no significant aquatic life uses for the unnamed tributary. The designated uses for Segment No. 1428 are contact recreation,exceptional aquatic life uses and public water supply. No significant degradation of high quality receiving waters is anticipated.

BIMBO CEREAL FOODS, Inc.,P.O. Box 150, Canyon, Texas 79015, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, Proposed Permit No. 04052 to authorize the disposal of process wastewater and wash water at a daily average flow not to exceed 100,000 gallons per day via irrigation of 250 acres of land. The applicant proposes to operate a corn flour processing plant. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal area are located on the west side of Farm to Market Road 809, approximately 500 feet north of the intersection of Farm to Market Road 809 and Farm to Market Road 1062, Deaf Smith County, Texas. The plant site and disposal area are located in the drainage basin of Upper Prairie Dog Town Fork Red River, in Segment No.0229, of the Red River Basin.

CITGO PRODUCTS PIPELINE COMPANY, P.O. Box 3758, Tulsa, Oklahoma 741023758 has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, Proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 03993, to authorize the discharge of remediated groundwater, stormwater and hydrostatic test water on an intermittent and flow variable basis via Outfall 001 and stormwater on an intermittent and flow variable basis via Outfall 002. The applicant operates Arlington Station, a petroleum pipeline pumping station with interim storage. The plant site is located at 3301 State Highway 157 in the City of Fort Worth, Tarrant County, Texas. The effluent is discharged to a series of drainage ditches; thence to Hurricane Creek; thence to the Lower West Fork Trinity River, in Segment No. 0841 of the Trinity River Basin. The unclassified receiving waters have presumed no significant aquatic life use for the drainage ditches and high aquatic life use for Hurricane Creek. The designated uses for Segment No. 0841 are intermediate quality aquatic life use and contact recreation. No significant degradation of high quality receiving waters is anticipated.

MILITARY HIGHWAY WATER SUPPLY CORPORATION, P.O. Box 250, Progresso, Texas 78579, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, Proposed Permit No. 13462006, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 510,000 gallons per day. The plant site is located approximately - mile east of the intersection of Balli Road and FarmtoMarket Road 907 and approximately 500 feet west of the intersection of Balli Road and Tower Road in Hidalgo County, Texas. The treated effluent is discharged to Arroyo Colorado Above Tidal in Segment No. 2202 of the Nueces Rio Grande Coastal Basin. The designated uses for Segment No. 2202 are contact recreation and intermediate aquatic life uses.

FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT NO. 116, c/o Vinson & Elkins, L.L.P., 2300 First City Tower, 1001 Fannin, Houston, Texas 770026760, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 13976001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The plant site is located along the west side of Crabb River Road approximately 4200 feet south of U.S. Highway 59 in Fort Bend County, Texas. The treated effluent is discharged to Rabbs Bayou; thence to the Brazos River Below Navasota River in Segment No. 1202 of the Brazos River Basin. The unclassified receiving water uses are limited aquatic life use for Rabbs Bayou. The designated uses for Segment No. 1202 are high aquatic life uses, public water supply, and contact recreation. No significant degradation of high quality receiving waters is anticipated.

CALPINE CORPORATION, 50 West San Fernando Street, San Jose, California 95113, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 04040, to authorize the discharge of cooling tower blowdown, previously monitored effluents (low volume waste sources) and stormwater at a daily average flow not to exceed 1,500,000 gallons per day via Outfall 001. The applicant proposes to operate an electric power plant. The plant site is located at the southwest corner of the intersection of McColl Road and State Highway 1925 (Monte Cristo Road) approximately three miles northwest of the City of Edinburg, Hidalgo County, Texas. The effluent is discharged to Hidalgo County Drainage Ditch No. 1 (North Main Drain); thence to Santa Cruz Canal; thence to Donna Drain; thence to the North Floodway Pilot Channel; thence to Laguna Madre in Segment No. 2491 of the Bays and Estuaries. The unclassified receiving waters have high aquatic life use for the Hidalgo County Drainage Ditch No. 1 (North Main Drain) and the Santa Cruz Canal. The designated uses for Segment No. 2491 are exceptional quality aquatic life use, contact recreation and oyster waters. No significant degradation of high quality receiving waters is anticipated.

VULCAN MATERIALS COMPANY, P.O. Box 791550, San Antonio, Texas 78279, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a major amendment to Permit No. 03806 to authorize relocation of Outfalls 001 and 003 from the currently authorized locations. The permit currently authorizes an intermittent, flow variable discharge of mine pit water and storm water runoff via Outfalls 001, 002 and 003, which will remain the same. The applicant operates a limestone quarry and rock crushing operation. The plant site is located at: crushing operation adjacent to County Road (CR) 228 approximately - mile north of the intersection of CR 228 and CR 234; mining operation immediately south of the intersection of CR 228 and CR 234, near the City of Tehuacana, Limestone County, Texas. The effluent is discharged to: Outfall 001 to a grassy swale; thence to Tehuacana Creek; thence to the Trinity River Above Lake Livingston in Segment No. 0804 of the Trinity River Basin; Outfall 002 to a ditch; thence to an unnamed tributary of Tehuacana Creek; thence to Tehuacana Creek; thence to the Trinity River Above Lake Livingston in Segment No. 0804 of the Trinity River Basin; and Outfall 003 to an unnamed tributary; thence to Trotter Ponds; thence to an unnamed tributary; thence to SCS Reservoir #24; thence to Elm Creek; thence to Pin Oak Creek; thence to Richland Chambers Reservoir in Segment No. 0836 of the Trinity River Basin. The unclassified receiving water use is limited aquatic life use for Trotter Ponds. The designated uses for Segment No. 0804 are high quality aquatic life use and contact recreation. The designated uses for Segment No. 0836 are high quality aquatic life use, contact recreation, and public water supply.

AUSTEX PARTS & SERVICE, L.L.C., P.O. Box 17547, Austin, Texas 78760, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14060001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 123,750 gallons per day. The plant site is located 2.6 miles northwest of the intersection of State Highway 21 and County Road 127 in Hayes County, Texas. The treated effluent is discharged to an unnamed tributary of Brushy Creek; thence to Brushy Creek; thence to Plum Creek in Segment No. 1810 of the Guadalupe River Basin. The unclassified receiving water uses are no significant aquatic life uses for the unnamed tributary of Brushy Creek. The designated uses for Segment No. 1810 are high aquatic life uses and contact recreation. No significant degradation of high quality receiving waters is anticipated.

