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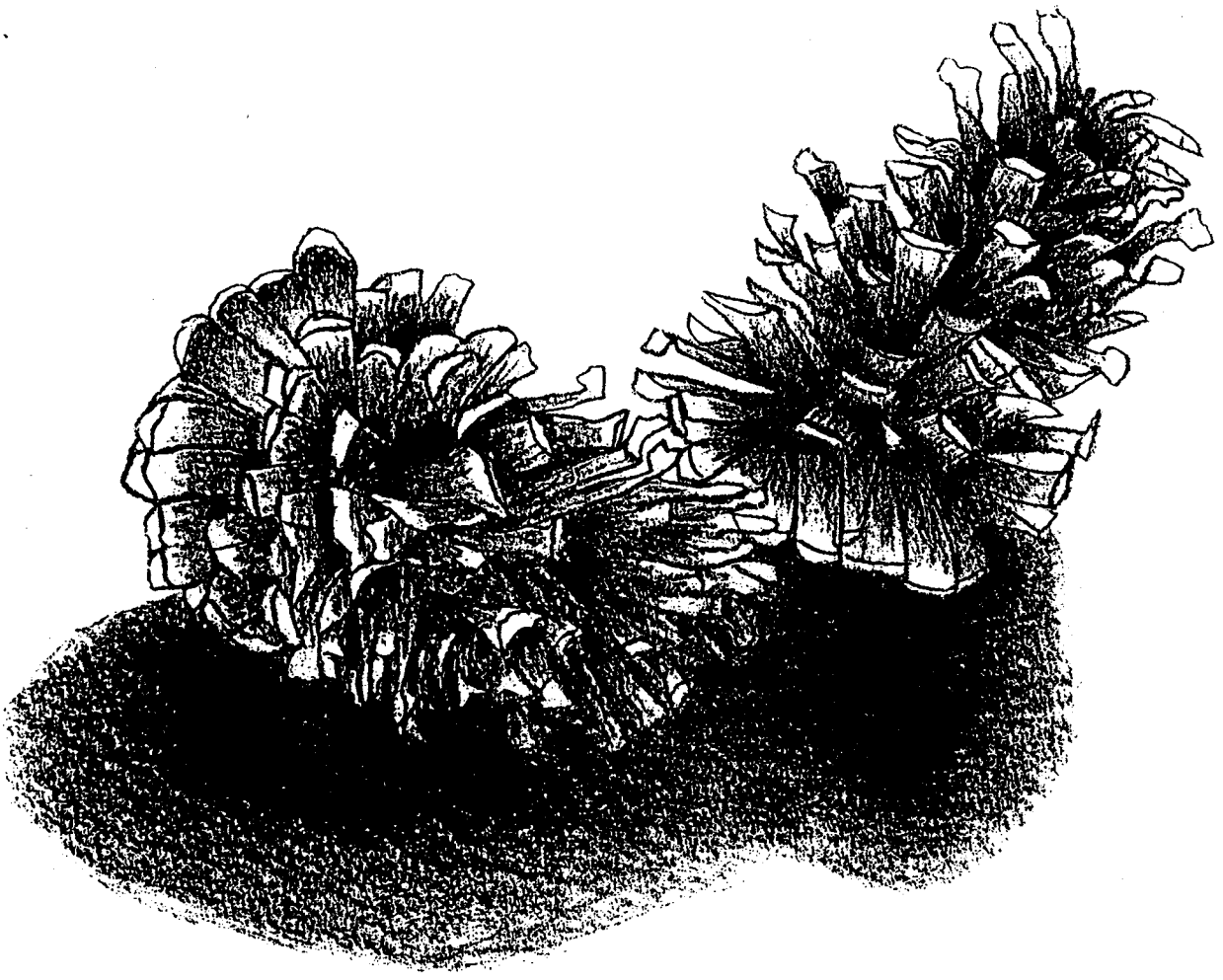

Part III of IV

GIFT

This month's front cover artwork:

Artist: Joshua Smith

9th Grade

Killeen Ninth Grade Center

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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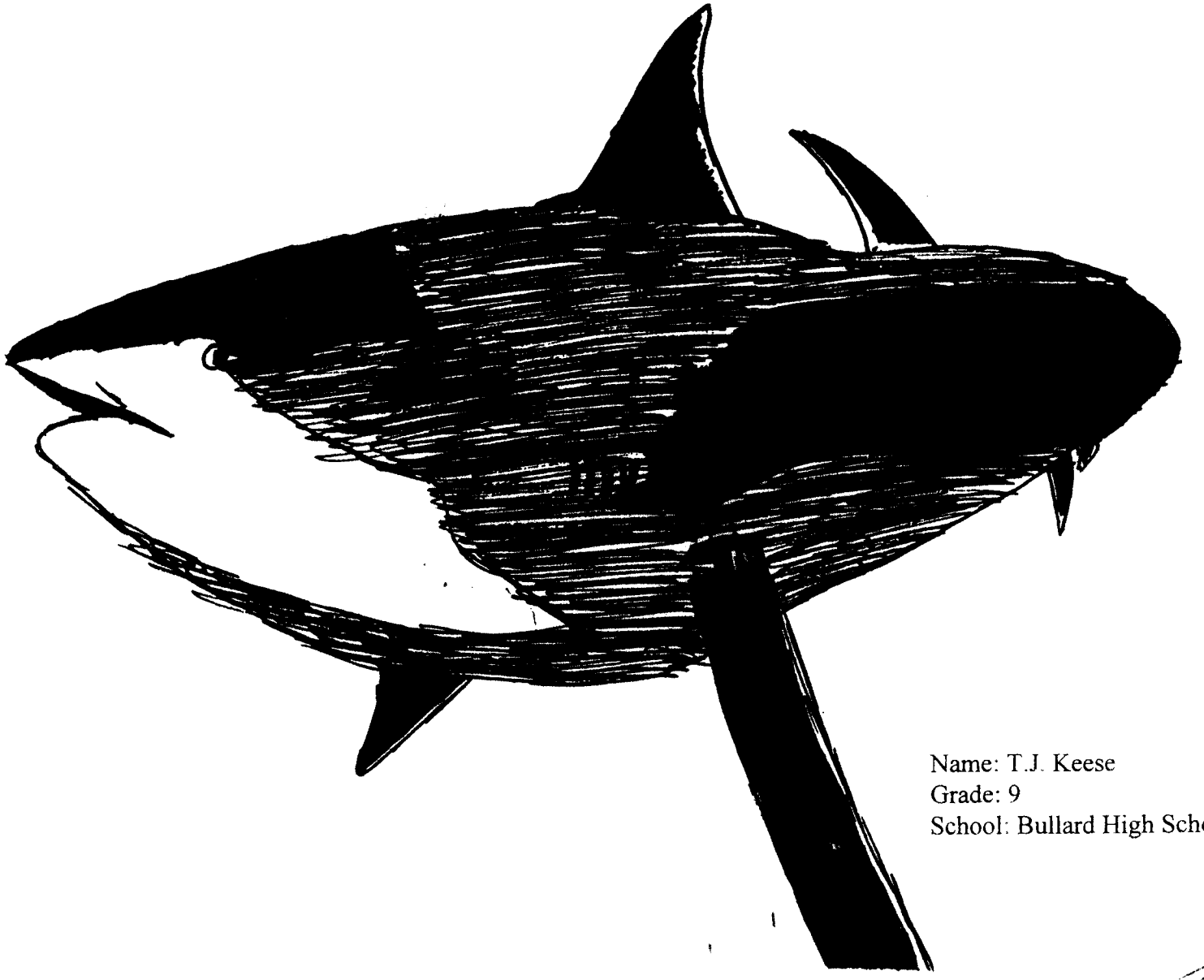
IN THIS ISSUE

ATTORNEY GENERAL

PROPOSED RULES

WITHDRAWN RULES

ADOPTED RULES



Name: T.J. Keese
Grade: 9
School: Bullard High School

complete an ethics course, but if the exempt licensee reactivates their license and are no longer on exempt status, they have to complete a four-hour ethics course within one year of reactivation.

The amendment will function by having new CPAs who are familiar with the Board's rules and professional ethics and reactivated licensees who are current on their ethics course.

No comments were received regarding adoption of the rule.

The amendment is adopted under Texas Civil Statutes, Article 41a-1, Section 6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law.

§523.32. Ethics Course.

(a) General. Licensees certified or registered prior to January 1, 1995 are required to successfully complete within three years of January 1, 1995 a board approved four-hour course of comprehensive study on the Rules of Professional Conduct of the board. A person certified or registered on or after January 1, 1995 shall report to the board the successful completion of the four-hour course within three years of the end of the initial license period. A minimum of two hours of instruction on the board's Rules of Professional Conduct must be taken by and reported on every third subsequent annual license notice.

(1) An individual certified or registered on or after September 1, 1999 must successfully complete and submit to the board proof of completion of the four-hour ethics course prior to being issued a certificate. Within three years of the end of the initial license period, the individual shall take and report completion of a board approved two-hour course. The two-hour course shall be reported on the annual renewal notice. Thereafter, minimum of two hours on instruction on the Board's Rules of Professional Conduct must be taken by and reported on every third annual license notice.

(2) A licensee granted retired, permanent disability, or other exempt status is not required to complete the ethics course described during their exempt status. When the exemption status is no longer applicable, the individual must complete the ethics course as defined in §523.32(a) of this title (relating to Ethics Course) and report it on the license notice.

(b) Course content and board approval. Before a provider of continuing professional education can offer this course, the content of the course must be submitted to the continuing professional education committee of the board for approval. Course content shall be approved only after demonstrating, either in a live instructor format, or a computer-based interactive format as defined in §523.1(c) of this chapter (relating to Formal Continuing Professional Education) that the course contains the underlying intent established in the following criteria.

(1) The course shall encourage the certificate or registration holder to educate himself or herself in the ethics of the profession, specifically the Rules of Professional Conduct of the board.

(2) The course shall convey the intent of the board's Rules of Professional Conduct in the certificate or registration holder's performance of professional services, and not mere technical compliance. A certificate or registration holder is expected to apply ethical judgment in interpreting the rules and determining the public interest. The public interest should be placed ahead of self-interest, even if it means a loss of job or client.

(3) The primary objectives of a continuing professional education ethics course shall be to:

(A) emphasize the ethical standards of the profession, as described in this section; and

(B) review and discuss the board's Rules of Professional Conduct and their implications for certificate or registration holders in a variety of practices, including:

(i) a certificate or registration holder engaged in the client practice of public accountancy who performs attest and non-attest services, as defined in §501.2 of this title (relating to Definitions);

(ii) a certificate or registration holder employed in industry who provides internal accounting and auditing services; and

(iii) a certificate or registration holder working in education or in government accounting or auditing.

(4) An ethics course shall meet the requirements of the board's continuing professional education rules as described in this chapter (relating to Continuing Professional Education). Effective June 1, 1996, prior to offering and scheduling an ethics course, a sponsor shall:

(A) ensure that the instructor has completed the board's ethics training program at least every three years or as required by the board;

(B) ensure that the instructor's professional license has never been suspended or revoked for violation of the Rules of Professional Conduct; and

(C) provide its advertising materials to the board's CPE Committee for approval. Such advertisements shall:

(i) avoid commercial exploitation;

(ii) identify the primary focus of the course; and

(iii) be professionally presented and consistent with the intent of Section 501.43 of this title (relating to Advertising).