ARISTECH CHEMICAL CORPORATION, 8811 Strang Road, P.O. Box 1436, LaPorte, Texas 77572, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a major amendment to TNRCC Permit No. 02107 to authorize an increase in the discharge from a daily average flow not to exceed 300,000 gallons per day to a daily average flow not to exceed 422,000 gallons per day via Outfall 001; to reroute cooling tower blowdown from Outfall 001 to Outfall 002; increase the discharge from an intermittent and flow variable basis to a daily average flow not to exceed 323,000 gallons per day via Outfall 002; and to add a new discharge of storm water runoff on an intermittent and flow variable basis via Outfall 003. The current permit authorizes the discharge of treated wastewaters consisting of commingled process wastewater, cooling tower and boiler blowdown, domestic wastewater, and storm water runoff at a daily

average flow not to exceed 300,000 gallons per day via Outfall 001, and storm water runoff on an intermittent and flow variable basis via Outfall 002. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing National Pollutant Discharge Elimination System (NPDES) Permit No. TX0074276 issued on June 24, 1994 and TNRCC Permit No. 02107. The applicant operates a polypropylene manufacturing plant. The plant site is located at 8811 Strang Road, approximately 1000 feet east of the intersection of Strang Road and State Highway 225, and approximately 3.5 miles northwest of the City of LaPorte, Harris County, Texas. The effluent is discharged to a drainage ditch; thence to San Jacinto Bay, in Segment No. 2427 of the Bays and Estuaries. The unclassified receiving waters have no significant aquatic life use for the drainage ditch. The designated uses for Segment No. 2427 are high quality aquatic life use and contact recreation. No significant degradation of high quality receiving waters is anticipated.

CITY OF BLOOMBURG, P.O. Box 198, Bloomburg, Texas 75556, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, Proposed Permit No. 13930001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 90,000 gallons per day. The plant site is located approximately 200 feet south of the intersection of Anthony and Louisiana Streets in Cass County, Texas. The treated effluent is discharged to State Line Creek in the drainage area of nondesignated segment (referenced as Segment 0400) of the Cypress Creek Basin in Texas.

AMTOPP CORPORATION, P.O. Box 405, Lolita, Texas 77971, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a major amendment to TNRCC Permit No. 03477 to authorize an increase from a daily average flow not to exceed 140,000 gallons per day to a daily average flow not to exceed 533,000 gallons per day via Outfall 001; to add two additional waste streams (noncontact cooling water from the chiller system and noncontact cooling water from the air conditioning system) to the list of permitted waste streams at Outfall 001; and to add two additional waste streams (raw water from the fire water system and air conditioning condensate) to the list of permitted waste streams at Outfalls 002 and 003. The current permit authorizes the discharge of contact cooling water, cooling tower blowdown, reverse osmosis reject water, and treated domestic wastewater at a daily average flow not to exceed 140,000 gallons per day via Outfall 001, and storm water on an intermittent and flow variable basis via Outfalls 002 and 003. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0108405 issued on February 26, 1993 and TNRCC Permit No. 03477. The applicant operates a plastics extrusion facility manufacturing plastic film, plastic bags, and plastic corrugated sheets. The plant site is located at 101 Inteplast Boulevard, adjacent to Farm to Market Road 1593, approximately 3.5 miles south of the City of Lolita, Jackson County, Texas. The effluent is discharged from the plant site through a 12inch pipe to the Lavaca River Tidal in Segment No. 1601 of the Lavaca River Basin (Outfall 001); and to Huisache Creek; thence to Cox Bay in Segment No. 2454 of the Bays and Estuaries (Outfalls 002 and 003). The designated uses for Segment No. 1601 are high quality aquatic life use and contact recreation. The designated uses for Segment No. 2454 are exceptional quality aquatic life use, contact recreation, and oyster waters. No significant degradation of high quality receiving waters is anticipated.

CENTRAL POWER & LIGHT COMPANY , P.O. Box 2121, Corpus Christi, Texas 78403, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a major amendment to TNRCC Permit No. 01303 to authorize the disposal of domestic wastewater via evaporation and to allow for an alternative method for the analytical laboratory analysis of total residual chlorine. The current permit authorizes the discharge of once through cooling water and previously monitored effluents at a daily average flow not to exceed 231,000,000 gallons per day via Outfall 001, which will remain the same. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing NPDES Permit No. TX0003573 issued on December 20, 1996 and TNRCC Permit No. 01303 issued on October 22, 1993. The applicant operates the E.S. Joslin Steam Electric Station. The plant site is located approximately 1.5 miles south of State Highway 35 near the City of Point Comfort, Calhoun County, Texas. The effluent is discharged to Cox Bay, in Segment No. 2454 of the Bays and Estuaries. The designated uses for Segment No. 2454 are exceptional quality aquatic life use, contact recreation, and oyster waters. No significant degradation of high quality receiving waters is anticipated.

NJB & SONS, INC., 7810 South Lone Star Parkway, Moody, Texas 76557, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a major amendment to TNRCC Permit No. 10888001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 5,000 gallons per day to a daily average flow not to exceed 40,000 gallons per day. The current permit also authorizes the disposal of treated domestic wastewater via irrigation of five (5) acres of golf course. Application rates for the irrigated land shall not exceed 1.1 acrefeet/acre/year on 5.0 acres. The plant site is located 0.75 mile west of State Highway 317 and approximately 2.25 miles north of the intersection of State Highway 317 and FarmtoMarket Road 107 in McLennan County, Texas. The treated effluent is discharged to an unnamed lake; thence to an unnamed tributary; thence to Stampede Creek; thence to Belton Lake in Segment No. 1220 of the Brazos River Basin. The unclassified receiving water uses are high aquatic life uses for unnamed lake. The designated uses for Segment No. 1220 are high aquatic life uses, public water supply, and contact recreation. No significant degradation of high quality receiving waters is anticipated.

GEORGIA GULF CORPORATION, P.O. Box 1959, Pasadena, Texas 77501, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a major amendment to TNRCC Permit No. 02067 to authorize the removal of effluent limitations and monitoring requirements for biochemical oxygen demand (5day), total suspended solids, benzene, total arsenic, total nickel, and total zinc at Outfall 001; to add boiler blowdown to the list of permitted wastes at Outfall 001; and to reroute domestic sewage from Outfalls 101/001 to Outfall 004. The current permit authorizes the discharge of treated sanitary wastewater, cooling tower blowdown, steam system blowdown, and storm water at a flow not to exceed 320,000 gallons during any 24hour period via Outfall 001; Phenol Unit treated wastewater at a daily average flow not to exceed 550,000 gallons per day via Outfall 004; Phenol Plant cooling tower blowdown and steam condensate at a flow not to exceed 500,000 gallons during any 24hour period via Outfall 005 which will remain the same; and storm water on an intermittent and flow variable basis via Outfalls 002, 003, and 006 which will remain the same. Issuance of this Texas Pollutant Discharge Elimination System (TPDES) permit will replace the existing National Pollutant Discharge Elimination System (NPDES) Permit No. TX0072320 issued on June 30, 1992 and TNRCC Permit No. 02067. The applicant operates an organic chemical manufacturing plant which produces cumene, phenol, and acetone as its primary products. The plant site is located at 3503 Pasadena Freeway, on the south bank of the Houston Ship Channel, approximately 7500 feet north of State Highway 225, in the City of Pasadena, Harris County, Texas. The effluent is discharged directly to the Houston Ship Channel, in Segment No. 1006 of the San

Jacinto River Basin. The designated uses for Segment No. 1006 are navigation and industrial water supply. No significant degradation of high quality receiving waters is anticipated.