(c) Evaluation. At the conclusion of each course, the sponsor shall administer testing procedures to determine whether the program participants have obtained a basic understanding of the course content, including the need for a high level of ethical standards in the accounting profession.

(d) Texas resident. A certificate or registration holder who resides in the state of Texas may not take the ethics course via self-study but must take the ethics course in a live instructor format or in an interactive computer-based format

(e) Out-of state resident. A certificate or registration holder who does not reside in the state of Texas may take the course in either a live instructor format, a computer-based interactive format, a self-study format, or may write the board to request an exemption.

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 November 20, 1998.

TRD-9817805
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 10, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 305-7848

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Chapter 527. Quality Review

22 TAC §527.4

The Texas State Board of Public Accountancy adopts an amendment to §527.4 concerning Quality Review Program, without changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register*, (23 TexReg 9902).

The amendment allows for a clearer understanding of when a practice unit must register for peer review and adds the National Conference of CPA Practitioners (NCCPAP) to the list of qualified sponsoring organizations.

The amendment will function by having a clearer understanding of when a practice unit must register for peer review and by adding NCCPAP to the list of qualified sponsoring organizations.

No comments were received regarding adoption of the rule.

The amendment is adopted under Texas Civil Statutes, Article 41a-1, Section 6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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William Treacy
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Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 33. Early and Periodic Screening, Diagnosis, and Treatment

On behalf of the State Medicaid Director, the Texas Department of Health (department) adopts the repeal of §33.263, §§33.301-33.309, §§33.314-33.318, 33.320, 33.322-33.327, and §§33.331-33.338, and new §§33.301-33.309, §§33.312-33.318, §§33.331-33.334, and §§33.351-33.358 concerning the provision of dental services to Medicaid Early and Periodic Screening, Diagnosis, and Treatment (EPSDT)-eligible recipients. New §§33.301, 33.307, 33.308, 33.309, 33.312, 33.314, 33.316, 33.317, 33.318, 33.331, 33.333, 33.351, 33.352, 33.353, and 33.355 are adopted with changes to the proposed text as published in the May 22, 1998, issue of the *Texas Register* (23 TexReg 5310). The repeal of §§33.263, 33.301–33.309, 33.314 – 33.318, 33.320, 33.322–33.327 and 33.331–33.338 and new §§33.302–33.306, 33.313, 33.315, 33.332, 33.334, 33.354 and 33.356–33.358 are adopted without changes and will not be republished.

The sections were originally adopted during 1981-1989, prior to the initiation of the claims processing contract with the National Heritage Insurance Company (NHIC) and the transfer of the EPSDT Program to the department from the Texas Department of Human Services. Subsequent organizational restructurings, transfer of the Medicaid Provider Sanctions Division from the department to the Health and Human Services Commission, and other interagency agreements and events, including the initiation of electronic claims processing, have made parts of many of the current sections inaccurate or inapplicable. Updating these inaccurate and inappropriate references requires repeal of the existing sections and proposal of new rules.

The new sections cover definitions; oral evaluations and dental services' preventive dental services; therapeutic dental services; emergency dental services; allowable services and limitations; eligibility for Texas Health Steps dental services; requirements for provider enrollment and continuing participation; termination of a provider agreement; charges to recipients; claims; claims - time limits, submission, and denial; change to another provider; standards of care; management of complaints; performance of dental services; orthodontic services limitation; eligibility for orthodontic services; payment limitations for orthodontic services; post-payment orthodontic utilization review; types of department utilization reviews; selection of dentists for department utilization review; notification to provider of department on-site utilization review; provider cooperation; disposition of department utilization review results; recoupment of overpayments as a result of department utilization review; administrative actions and/or sanctions; and referral for investigation of fraud or program abuse.

The department is making the following minor changes due to staff comments to clarify the intent and improve the accuracy of the sections.

Change: Concerning §33.301(2), the department deleted "Program" and added "(THSTEPS)".

Change: Concerning §33.301(4), the department deleted "bimonthly" because the current publication schedule could change in the future.

Change: Concerning proposed §33.301(6), the department deleted the definition of "NHIC" as unnecessary because neither the acronym nor "National Heritage Insurance Company" is used in the rules. The three remaining definitions have been renumbered.

Change: Concerning new §33.301(6), the department has corrected the inaccurate definition of OIE originally proposed.

Change: Concerning new §33.301(7), the department rephrased the definition of "recipient" for clarity.

Change: Concerning §33.307(b), the department added the second sentence to clarify that a slightly different eligibility time limit applies to THSteps-Comprehensive Care Program (CCP) recipients.

Change: Concerning §33.307(c), the department replaced "preventative" with "preventive" for consistency. The title of §33 303 as proposed used the word "preventive".

Change: Concerning §33.308(a), the department deleted the phrase "and orthodontists" as redundant.

Change: Concerning §33.308(c), the department redrafted the subsection as two new sentences for purposes for clarity.

Change: Concerning §33.312(d)(1), the department deleted "or" for clarity.

Change: Concerning §33.314(a)(2), the department substituted "a third-party" for "another insurance"; and "third-party resource" for "other insurer" for consistency with §33.314(a)(3) and with the Texas Medicaid Provider Procedures Manual.

Change: Concerning §33.314(b), the department substituted the word "denied" for "rejected" in the first sentence for clarity and consistency with §29.3(c) of this title (Time Limits for Submitted Claims), which apply to all Medicaid claims.

Change: Concerning §33.316(a)(2), the department added the word "of" for clarity.

Change: Concerning §33.317(a)(1), the department combined the first two sentences to improve clarity. The department also amended the third sentence to emphasize that information about possible violations of the law or regulations by recipients will also be referred to the Texas Department of Human Services.