UTILITIES INVESTMENT COMPANY, INC., P.O. Box 11130, Houston, Texas 772931130, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 13988001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 49,000 gallons per day.The plant site is located approximately 2.5 miles westnorthwest of the intersection of Interstate Highway 45 and Longstreet Road and 3.8 miles northnorthwest of the intersection of River Road and Farm to Market Road 830 in Montgomery County, Texas. The treated effluent is discharged to a drainage ditch; thence to an unnamed tributary; thence to Chambers Creek; thence to Lake Conroe in Segment No. 1012 of the San Jacinto River Basin. The unclassified receiving water uses are no significant aquatic life use for the drainage ditch and limited aquatic life use for the unnamed tributary. The designated uses for Segment No. 1012 are high aquatic life use, public water supply and contact recreation. No significant degradation of high quality receiving waters is anticipated.

CHILTON WATER SUPPLY AND SEWER SERVICE CORPORATION, P.O. Box 95, Cameron, Texas 765200095, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a major amendment to TNRCC Permit No. 10811001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 66,000 gallons per day to a daily average flow not to exceed 74,000 gallons per day. Issuance of the proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No.10811001 will replace the existing NPDES Permit No. TX0053520 issued on May 10, 1988 and TNRCC Permit No.10811001 issued on May 23, 1994. The plant site is located approximately 0.7 mile east of State Highway 77 and 1 mile south of the City of Chilton, just northeast of the crossing of Deer Creek by old Highway 77 in Falls County, Texas. The treated effluent is discharged to Deer Creek; thence to Brazos River Below Whitney Creek in Segment No. 1242 of the Brazos River Basin. The unclassified receiving water uses are intermediate aquatic life uses for Deer Creek. The designated uses for Segment No. 1242 are contact recreation, high aquatic life uses and public water supply. No significant degradation of high quality receiving waters is anticipated.

NORTHEAST TEXAS COMMUNITY COLLEGE, P.O. Box 1307, Mount Pleasant, Texas 754561307, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 13948001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 10,000 gallons per day. The plant site is located approximately 100 yards northwest of the campus entrance on Farm to Market Road 1735; approximately 31/2 miles southeast of the intersection of Farm to-Market Road 1735 and State Highway 49 in Titus County, Texas. The treated effluent is discharged to an unnamed tributary of Williamson Creek; thence to Williamson Creek; thence to Big Cypress Creek Below Lake Bob Sandlin in Segment No. 0404 of the Cypress Creek Basin. The unclassified receiving water uses are no significant aquatic life use for unnamed tributary of Williamson Creek. The designated uses for Segment No. 0404 are intermediate aquatic life use, and contact recreation. No significant degradation of high quality receiving waters is anticipated.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, P.O. Box 4011, Huntsville, Texas 77342, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a major amendment to TNRCC Permit No. 11180-001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 700,000 gallons per day to a daily average flow not to exceed 850,000 gallons per day. Issuance of the proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 11180-001 will replace the existing NPDES Permit No. TX0031607 issued on December 1, 1989 and TNRCC Permit No. 11180-001. The plant site is located approximately 3.5 miles northwest of State Highway 19 and approximately 12 miles northeast of the City of Huntsville in Walker County, Texas. The treated effluent is discharged to a drainage ditch; thence to Turkey Creek; thence to Lake Livingston in Segment No. 0803 of the Trinity River Basin. The unclassified receiving water uses are no significant aquatic life uses for the drainage ditch and intermediate aquatic life use for Turkey Creek. The designated uses for Segment No. 0803 are high aquatic life uses, public water supply, and contact recreation. No significant degradation of high quality receiving waters is anticipated.

CITY OF CANTON, P. O. Box 245, Canton, Texas 75103, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a renewal of TNRCC Permit No. 10399-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 900,000 gallons per day. Issuance of the proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No.10399-002 will replace the existing NPDES Permit No. TX0099112 issued on July 23, 1996 and TNRCC Permit No.10399-002. The plant site is located approximately 4,000 feet northeast of the intersection of Interstate Highway 20 and State Highway 19 and approximately 5,000 feet northwest of the intersection of Interstate Highway 20 and Farm-to-Market Road 17 in Van Zandt County, Texas. The treated effluent is discharged to Mill Creek; thence to the Sabine River Below Lake Tawakoni in Segment No. 0506 of the Sabine River Basin. The unclassified receiving water uses are intermediate aquatic life uses for Mill Creek. The designated uses for Segment No. 0506 are contact recreation, high aquatic life uses and public water supply.

Notice of Concentrated Animal Feeding Operation Applications.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of Chief Clerk, at the address provided in the information section above, WITHIN 30 DAYS AFTER THE NEWSPAPER PUBLICATION OF THE NOTICE.

BEN GAY, INC., P.O. Box 383, Brush, Colorado 80723-0383 and CATTLECO, INC., 1301 East Burlington Avenue, Fort Morgan, CO. 80701, have applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new TPDES Permit No. 04019 to authorize the applicant to operate a beef cattle facility at a maximum capacity of 35,000 head in Gaines County, Texas. No discharge of pollutants into the waters int he state is authorized by this permit. All waste and wastewater will be beneficially used on agricultural land. The facility is located on the east side of Farm to Market Road 3306, approximately tow miles north of the intersection of Farm to Market Road 3306 and U. S. Highway 180, this intersection is approximately 22 miles west of the City of Seminole in Gaines county, Texas. The facility is located in the drainage area below Lake J.B. Thomas in Segment No. 1412 of the Colorado River Basin.

YME BOSMA, Route 1, Box 106, May TX 76857 has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new TPDES Permit to replace state Permit No. 03855 to authorize the applicant to operate an existing dairy facility at a maximum capacity of 995 head in Brown County, Texas. No discharge of pollutants into

the waters in the state is authorized by this Permit. All waste and wastewater will be beneficially used on agricultural land. The existing dairy facility is located on the north side of Farm to Market Road 1689 approximately three miles east of the intersection of Farm to Market Road 1689 and U. S. Highway 183 in Brown County, Texas. The facility is located in the drainage area of Lake Brownwood in Segment No. 1418 of the Colorado River Basin.

BILLY RAY EVANS, P.O. Box 922, Proctor TX 76468 has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new Permit No. 04041 to authorize the applicant to operate an existing dairy operation at a maximum capacity of 600 head in Comanche County, Texas. No discharge of pollutants into the waters in the state is authorized by this permit. All waste and wastewater will be beneficially used on agricultural land. The existing facility is located 0.15 mile east on Farm-to-Market Road 1476 from the intersection of Farm-to-Market Road 1476 with Texas Highway 377 in Proctor, then 1.6 miles east on a gravel county road in Comanche County. The facility is located in the drainage area of the Leon River Below Proctor Lake in Segment No. 1221 of the Brazos River Basin.

BILLY MCPHERSON, 6365 County Road 1126B, Godley TX 76044 has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new Permit No. 04030 to authorize the applicant to operate a dairy facility at a maximum capacity of 249 head in Johnson County, Texas. No discharge of pollutants into the waters in the state is authorized by this permit. All waste and wastewater will be beneficially used on agricultural land. The dairy facility is located on the an unnamed county road approximately one-half mile east of the intersection of the unnamed county road and Texas Highway 171, this intersection is approximately four miles south of the Community of Godley in Johnson County, Texas. The facility is located in the drainage area of Lake Pat Cleburne in Segment No. 1228 of the Brazos River Basin.

FRIONA INDUSTRIES, L.P., P.O. Box 806, Friona TX 79035 has applied to the Texas Natural Resource Conservation Commission (TNRCC) for an amendment of the TPDES Permit No. 01600 to authorize the applicant to expand from a maximum capacity of 36,000 head to 55,000 head in Parmer County, Texas. No discharge of pollutants into the waters in the state is authorized by this Permit. All waste and wastewater will be beneficially used on agricultural land. The existing facility is located on the east side of Farm-to-Market Road 3140 approximately two miles south of the intersection of Farm-to-Market 3140 and U.S. Highway 60 five miles east of Friona in Parmer County, Texas. The facility is located in the drainage area of Frio Draw of the Upper Prairie Dog Town Fork of the Red River in Segment No. 0229 of the Red River Basin.

FRIONA INDUSTRIES, L.P., P.O. Box 806, Friona TX 79035 has applied to the Texas Natural Resource Conservation Commission (TNRCC) for an amendment of the TPDES Permit No. 01600 to authorize the applicant to expand from a maximum capacity of 36,000 head to 55,000 head in Parmer County, Texas. No discharge of pollutants into the waters in the state is authorized by this Permit. All waste and wastewater will be beneficially used on agricultural land. The existing facility is located on the east side of Farm-to-Market Road 3140 approximately two miles south of the intersection of Farm-to-Market 3140 and U.S. Highway 60 five miles east of Friona in Parmer County, Texas. The facility is located in the drainage area of Frio Draw of the Upper Prairie Dog Town Fork of the Red River in Segment No. 0229 of the Red River Basin.

FRIONA INDUSTRIES, L.P., P.O. Box 806, Friona TX 79035 has applied to the Texas Natural Resource Conservation Commission (TNRCC) for an amendment of the TPDES Permit No. 01600 to authorize the applicant to expand from a maximum capacity of 36,000 head to 55,000 head in Parmer County, Texas. No discharge of pollutants into the waters in the state is authorized by this Permit. All waste and wastewater will be beneficially used on agricultural land. The existing facility is located on the east side of Farm-to-Market Road 3140 approximately two miles south of the intersection of Farm-to-Market 3140 and U.S. Highway 60 five miles east of Friona in Parmer County, Texas. The facility is located in the drainage area of Frio Draw of the Upper Prairie Dog Town Fork of the Red River in Segment No. 0229 of the Red River Basin.

SPARKMAN CATTLE COMPANY, INC., Route 2 Box 50, Hereford TX 79045 has applied to the Texas Natural Resource Conservation Commission (TNRCC) for renewal of TPDES Permit No. 03695 to authorize the applicant to operate an existing beef cattle operation at a maximum capacity of 9,500 head in Castro County, Texas. No discharge of pollutants into the waters in the state is authorized by this Permit. All waste and wastewater will be beneficially used on agricultural land. The existing facility is located on a private road approximately one half mile west of FM 1055. The entrance to the private road is approximately 6 miles south of the intersection of FM 1055 and IH 60 in Castro County, Texas. The facility is located in the drainage area of Upper Prairie Dog Town Fork Red River in Segment No. 0229 of the Red River Basin.

STANLEY RAY JONES, P.O. Box 200, Amherst TX 79312 has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new TPDES Permit No. 03863 to authorize the applicant to operate a dairy operation at a maximum capacity of 3,250 head in Lamb County, Texas. No discharge of pollutants into the waters in the state is authorized by this Permit. All waste and wastewater will be beneficially used on agricultural land. The dairy facility is located on the east side of Farm-to-Market Road 1928, approximately 0.5 miles south of the intersection of Farm-to-Market Road 1928 and US Highway 84, and 1.5 miles south of Amherst, Lamb County, Texas. The facility is located in the drainage area of the Double Mountain Fork of the Brazos River in Segment No. 1241 of the Brazos River Basin.

TEXAS FARM INC., 9 SW 2nd Avenue, Perryton TX 79070 submitted an application on December 12, 1998 to the Texas Natural Resource Conservation Commission (TNRCC) for a new Registration No. 03876 to authorize the applicant to operate a commercial nursery/ finish swine facility at a maximum capacity of 249,600 head in Ochiltree County, Texas. The facility will generate, collect and treat animal waste and wastewater on-site. Wastewater will be disposed by evaporation. The swine facility is located on the west side of Farm to Market 2711 approximately four miles south of the intersection of Farm to Market Road 377 and Farm to Market 2711 approximately four miles south of the intersection of Farm to Market Road 377 and Farm to Market Road 2711 in Ochiltree county, Texas. The facility is located in the drainage area of Wolf Creek in Segment No. 0104 of the Canadian River Basin.

VALL, INC., 911 Texas St., Texahoma OK 73949, submitted on November 9, 1998, to the Texas Natural Resource Conservation Commission (TNRCC) an application for a new Registration No. 04076 to authorie the applicant to operate a new swine operation at a maximum capacity of 16,200 head in Sherman county, Texas. The facility will generate, collect and treat animal waste and wastewater on site. All waste and wastewater will be beneficially used on agricultural land. The proposed facility will be located approximately 4 miles southeast of Stratford and 20 miles west of the Sherman/ Hansford county line. From the city of Stratford, go 2 miles east on Hwy. 15, then 2 miles south, then east into the facility. The facility will be located in segment number 0100 of the Canadian River Basin.

CACTUS OPERATING, LTD., 2209 West 7th, Amarillo TX 79116 has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a new TPDES Permit No. 04050 to authorize the applicant to operate a beef cattle operation at a maximum capacity of 85,000 head in Ochiltree County, Texas. No discharge of pollutants into the water in the state is authorized by this Permit. All waste and wastewater will be beneficially used on agricultural land. The existing facility is located approximately 7 miles south on US 70 from Perryton, Texas, then 6 miles east on FM 2711. The feedyard is on the south side of the road. The facility is located in the drainage area of Wolf Creek in Segment No. 0104 of the Canadian River Basin.