Change: Concerning §33.317(a)(1)(B), the department amended this subsection by deleting "to a departmental" and adding "for" because although peer review is not provided through the department, it may be available from private professional organizations or individual dentists.

Change: Concerning proposed §33.317(a)(1)(K), the department deleted the subparagraph of this subsection because it was redundant. Section 33.317(a)(1) already includes referral to the SBDE. Sections 33.317(a)(1)(I)-(J) have also been amended for consistency.

Change: Concerning §33.317(b)(1), the department amended the subsection by adding the first sentence to clarify that the scope of referrals by the department to OIE has already been determined by OIE and is not within the department's discretion.

Change: Concerning §33.317(b)(3), the department added "program" for consistency with the same phrase in §33.317(b)(1).

Change: Concerning §33.331(b), the department rephrased the subsection for clarity.

Change: Concerning §33.333(c), the department rephrased the subsection for clarity by adding "to another provider".

Change: Concerning §33.352(a)(3), the department deleted the phrase "violation of the Texas Dental Practice Act" because it was redundant. Section 33.317 already describes the possibility of referral to the SBDE for violation of the Texas Dental Practice Act.

Change: Concerning §33.353, the department added "On-Site" to the title of the section to clarify that other utilization review activities, such as desk reviews, were not intended to trigger a requirement for prior provider notification.

Change: Concerning §33.355, the department added the phrase "either automated or on-site" to continue to distinguish between the types of review. The phrase "or by its claims processing contractor" was also added to clarify that either department staff or staff of the department's contractor has the same authority to transmit utilization review data to OIE.

The following comments were received concerning the proposed rules. Following each comment is the department's response and any resulting changes.

Comment: Concerning the rules in general, one commenter asked whether the terms "abuse", "conviction", "convicted", "exclusion", and "fraud" as used in any of the sections would be interpreted according to definitions in 25 TAC §79.2111. The commenter added that if the terms are intended to have the same meanings, a cross-reference would be helpful.

Response: The department agrees that these terms should be used according to the definitions in 25 TAC §79.2111 concerning fraud or abuse involving Medicaid providers. Section 33.309(b)(5) has been amended to add the cross-reference.

Comment: Concerning §33.301, three commenters stated that the rules should include a definition of the term "medically necessary".

Response: The State Medicaid Director has stated that a definition of "medically necessary" will be coordinated by the Health and Human Services Commission for application across all Medicaid services. No change was made as a result of this comment.

Comment: Concerning §33.307(a), one commenter stated that an otherwise eligible child does not become ineligible if the family cannot present the child's Medicaid card when services are requested.

Response: The department agrees, and has amended the section to state that a provider may determine a client's eligibility by contacting the department's claims processing agent.

Comment: Concerning §33.307(a), one commenter stated that anyone who has Medicaid and is under the age of 21 is automatically eligible for THSteps.

Response: The department disagrees, since clients who are under age 21 and are Medicaid-eligible through Medicaid programs type 24 (Qualified Medicare Beneficiary), type 30 (Alien - Emergency Services Only), or type 42 (Presumptive Eligibility Based on Pregnancy) are not eligible for THSteps. No change was made as a result of this comment.

Comment: Concerning §33.307(c), one commenter stated that the subsection should be amended to clarify its meaning.

Response: The department agrees and has amended the subsection accordingly.

Comment: Concerning §33.308(c)(5), one commenter objected to "settlement of civil liability" as a basis for denial of an enrollment application or continuing participation because a settlement agreement usually contains neither a finding of guilt or violation nor an admission of liability.

Response: The department agrees and added "in civil litigation" and deleted "or settlement of civil liability".

Comment: Concerning §33.309(b)(4), one commenter stated that the standards of care identified in §33.316 are too vague and subject to interpretation to provide an objective basis for terminating a provider's contract.

Response: The department agrees that more specificity concerning conduct which may constitute a violation of the standards of care is appropriate and has amended the subsection to include 22 TAC Chapter 109 of the rules of the State Board of Dental Examiners.

Comment: Concerning §33.309(b)(5), one commenter stated that the section should refer to "final conviction", rather than a "conviction" which may be appealed and perhaps reversed.

Response: The department disagrees that only a "final" conviction for fraud in a criminal case should be the basis for termination of a provider agreement. The department has amended this subsection to include the definition of "conviction" at 25 TAC §79.2111, which specifically excludes the "final conviction" interpretation.

Comment: Concerning §33.314(d)(3), one commenter objected to this subsection because the term "medically necessary" has not been defined, and also stated that providers should have timely notification by mail of denial of a claim based on policy.

Response: A definition of "medically necessary" intended for application to services across the Medicaid program is being coordinated by the Health and Human Services Commission. According to policy detailed in the Medicaid Provider Procedures Manual, THSteps dental providers now receive a remittance and status report either by mail or electronically, which explains any denied claims. No change was made as a result of this comment.

Comment: Concerning §33.316, one commenter stated that the section is too vague to be enforceable. The commenter asked whether providers must obtain receipts from recipients or parents or guardians indicating that they received the information, how much information the recipient must receive, what constitutes a "full explanation of the treatment plan", whether the "standard of care" established by laws relating to the practice of dentistry and "standards of health care" as recognized by the SBDE can be articulated, and if so, how the standards differ.

Response: The department disagrees that the section is too vague to be enforceable. Clarification of standards of care issues will be addressed in Medicaid Bulletin articles or information letters. No changes were made as a result of this comment.

Comment: Concerning §33.316(a)(2), one commenter stated that the subsection should be rewritten to state that patients shall "participate fully in the development of the treatment plan and the process of giving informed consent."

Response: Some clients will choose to take an active role in determining the final scope of their treatment plans, while others will agree passively with whatever treatment plans their providers propose. Thus, providers can encourage, but not require clients to "participate fully". The department agrees that clients or their parents or guardians must receive information concerning the dental diagnosis; a full explanation of the scope of proposed treatment, including risks and alternatives; the anticipated results; and the need for administration of sedation or anesthesia, including the risks thereof, to make any consent given truly an informed one. Further, the department can provide information to clients concerning their rights and responsibilities concerning informed consent for dental services. Since there appears to be no fundamental disagreement about the client's right to participate as fully as he or she chooses, no changes were made as a result of this comment.

Comment: Concerning §33.317(a)(1)(B), one commenter stated that the section should be rewritten as follows: "referral to a departmental peer review performed by a dentist licensed by the SBDE, and in the case of specialist, review of the work of the specialist shall be substantiated by a specialist in the same field or by a panel which contains such a specialist when issues of patient care are involved".

Response: The department agrees that review of services provided by dental specialists should include review and substantiation by one or more peers in the same specialty. Section 33.317(a)(1)(B) has been amended only in response to a staff comment suggesting deletion of the reference to "departmental" peer review, which is no longer available. The commenter's concerns about inclusion of specialists in peer review of specialists have been addressed by an amendment to §33.351. No change to §33.317(a)(1)(B) has been made as a result of this comment.

Comment: Concerning §33.318, the State Board of Dental Examiners suggested that the first sentence of the section be amended as follows: "All Texas Health Steps dental services shall be performed by the enrolled provider except for that work allowed to be done by a licensed dental hygienist, dental assistant, or dental technician in a dental laboratory on the premises where the dentist practices or in a commercial laboratory registered with the SBDE."

Response: The department agrees and has amended the section with the suggested language.

Comment: Concerning §33.351, one commenter stated that the section should be amended to include the following: "Dental utilization review decisions shall be made in accordance with written, currently acceptable screening criteria and review procedures that are established and periodically evaluated and updated with appropriate involvement from practicing dentists. Such decisions shall be made, taking into account special circumstances of each case that may require a deviation from the norm stated in the criteria. Criteria must be objective, clinically valid, compatible with established principles of dental care, and flexible enough to allow deviations from the norms when justified on a case-by-case basis."

Response: The department agrees that dental utilization review criteria should be addressed with greater specificity. Based on the commenter's suggested language, the department has added subsection (c) to this section.

Comment: Concerning §33.355, one commenter stated that the section should be revised to require prompt notice to dentists when the results of utilization reviews deviate from expected norms, unless there is a reasonable expectation that notice will result in an effort by the provider to destroy or alter relevant records.

Response: The department cannot assure "prompt" notice because OIE is responsible for disposition of cases that show deviation from expected results. No change was made as a result of this comment.

Comment: Concerning §33.356, one commenter stated that recoupment should reflect the discrepancy rate for bills submitted for services not performed (overbilling), as well as offsets for any services performed for which no bill was submitted by the provider (underbilling).

Response: The department disagrees because EPSDT/THSteps dental services is a comprehensive program which includes the vast majority of procedures codes listed by the American Dental Association. Because of this wide scope of covered services, the department does not anticipate that providers will fail to bill for medically necessary services

provided to eligible clients to any significant extent. The department could not determine with any certainty whether underbilling should offset overbilling if no records or documentation for the service(s) has been submitted. If documentation does exist, and supports the medical necessity of the service rendered, the provider retains the option of submitting the claim(s) for consideration of payment through the appeals process. No change has been made as a result of this comment.

The comments on the proposed rules received by the department during the comment period were submitted by the Texas Dental Association, the State Board of Dental Examiners, and by two individuals. The commenters were neither for nor against the rules in their entirety. However, they raised questions, offered comments for clarification purposes, and suggested clarifying language concerning specific provisions in the rules.

After the Texas Board of Health approved this set of rules on October 16, 1998, the State Medicaid Director required the following changes to clarify the intent of the sections. In §33.316(a)(2), the phrase "and give informed consent" was added. In §33.351(c), the word "input" was substituted for "involvement".

Subchapter F. Special Dental Cases

25 TAC §33.263

The repeal is adopted under the Human Resources Code, §32.021, and Government Code, §531.021, which provide the Health and Human Services Commission with the authority to propose rules to administer the state's medical assistance program and are submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the EPSDT program, and as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

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 November 18, 1998.

TRD-9817694
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: December 8, 1998
Proposal publication date: May 22, 1998
For further information, please call: (512) 458–7236

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Subchapter G. Dental Services

25 TAC §§33.301–33.309, 33.314–33.318, 33.320, 33.322–33.327

The repeals are adopted under the Human Resources Code, §32.021, and Government Code, §531.021, which provide the Health and Human Services Commission with the authority to propose rules to administer the state's medical assistance program and are submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the EPSDT program, and as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

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-9817695
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: December 8, 1998
Proposal publication date: May 22, 1998
For further information, please call: (512) 458–7236

♦ ♦ ♦

25 TAC §§33.301–33.309, 33.312–33.318

The new sections are adopted under the Human Resources Code, §32.021, and Government Code, §531.021, which provide the Health and Human Services Commission with the authority to propose rules to administer the state's medical assistance program and are submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the EPSDT program, and as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

§33.301. Definitions.

The following words and terms when used in Subchapters F, G, or H of this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Department - The Texas Department of Health.

(2) Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) - A component of the Medicaid program, also known as Texas Health Steps (THSteps), which provides medical check-up and dental services to Medicaid and Texas Health Steps clients under age 21 years.

(3) HHSC - Health and Human Services Commission.

(4) Manual - The Texas Medicaid Provider Procedures Manual, including all updates published in the Texas Medicaid Bulletin.