JIMMY DON AND LARRY PACK, Rt 1 Box 147C, Stephenville TX 76401 has applied to the Texas Natural Resource Conservation Commission (TNRCC) for renewal of Permit No. 03563 to authorize the applicant to operate an existing dairy operation at a maximum capacity of 450 head in Erath County, Texas. No discharge of pollutants into the waters in the state is authorized by this Permit. All waste and wastewater will be beneficially used on agricultural land. The existing facility is located on the north side of State Hwy 8 approximately 5 miles northwest of the intersection of State Hwy 8 and FM 988 in Erath County, Texas. The facility is located in the drainage area of the Upper North Bosque in Segment No. 1255 of the Brazos River Basin

TEXAS FARM INC., 9 South West 2nd Avenue, Perryton TX 79070 submitted an application on December 11, 1998 to the Texas Natural Resource Conservation Commission (TNRCC) for a new Registration No. 03902 to authorize the applicant to operate a commercial sow/ swine facility at a maximum capacity of 57,750 head in Ochiltree County, Texas. The facility will generate, collect and treat animal waste and wastewater on site. Wastewater will be disposed of by evaporation. The swine facility is located Approximately 7 miles west and 1.5 miles south of Hwy. 15 East of the city of Perryton in Ochiltree county. The facility is located in an unknown drainage area in Segment No. 0100 of the Canadian River Basin.

TRD-9901725
LaDonna Castanuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: March 23, 1999

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Provisionally-Issued Temporary Permits to Appropriate State Water

Permits issued March 8 - March 16, 1999.

Temporary Permit Number TP-8069 by TransTexas Gas Corporation for diversion of 1 acre-feet period for mining (hydrostatic test of pipelines) use. Water may be diverted from approximately 15 miles N. of Galveston and 1 mile E of San Leon at a site in-between 7th and 8th Streets on the coast of Galveston Bay, San Jacinto-Brazos River Basin.

Temporary Permit Number TP-8070 by Dean Work Company, Ltd. for diversion of 8 acre-feet in a 1-year period for industrial (highway construction) use. Water may be diverted from Nueces River, tributary of Nueces River Basin for industrial purposes at a diversion of rate of 500 gpm (1.11 cfs) at a point where Nueces River crosses FM 481 approximately 12 mi. SW of Uvalde and 8 mi. N of La Pryor in Uvalde County, Texas.

Temporary Permit Number TP-8071 by Angelo Iafrate Construction L.L.C. Address for diversion of 8 acre-feet in a 1-year period for industrial (highway construction) use. Water may be diverted from a point where Brushy Creek crosses State Highway 7 approximately 14 mi. W of Centerville and 2.5 mi. E of Marquez in Leon County, Texas.

Temporary Permit Number TP-8072 by Odell Geer Construction Co., Inc for diversion of 1 acre-feet in a 1-year period for industrial (highway construction) use. Water may be diverted from a point where Alligator Creek crosses FM 486 approximately 14 mi. SW of Cameron and 2 mi. NE of San Gabriel in Milam County, Texas.

Temporary Permit Number TP-8073 by Matador Operating Company for diversion of 3 acre-feet in a 90 day period for mining (gas well drilling) use. Water may be diverted from near a point where unnamed creek crosses FM 782 approximately 6 mi. NW of Henderson and 3 mi. NW of New Prospect in Rusk County, Texas.

The Executive Director of the TNRCC has reviewed each application for the permits listed and determined that sufficient water is available at the proposed point of diversion to satisfy the requirements of the application as well as all existing water rights. Any person or persons who own water rights or who are lawful users of water on a stream affected by the temporary permits listed above and who believe that the diversion of water under the temporary permit will impair their rights may file a complaint with the TNRCC. The complaint can be filed at any point after the application has been filed with the TNRCC and the time the permit expires. The Executive Director shall make an immediate investigation to determine whether there is a reasonable basis for such a complaint. If a preliminary investigation determines that diversion under the temporary permit will cause injury to the complainant the commission shall notify the holder that the permit shall be canceled without notice and hearing. No further diversions may be made pending a full hearing as provided in Section 295.174. Complaints should be addressed to Water Rights Permitting Section, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711, Telephone (512) 239-4433. Information concerning these applications may be obtained by contacting the Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711, Telephone (512) 239-3300.

TRD-9901726
LaDonna Castanuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: March 23, 1999

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Texas Department of Protective and Regulatory Services

Request for Proposal for Social Studies and/or Adoption Readiness Studies

The Texas Department of Protective and Regulatory Services (PRS) is soliciting proposals for Child Protective Services (CPS) to provide Social Studies and/or Adoption Readiness Studies either directly or through subcontractors.

The objectives of these services are to reduce and/or eliminate the risk of child abuse and neglect within the family unit.

Contractors selected may choose to serve any or all of five (5) geographic areas representative of the 30 central counties in Region 07. Catchment area designations will be listed in the request document. Client eligibility is determined by CPS staff and referrals made to the contractor. The Title IV-B funding for this contract is approximately $200,000.00 and is dependent upon state and/or federal appropriation for September 1, 1999 - August 31, 2000.

This contract is renewable at PRS's discretion. Eligible offerors are public or private nonprofit, or for-profit agencies, individuals and partnerships with knowledge, competence and qualifications in serving families and children who have been abused or neglected. Minimum education and experience requirements are contained in the request document. PRS is an Affirmative Action/Equal Opportunity state agency that encourages Historically Underutilized Businesses to apply. Reimbursement rates for these professional services are listed in the request document and are based on a review of reasonable and customary fees for the regional area. An offeror's conference will be held on April 8, 1999 at 10:00 a.m. in room 353, building 2, at 7901 Cameron Road, Austin (PRS Building).

Contact Person: A "Request for Proposal" packet may be obtained beginning March 30, 1999, by contacting: Bill Simmons, PRS Procurement Officer, Mail Code 367-2, 1011 Gattis School Road, Ste. 110, Round Rock, Texas 78664, (512) 388-6277 or fax (512) 388-6202. Deadline for receipt of "Intent to Apply" form is April 15, 1999. Deadline for receipt of completed and modified proposals is April 30, 1999, at 3:00 P.M.

TRD-9901653
C. Ed Davis
Deputy Commissioner for Legal Services
Texas Department of Protective and Regulatory Services
Filed: March 17, 1999

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Public Utility Commission of Texas

Applications to Introduce New or Modified Rates or Terms Pursuant to P.U.C. Substantive Rule §23.25

Notice is given to the public of an application filed with the Public Utility Commission of Texas on March 19, 1999 to introduce new or modified rates or terms pursuant to P.U.C. Substantive Rule §23.25, *Procedures Applicable to Chapter 58-Electing Incumbent Local Exchange Companies (ILECs)*.

Tariff Title and Number: Application of Contel of Texas, Inc. to Introduce New or Modified Rates, to Offer Three Fixed Price Calling Services Packages for Residential Customers Throughout the Company's Operating Area in Texas Pursuant to P.U.C. Substantive Rule §23.25. Tariff Control Number 20640.

The Application: GTE Contel, Inc. has notified the Public Utility Commission of Texas that it is offering three fixed price calling services packages for residential customers throughout the Company's operating area in Texas. This filing proposes to make the packages of services available to all GTE Contel, Inc. residential customers. The packages offered are: pick any three custom calling services for a monthly rate of $5.25, pick any five custom calling services for a monthly rate of $7.25, or for a monthly rate of $10.25 the residential customer can have all the available custom calling services. Some residential customers in the state, as a result of subscribing to three or five custom calling services, may already be eligible for one of the packages. Those customers will be contacted by direct mail and will be offered the appropriate package.