(5) Medicaid - A medical and dental program provided under Title XIX of the federal Social Security Act and the Human Resources Code, Chapter 32.

(6) OIE - The Office of Investigations and Enforcement at the Health and Human Services Commission.

(7) Recipient - A Medicaid-enrolled client.

(8) SBDE - State Board of Dental Examiners.

§33.307. Eligibility for Texas Health Steps Dental Services.

(a) Persons are eligible for dental services if they have a current Texas Medicaid identification or Medicaid verification letter that indicates Medicaid and Texas Health Steps eligibility for the time period during which services are delivered, and are under age 21. Providers may also verify eligibility for clients who do not have a Medicaid identification or Medicaid verification letter by contacting the department's claims processing agent.

(b) Dental services can be continued through the month in which the recipient reaches 21. A recipient becomes ineligible for THSteps-Comprehensive Care Program (CCP) services on his or her 21st birthday.

(c) Persons one year of age and older who are eligible for Medicaid and Texas Health Steps services may receive periodic, preventive dental services as defined in §33.303 of this title (relating to Preventive Dental Services) every six months.

§33.308. Requirements for Provider Enrollment and Continuing Participation.

(a) Dentists providing Texas Health Steps dental services must:

(1) be licensed by the SBDE;

(2) operate in accordance with the laws relating to the practice of dentistry and the rules and regulations of the SBDE;

(3) practice in the United States of America; and

(4) be enrolled as Texas Health Steps dental providers.

(b) Dentists who deliver emergency dental services as defined in §33.305 of this title (relating to Emergency Dental Services) to Medicaid and Texas Health Steps-eligible Texas recipients while the recipients are out of state are not required to be licensed by the SBDE, but must be authorized to provide Title XIX services in the state in which the services are delivered.

(c) Enrollment and continuing participation as a Texas Health Steps dental provider are voluntary. An application for enrollment may be denied and/or continuing participation may be terminated for any of the following reasons:

(1) disciplinary action(s) taken against the provider by the SBDE or the licensing entity of any other state;

(2) previous or current Medicaid or other federally funded health care program violation(s);

(3) prior imposition of sanctions by a regulatory entity of the State of Texas or any other state;

(4) failure of the provider to comply with Texas Health Steps program rules;

(5) a judgment in civil litigation or a criminal conviction based on fraud or abuse in Medicaid or any other federally funded health care program in any state. This includes a plea into a first offender program, misdemeanor, or felony;

(6) failure to comply with Family Code, §231.006, regarding payment of child support;

(7) notification from the HHSC OIE of adverse action taken against the provider; or

(8) any other reason authorized by rules, regulations, statute, or contract.

(d) A provider shall cease providing Texas Health Steps services and notify the department or its claims processing contractor if the SBDE suspends or revokes the provider's license, unless the suspension or revocation is probated in its entirety and without conditions or limitations.

§33.309. Termination of a Provider Agreement.

(a) The agreement between the provider and the department for provision of Texas Health Steps dental services may be terminated without cause by either the provider or the department according to its terms with 30 days written notice.

(b) The provider agreement may be terminated by the department for any of the following reasons:

(1) breach of contract;

(2) suspension or revocation of the provider's license by the SBDE unless the suspension or revocation is probated in its entirety and without conditions or limitations;

(3) disciplinary action(s) taken by the SBDE or the dental licensing entity of any other state in which the provider has been previously licensed;

(4) violation of any of the standards of care identified in §33.316 of this title (relating to Standards of Care), including, but not limited to, conduct described in 22 TAC, Chapter 109 (relating to Conduct);

(5) conviction, as defined at §79.2111 of this title (relating to Definitions), for fraud in any federal or state health care program, including, but not limited to, titles V, XVIII, XIX, XX, and XXI of the Social Security Act;

(6) amendment or judicial interpretation of federal or state laws or other requirements in a way that would make it unfeasible or impossible for either party to fulfill the agreement, or if either party is unable to agree on changes necessary for the substantial continuation of the agreement;

(7) denial of federal financial participation;

(8) any other violations of HHSC rules; or

(9) any other reason authorized by rule, regulation, statute, or contract.

§33.312. Charges to Recipients.

(a) A provider shall not require a down payment before providing Medicaid-allowable services to eligible recipients.

(b) A provider shall not charge recipients for missed appointments.

(c) A provider shall neither bill, nor take recourse against an eligible recipient, for a denied or reduced claim for services that are within the amount, duration, and scope of benefits of the Texas Health Steps dental program, if the denial or reduction is the result of any of the following errors that are attributed to the provider.

(1) failure to submit a claim, including claims not received by the department's claims processing contractor;

(2) failure to submit a claim within the filing deadlines as described in §33.314 of this title (relating to Claims–Time Limits, Submission, and Denial);

(3) filing of an incorrect paper or electronic claim;

(4) failure to resubmit a corrected paper or electronic claim within the appropriate time period as described in §33.314 of this title;

(5) failure to appeal a claim denial within the appropriate time period; or

(6) errors made in claims preparation, appeal submission, or the appeal process.

(d) A provider may bill a recipient for a dental service or item only if both:

(1) a request for prior authorization or a claim for payment for the service or item was denied as not being medically necessary,

not a benefit of the Medicaid program, or not allowable according to program rules and policy requirements; and

(2) the service or item was provided at the request of the recipient and the provider obtained a written client acknowledgment statement, as described in the manual, which was signed and dated by the recipient or the recipient's parent/guardian prior to the initiation of the specified dental service, and is retained in the recipient's dental record.

§33.314. Claims–Time Limits, Submission, and Denial.