Persons who wish to intervene in this proceeding should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 by April 12, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9901735
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 23, 1999

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Notice is given to the public of an application filed with the Public Utility Commission of Texas on March 19, 1999 to introduce new or modified rates or terms pursuant to P.U.C. Substantive Rule §23.25, *Procedures Applicable to Chapter 58-Electing Incumbent Local Exchange Companies (ILECs)*.

Tariff Title and Number: Application of GTE-Southwest, Inc. to Introduce New or Modified Rates, to Offer Three Fixed Price Calling Services Packages for Residential Customers Throughout the Company's Operating Area in Texas Pursuant to P.U.C. Substantive Rule §23.25. Tariff Control Number 20641.

The Application: GTE Southwest, Inc. has notified the Public Utility Commission of Texas that it is offering three fixed price calling services packages for residential customers throughout the Company's operating area in Texas. This filing proposes to make the packages of services available to all GTE Southwest, Inc. residential customers. The packages offered are: pick any three custom calling services for a monthly rate of $5.25, pick any five custom calling services for a monthly rate of $7.25, or for a monthly rate of $10.25 the residential customer can have all the available custom calling services. Since some residential customers in the Dallas-Fort Worth Metroplex already have the services as a result of a previous promotional offering, this filing proposes to allow those customers to maintain the service uninterrupted. Some residential customers in the state, as a result of subscribing to three or five custom calling services, may already be eligible for one of the packages. Those customers will be contacted by direct mail and will be offered the appropriate package.

Persons who wish to intervene in this proceeding should contact the Public Utility Commission of Texas, by mail at PO Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 by April 12, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9901736
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 23, 1999

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Notice is given to the public of an application filed with the Public Utility Commission of Texas on March 23, 1999 to introduce new or modified rates or terms pursuant to P.U.C. Substantive Rule §23.25, *Procedures Applicable to Chapter 58-Electing Incumbent Local Exchange Companies (ILECs)*.

Tariff Title and Number: Southwestern Bell Telephone Company Notification to Institute Promotional Rates for Customers Newly Subscribing to the Home 800 ™ Per Minute of Use Plan Between April 15, 1999 and December 31, 1999 Pursuant to P.U.C. Substantive Rule §23.25. Tariff Control Number 20655.

The Application: Southwestern Bell Telephone Company (SWBT) has notified the Public Utility Commission of Texas that it is instituting promotional rates for customers newly subscribing to the Home 800™ Per Minute of Use plan between April 15, 1999 and

December 31, 1999. During the promotional period, new twelve-month subscribers to the Home 800 ™ Per Minute of Use plan will receive a one-time credit of $10.00 and a monthly waiver of $1.95 off the regular monthly service charge of $3.95. The $1.95 waiver will be applied to each month's bill during the twelve months resulting in a promotional monthly service charge of $2.00. The $10.00 credit will be applied in the customer's twelfth month bill cycle. The effective date for this tariff is April 15, 1999. SWBT has provided notification of this Home 800 ™ per Minute of Use plan promotion to the Local Service Providers (LSP's). The LSP's will be provided the wholesale discount for this Home 800™ promotion.

Persons who wish to intervene in this proceeding should contact the Public Utility Commission of Texas, by mail at PO Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 by April 12, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9901754
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 24, 1999

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Notices of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on March 16, 1999, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.154 - 54.159 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Laredo Telephone Company Limited Partnership for a Service Provider Certificate of Operating Authority, Docket Number 20633 before the Public Utility Commission of Texas.

Applicant intends to provide a full range of telecommunications services, including, but not limited to, local exchange service, basic local telecommunications service and switched access service in the proposed area. The Applicant will also provide long distance, POTS service, Operator Services, WATS, 800, ISDN, data services, custom calling services, Caller ID and other optional calling services.

Applicant's requested SPCOA geographic area includes the geographic area comprising Webb County, Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at PO Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than April 7, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9901658
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 18, 1999

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Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on March 18, 1999, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.154 - 54.159 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Texas State Telephone for a Service Provider Certificate of Operating Authority, Docket Number 20638 before the Public Utility Commission of Texas.

Applicant intends to provide resale local and long distance services.

Applicant's requested SPCOA geographic area includes the Abilene, Austin, Beaumont, Brownsville, Bryan, Corpus Christi, Dallas, El Paso, Hearne, Houston, Longview, Lubbock, Midland, San Angelo, San Antonio, Waco and Wichita Falls Local Access and Transport Areas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than April 7, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9901717
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 22, 1999

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Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on March 19, 1999, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.154 - 54.159 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of C3 Communications, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 20647 before the Public Utility Commission of Texas.

Applicant intends to provide data services, regional long-haul transport and dedicated access. The Applicant will not provide dial tone services.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at PO Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than April 7, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9901732
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 23, 1999

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Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on March 22, 1999, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.154 - 54.159 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of KMC Telecom III, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 20586 before the Public Utility Commission of Texas.

Applicant intends to provide local exchange service, basic local telecommunications service, and switched access services through the use of its own facilities and the resold facilities of other certificated telecommunications carriers.

Applicant's requested SPCOA geographic area includes the cities of Amarillo, Beaumont/Port Arthur, Brownsville/Harlingen, El Paso, Lubbock, Midland/Odessa, Tyler and Waco within the state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at PO Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than April 7, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9901716
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 22, 1999

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Notice of Application to Amend Certificate of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on March 16, 1999 to amend a certificate of convenience and necessity pursuant to §§14.001, 32.001, 36.001, 37.051, and 37.054, 37.056, 37.057, 37.058 of the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1998) (PURA). A summary of the application follows.

Docket Title and Number: Application of Nueces Electric Cooperative, Inc. to Amend Certificated Service Area Boundaries (Service Area Exception) within Nueces County and City of Corpus Christi, Docket Number 20632, before the Public Utility Commission of Texas.

The Application: In Docket Number 20632, Nueces Electric Cooperative, Inc. (NEC) requests a service area exception with Central Power and Light Company (CPL) in order to provide service to a ten unit office building and a separate 35 foot by 15 foot building located in the singly-certificated area of CPL. Both buildings are owned by Mr. Howard Cagle, who has requested service be provided by NEC. NEC has a grandfathered transmission line located in CPL's singly-certificated area, which is approximately 261 feet from the end of the office building.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 within 15 days of this notice. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9901659
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 18, 1999

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Notice of Intent to File Pursuant to P.U.C. Substantive Rule §23.27

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application pursuant to the Public Utility Regulatory Act (PURA) §58.103 for a customer- specific contract for SmartTrunk Service to Marcus Cable.

Tariff Title and Number: Southwestern Bell Telephone Company's Notification of Customer Specific Pricing Contract for SmartTrunk Service to Marcus Cable Pursuant to §58.103 of PURA. Tariff Control Number 20532.

The Application: Southwestern Bell Telephone Company filed an application pursuant to §58.103 of Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001- 63.063 (Vernon 1998)(PURA). SWBT proposes to offer a discounted rate for SmartTrunk service to Marcus Cable. Specifically, SWBT proposes to waive the installation charge for the SmartTrunk interfaces and to provide the SmartTrunk interfaces at a volume discounted rate. The contract includes two components, including SmartTrunk interfaces and 138 B-channels. Information provided by SWBT indicates revenue generated from the SmartTrunk interface will not, by itself, recover the cost to SWBT of providing the SmartTrunk interface. However, when combined with the B-channels, revenue for the overall customer-specific contract will recover the cost of the contract. SmartTrunk is a discretionary service under §58.107(7) of PURA.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at PO Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 by April 16, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9901734
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 23, 1999

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Notice of Rescheduled Public Hearing

In the January 29, 1999 *Texas Register* (24 TexReg 473) the commission published proposed new rule §§25.272 - 25.275 in Project Number 17549 - *Code of Conduct for Electric Utilities and their Affiliates*. In the preamble to these sections the commission noticed that a public hearing would be held pursuant to Texas Government Code Annotated §2001.029 on March 29, 1999 at 9:00 a.m. This public hearing has been canceled and rescheduled.

A public hearing in Project Number 17549 will now be conducted on April 26, 1999 at 9:00 a.m. in the commission's offices located in the William B. Travis Building, seventh floor, 1701 North Congress Avenue, Austin, Texas 78701. If you have any questions in regards to this public hearing, contact Bridget Rabel at (512) 936-7216.

TRD-9901731
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 23, 1999

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Public Notices of Amendment to Interconnection Agreement

On March 9, 1999, Southwestern Bell Telephone Company and Valu-Line of Longview, Inc., collectively referred to as applicants, filed a joint application for approval of an amendment to an

existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001-63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 20611. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 20611. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 9, 1999, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20611.

TRD-9901719
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 22, 1999

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On March 11, 1999, Southwestern Bell Telephone Company and Teleport Communications Houston, Inc. and TCG Dallas (collectively, TCG), collectively referred to as applicants, filed a joint application for approval of amendments to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001-63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 20621. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendments to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 20621. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 11, 1999, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20621.

TRD-9901720
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 22, 1999

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On March 19, 1999, Southwestern Bell Telephone Company and BasicPhone, Inc., collectively referred to as applicants, filed a joint application for approval of an amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001-63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 20642. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 20642. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 19, 1999, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20642.

TRD-9901757
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 24, 1999

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On March 19, 1999, Southwestern Bell Telephone Company and Teligent, Inc., collectively referred to as applicants, filed a joint application for approval of an amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001-63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 20644. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 20644. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 19, 1999, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20644.

TRD-9901739
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 23, 1999

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On March 19, 1999, Southwestern Bell Telephone Company and Navigator Telecommunications, L.L.C., collectively referred to as applicants, filed a joint application for approval of an amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001-63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 20645. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 20645. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 19, 1999, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20645.

TRD-9901738
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas

Filed: March 23, 1999

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Public Notices of Interconnection Agreement

On March 9, 1999, Southwestern Bell Telephone Company and Comm South Companies, Inc., collectively referred to as applicants, filed a joint application for approval of an interconnection agreement under the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001-63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 20609. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties. The parties have requested expedited review of this application.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 20609. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 23, 1999, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20609.

TRD-9901718
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 22, 1999

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On March 31, 1999, Sage Telecom, Inc. (SAGE) and American Local Telecommunications, L.L.C. d/b/a ALT Communications, L.L.C. (ALT) are scheduled to file substitution pages for their interconnection agreements with Southwestern Bell Telephone Company (SWBT) under the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code)(FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001-63.063 (Vernon 1998)(PURA). The substitution pages for their interconnection agreements are to be filed pursuant to the arbitration award in Complaint of Sage Telecom, Inc. and American Local Telecommunications. L.L.C. Against Southwestern Bell Telephone Company in Docket Number 20025 and in Petition of American Local Telecommunications, L.L.C. d/b/a ALT Communications, L.L.C. (ALT) Against Southwestern Bell Telephone Company in Docket Number 20170. The petition, complaint, interconnection agreements being amended and the substitution pages for the interconnection agreements will be available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement that is a result of arbitration. Pursuant to FTA §252(e)(2) the commission may reject any agreement resulting from an arbitration award if it finds that the agreement does not meet the requirements of §251, including the regulations prescribed by the commission pursuant to FTA §251, or the standards set forth in FTA §252(d). Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the amendments to the agreement within 35 days after it is submitted by the parties.

Pursuant to the procedural rules of the commission, public comment is allowed before the commission issues a final decision approving or rejecting the interconnection agreements. Any interested person may file written comments regarding the agreements by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on SAGE, ALT and SWBT. The comments should specifically refer to Docket Numbers 20025 and 20170. Such comments shall be limited to whether the agreements meet the requirements of FTA and relevant portions of state law. The comments shall be filed by April 20, 1999. If the comments request rejection or modification of the agreements, the interested person must provide the following information:

1) a detailed statement of the person's interests in the agreements including a description of how approval of the agreements may adversely affect those interests;

2) specific allegations that the agreements, or some portion thereof:

a) does not meet the requirements of FTA §251, including any Federal Communications Commission regulation implementing FTA §251; or

b) is not consistent with the standards established in FTA §252(d); or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the agreements. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202.

Persons with questions about these dockets or who wish to comment on the applications should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Numbers 20025 and 20170.

TRD-9901737
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 23, 1999

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Public Notice of Workshop Concerning a Permanent Industry Wide Solution for the Exchange of Billing Records

The staff of the Public Utility Commission of Texas plans to hold a second workshop on Tuesday, April 20, 1999 at 10:00 a.m. in the commission offices on Project Number 20537, regarding a permanent industry wide solution for the exchange of billing records between competitive local exchange companies (CLECs) and incumbent local exchange companies (ILECs) for calls involving the use of unbundled network elements (UNEs) or ported numbers. In order for the commission to develop a workable industry wide solution, the participation of both ILECs and CLECs operating in Texas is critical. This project is in response to the follow- up to Commission Recommendation Number 2 under Checklist Item Number 13 in Southwestern Bell Telephone Company's (SWBT's) §271 proceeding (Docket Number 16251). A list of issues and questions to be discussed during the workshop will be available at the commission offices on April 6, 1999. Staff requests that comments on these issues and questions be filed with the commission by 3:00 p.m. on April 13, 1999.

The workshop will be held from 10:00 a.m. to 5:00 p.m. in the Commissioner's Hearing Room on the seventh floor of the William B. Travis Building at 1701 North Congress Avenue, Austin, Texas 78701. The project has been assigned Project Number 20537.

Persons who plan to attend the April 20, 1999 workshop should register with Jennifer Luckey at (512) 936-7349. If there are any questions, please contact Meena Thomas at (512) 936-7344, Anne McKibbin at (512) 936-7390, or Stephen Mendoza at (512) 936-7394.