(a) Payment shall be denied if the following time limits for submitting claims are not met:

(1) dental service claims must be received by the department's claims processing contractor within 95 days from the earliest date of service on the claim;

(2) if a service is billed to a third-party resource, the claim must be received by the claims processing contractor within 95 days of the date of disposition by the third-party resource; or

(3) if a service is billed to a third-party resource that has not responded, the claim must be received by the claims processing contractor within 12 months of the service date. However, the claim may not be submitted before 110 days after the third party has been billed.

(b) Claims which lack information necessary for processing shall be denied as incomplete claims. A resubmitted claim containing the necessary information must be received by the claims processing contractor within 180 days from the last denial date.

(c) The claims processing contractor must receive all claims appeals and requests for adjustments within 180 days of the claim's disposition date. This is the date on the remittance and status report on which the claim appears.

(d) Claims for services shall be denied for any of the following reasons:

(1) the recipient was not eligible for Texas Health Steps services on the date of service;

(2) the service is not an allowable service;

(3) the service was either not medically necessary or not delivered according to program rules and policy in effect on the date of service, or both;

(4) the service required prior authorization, which the provider failed to obtain;

(5) the service was prior authorized but was delivered after the expiration of the prior authorization period;

(6) the service was provided by a nonparticipating, suspended, or otherwise ineligible dentist;

(7) the claim was not prepared or submitted according to the appropriate claims filing or claims appeal criteria as described in the manual; or

(8) a duplicate claim was submitted or the services were included in another claim previously paid.

§33.316. Standards of Care.

(a) Texas Health Steps recipients or their parents or guardians who can give informed consent shall:

(1) receive information following an oral evaluation regarding:

(A) the dental diagnosis;

(B) scope of proposed treatment, including alternatives and risks;

(C) anticipated results;

(D) need for administration of sedation or anesthesia, including risks; and

(2) receive a full explanation of the treatment plan and give informed consent prior to its implementation.

(b) Texas Health Steps recipients shall:

(1) receive dental services specified in the treatment plan which meet the standards of care established by the laws relating to the practice of dentistry and the rules and regulations of the SBDE;

(2) receive dental services free from abuse or harm from the provider or the provider's staff; and

(3) receive only that treatment required to address documented medical necessity and which meets professionally recognized standards of health care as recognized by the SBDE.

§33.317. Management of Complaints.

(a) Texas Health Steps dental program administration.

(1) The department has responsibility for the administration of Texas Health Steps dental services, including review of complaints and payments. In accordance with each agency's guidelines for referrals, the department shall refer a provider or recipient to the OIE, the SBDE, or the Texas Department of Human Services. If discrepancies or irregularities are reported to the department, or found during a utilization review, the department may take one or more administrative actions. These actions include, but are not limited to, the following:

(A) providing oral, written, or personal educational contact with the provider;

(B) referral for peer review;

(C) requiring execution of a closed-end or time-limited provider agreement for a specified period of time;

(D) requiring attendance at provider education sessions;

(E) requiring prior authorization of selected services;

(F) requiring review of all services before payment;

(G) requiring review of all services after payment;

(H) requiring submission of additional claim justification that is not normally required;

(I) imposing vendor hold; or

(J) recouping of overpayments.

(2) The department will notify the provider in writing of the review findings and of any proposed administrative action. This notification may occur before or after other action is taken by professional dental or governmental organizations.

(3) Upon receipt of a provider's written request, the department shall afford the provider a fair hearing pursuant to §§1.51-1.55 of this title (relating to Fair Hearing Procedures) before taking any of the administrative actions listed at subsection (a)(1)(A)-(J) of this section.

(b) Referrals to other state agencies.

(1) The department shall refer to OIE based on OIE criteria. OIE criteria for referrals by the department include, but are not limited to, complaints or allegations of provider fraud or abuse, including program abuse; abuse or harm to a recipient; lack of medical necessity; overbilling; soliciting or collecting unauthorized payments from recipients; or failure to refund payments to recipients. Such complaints or allegations shall be made in writing and forwarded to the OIE. The OIE may utilize staff from the department or its claims processing contractor to assist in determining the validity of any complaints or allegations received. A departmental employee acting as an agent of OIE is governed by the parameters of authority and investigation for OIE.

(2) Complaints about the practice of dentistry as described in the Texas Dental Practice Act or the rules and regulations of the SBDE shall be made in writing to the SBDE.

(3) Allegations of fraud or program abuse committed by a Texas Health Steps recipient shall be made in writing to the Office of Inspector General, Texas Department of Human Services, 701 West 51st Street, Austin, Texas, 78756.

§33.318. Performance of Dental Services.

All Texas Health Steps dental services shall be performed by the enrolled provider except for that work allowed to be done by a licensed dental hygienist, dental assistant, or dental technician in a dental laboratory on the premises where the dentist practices or in a commercial laboratory registered with the SBDE. The Texas Dental Practice Act and the rules and regulations of the SBDE define the scope of work that dental auxiliary personnel may perform. Any deviations from these practice limitations shall be reported to the SBDE and could result in sanctions or other actions being taken against the provider.

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 H. Dental Utilization Review

25 TAC §§33.331–33.338

The repeals are adopted under the Human Resources Code, §32.021, and Government Code, §531.021, which provide the Health and Human Services Commission with the authority to propose rules to administer the state's medical assistance program and are submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the EPSDT program, and as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

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25 TAC §§33.331–33.334, 33.351–33.358

The new sections are adopted under the Human Resources Code, §32.021, and Government Code, §531.021, which provide the Health and Human Services Commission with the authority to propose rules to administer the state's medical assistance program and are submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the EPSDT program, and as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

§33.331. Orthodontic Services Limitations.

(a) Orthodontic services are limited to treatment of severe handicapping malocclusion and related conditions as described and measured by the procedures and standards published in the manual.

(b) Orthodontics for cosmetic reasons only is not an allowable service.

§33.333. Payment Limitations for Orthodontic Services.