TRD-9901730
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 23, 1999

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Texas Water Development Board

Applications Received

Pursuant to the Texas Water Code, Section 6.195, the Texas Water Development Board provides notice of the following applications received by the Board:

Walnut Creek Special Utility District, 1155 Highway 199 West, Springtown, Texas, 76082, received March 1, 1999, application for financial assistance in the amount of $9,600,000 from the Texas Water Development Funds.

Beechwood Water Supply Corporation, HC 52, Box 763, Hemphill, Texas, 75948, received March 1, 1999, application for financial assistance in the amount of $1,565,000 from the Texas Water Development Funds.

Roman Forest Consolidated Municipal Utility District, P.O. Box 1743, New Caney, Texas, 77357, received February 26, 1999, application for financial assistance in the amount of $2,705,000 from the Texas Water Development Funds.

City of Victoria, 105 West Juan Linn, Victoria, Texas, 77902, received March 1, 1999, application for financial assistance in the amount of $25,580,000 from the Clean Water State Revolving Fund.

Chisholm Trail Special Utility District, P.O. Box 249, Florence, Texas, 76527, received March 1, 1999, application for financial assistance in the amount of $1,670,000 from the Texas Water Development Fund.

Lower Valley Water District, 10005 Alameda, Suite P, El Paso, Texas, 79927, received March 5, 1999, application for grant assistance in the amount of $2,000,000 from the Economically Distressed Areas Program.

Brownsville Public Utilities Board, 1425 Robinhood Drive, Brownsville, Texas, 78520-3270, received February 25, 1999, application for grant assistance in the amount of $115,200 from the Research and Planning Fund.

Gulf Coast Water Authority, 3630 Highway 1765, Texas City, Texas, 77591-1651, received February 25, 1999, application for grant assistance in the amount of $87,500 from the Research and Planning Fund.

Brazos River Authority, P.O. Box 7555, Waco, Texas, 76714-7555, received February 25, 1999, application for grant assistance in the amount of $121,250 from the Research and Planning Fund.

Trinity River Authority of Texas, P.O. Box 1554, Huntsville, Texas, 77342-1554, received February 25, 1999, application for grant assistance in the amount of $20,000 from the Research and Planning Fund.

North Richland Hills, 7301 N.E. Loop 820, North Richland Hills, Texas, 76180, received February 8, 1999, application for grant assistance in the amount of $30,000 from the Research and Planning Fund.

City of Whitehouse, P.O. Box 776, Whitehouse, Texas, 75791-0776, received February 25, 1999, application for grant assistance in the amount of $60,327 from the Research and Planning Fund.

Three Rivers Water District, P.O. Box 398, Three Rivers, Texas, 78071, received February 25, 1999, application for grant assistance in the amount of $50,000 from the Research and Planning Fund.

Greater Texoma Utility Authority, 5100 Airport Drive, Denison, Texas, 75020, received February 25, 1999, application for grant assistance in the amount of $54,175 from the Research and Planning Fund.

Additional information concerning this matter may be obtained from Craig D. Pedersen, Executive Administrator, P.O. Box 13231, Austin, Texas, 78711.

TRD-9901755
Gail L. Allan
Director of Project-Related Legal Services
Texas Water Development Board
Filed: March 24, 1999

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West Central Texas Workforce Development Board

Public Notice

The West Central Texas Workforce Development Board (WCTWDB) Abilene, Texas, is issuing a Request for Proposal (RFP) for solicitation of bidders to manage and operate the Child Care service delivery system.

The WCTWDB is appointed by local elected officials to plan and oversee operation of the public workforce system, including child care resources in the West Central Texas 19 county area.

The purpose of Child Care Program Operation is to offer child care to eligible families and to improve the quality, availability and affordability of child care in Texas. This proposal will address delivery and payment for child care services to be provided in the WCTWDB Service Delivery Area which includes the following counties: Brown, Callahan, Coleman, Comanche, Eastland, Fisher, Haskell, Jones, Kent, Knox, Mitchell, Nolan, Runnels, Scurry, Shackelford, Stephens, Stonewall, Taylor and Throckmorton.

Public and private service providers, or other interested parties may obtain a RFP by contacting the West Central Texas Workforce Development Board, PO Box 3195, Abilene, Texas 79604, Attn: Karen Spaar, or by calling (915) 672-8544.

A bidders conference will be held April 6, 1999 at 10:00 AM in the large conference room at the offices of West Central Texas Council of Governments, 1025 EN 10th., Abilene, Texas 79601. Attendance at the bidders conference is not required but is recommended. Proposers unable to attend the bidders conference may submit written questions, via mail or fax, no later than 5:00 PM, April, 1, 1999 to the following address West Central Texas Workforce Development Board, P.O. Box 3195, Abilene, Texas, 79604, Fax (915) 675-5214.

Deadline: Proposals must be received in the WCTWDB offices by 5:00 PM, May 5, 1999 to be considered. Proposals received at the WCTWDB offices after the deadline will not be accepted. There will be no exceptions. Proposals may be mailed to the above address or hand delivered to the WCTWDB offices Monday through Friday, 8:30 AM to 12:00 Noon and 1:00 PM to 5:00 PM at 1025 EN 10th. Abilene, Texas 79601. The WCTWDB will not accept proposals transmitted by facsimile (Fax).

TRD-9901661
Mary Ross
Executive Director
West Central Texas Workforce Development Board
Filed: March 18, 1999

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Texas Workers' Compensation Commission

Invitation to Applicants for Appointment to the Medical Advisory Committee

The Texas Workers' Compensation Commission invites all qualified individuals and representatives of public health care facilities and other entities to apply for openings on the Medical Advisory Committee in accordance with the eligibility requirements of the new Standards and Procedures for the Medical Advisory Committee. Each member must be knowledgeable and qualified regarding work-related injuries and diseases.

Commissioners for the Texas Workers' Compensation appoint the Medical Advisory Committee members, which is composed of 16 primary and 16 alternate members representing health care providers, employees, employers and the public.

The purpose and tasks of the Medical Advisory Commission are outlined in the Texas Workers' Compensation Act, §413.005, which includes advising the Commission's Medical Review Division on the development and administration of medical policies and guidelines.

The Medical Advisory Committee meets approximately once every six weeks. Members are not reimbursed for travel, per diem, or other expenses associated with Committee activities and meetings.

During a primary member's absence, an alternate member must attend meetings for the Medical Advisory Committee, subcommittees, and work groups to which the primary member is appointed. The alternate may attend all meetings and shall fulfill the same responsibilities as primary members, as established in the Standards and Procedures for the Medical Advisory Committee as adopted by the Commission.

Medical Advisory Committee openings include:

Primary Members

Doctor of Medicine Public Health Care Facility

Alternate Members

Public Health Care Facility Dentist Employee Representative

For an application, call Juanita Salinas at 512-707-5888 or Ruth Richardson at 512-440-3518.

TRD-9901759
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Filed: March 24, 1999

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