(a) Except for the initial orthodontic visit, all orthodontic services must be prior-authorized by the dental director of the department's claims processing contractor according to the procedures described in the manual.

(b) A prior authorization is issued for a complete plan of orthodontic treatment that includes all procedures for completion of the single course of treatment to be accomplished over a specified time period.

(c) A prior authorization for orthodontic services is not transferrable to another provider.

(d) If a request for prior authorization of a plan of orthodontic services for a recipient is not approved, the provider may file a claim and receive payment to defray the costs of the diagnostic materials required for submitting the request. Department policy in effect at the time of service delivery shall determine the number of denials for which reimbursement of costs shall be available.

§33.351. Types of Department Utilization Reviews.

(a) The department or its claims processing contractor may conduct utilization reviews through automated analysis of a provider's pattern(s) of practice, including peer group analysis. Such analysis may result in the subsequent conduct of an on-site utilization review. The department or its claims processing contractor may conduct utilization reviews at the direction of OIE, according to HHSC rules.

(b) The department may conduct dental utilization reviews which:

(1) may include examination of:

(A) recipients;

(B) office records;

(C) hospital records;

(D) patient records, including radiographs; or

(E) any other records determined to be necessary to conduct the review; and

(2) are performed by a dentist licensed by the SBDE. Review of the work of specialists shall be substantiated by a specialist in the same field or by a panel which contains such a specialist when issues of patient care are involved.

(c) Dental utilization reviews shall be based on written procedures and screening criteria which are evaluated and updated periodically with input from practicing dentists. Criteria shall be objective, clinically valid, and compatible with established principles of dental care. The department shall apply review and screening criteria with flexibility appropriate to the circumstances of each case.

§33.352. Selection of Dentists for Department Utilization Review.

(a) An individual or group dental provider may be selected by the department for a utilization review as a result of:

(1) a random selection procedure from the current list of participating dental providers in a geographic area selected for review;

(2) comparisons of claims submitted or patterns of practice in relation to other participating dentists; or

(3) information or complaints received by the department, except those alleging fraud or abuse or concerning the practice of dentistry as described in §33.317 of this title (relating to Management of Complaints).

(b) Providers suspected of program fraud or abuse will not be subject to a utilization review by the department, but will instead be referred to OIE for disposition.

(c) Complaints regarding the practice of dentistry will be referred to SBDE.

§33.353. Notification to Provider of Department On-Site Utilization Review.

(a) The department shall give the provider at least 30 days notice of the time and place of a utilization review, unless such notice would jeopardize an active investigation.

(b) At least seven days prior to a utilization review, the department shall give the provider a list of the recipients for whom all records must be provided, unless such notice would jeopardize an active investigation.

(c) Prior notification requirements to providers do not apply to utilization reviews conducted under the direction of the OIE.

§33.355. Disposition of Department Utilization Review Results.

The results of utilization reviews, either automated or on-site, shall be forwarded by the department or by its claims processing contractor to the OIE for evaluation and final disposition. Results of a review which reflects no deviation from review standards will be mailed to the provider in a timely manner upon completion of the review.

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Chapter 38. Chronically Ill and Disabled Children's Services Programs

25 TAC §38.18

The Texas Department of Health (department) adopts an amendment to §38.18, concerning the Children with Special Health Care Needs Advisory Committee (committee) with changes to the proposed text as published in the September 25, 1998, issue of the *Texas Register* (23 TexReg 9689).

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, state the 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 in existence.

In 1995, the Texas Board of Health (board) established a rule relating to the Children with Special Health Care Needs Advisory Committee. The committee provides advice to the board and the department in the area of developing comprehensive systems of health care for children with special health care needs and their families. The rule states that the committee will automatically be abolished on January 1, 1999. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until January 1, 2003.

This section amends provisions relating to the operation of the committee. Specifically, language is revised to state the committee is established under the Health and Safety Code, §11.016 which allows the board to establish advisory committees; to reference the Government Code; to make it clear that the purpose of the committee is to provide advice to the board; to continue the committee until January 1, 2003; to address changes to the composition of the committee; 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 an office 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; and 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. These changes will clarify procedures for the committee and emphasize the advisory nature of the committee.

No comments were received on the proposal during the comment period; however, the department is making minor changes due to staff comments to clarify the intent and improve accuracy of the section.

Change: Concerning §38.18(f)(3), the language was revised to acknowledge that the composition of the committee is changing

for the composition described in the rules existing on November 1, 1998.

Change: Concerning §38.18(h)(3), the language was revised to reference the appointment, rather than election, of a presiding officer.

Change: Concerning §38.18(h)(4), the language was revised to recognize that the committee would temporarily fill only the position of the assistant presiding officer, if vacant. If the position of presiding officer was vacant, the assistant presiding officer serves pursuant to subsection (h)(3).

Change: Concerning §38.18(h)(7), the language was revised so that the chairman of the board may appoint officers at any time after the effective date of the rule.

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.

§38.18. Children with Special Health Care Needs Advisory Committee.

(a) The committee.

(1) The Children with Special Health Care Needs Advisory Committee (committee) shall be appointed under and governed by this section.

(2) The committee is established under the Health and Safety Code, §11.016 which allows the Texas Board of Health (board) to establish advisory committees.

(b) Applicable law. The committee is subject to the Government Code, Chapter 2110, concerning state agency advisory committees.

(c) Purpose. The purpose of the committee is to provide advice to the board in the area of developing comprehensive systems of health care for children with special health care needs and their families.

(d) Tasks.

(1) The committee shall advise the board concerning rules relating to the Chronically Ill and Disabled Children's Services (CIDC) Program and any other programs administered by the Texas Department of Health (department) that provide services to children with special health care needs.

(2) The committee will assist the department and the board to promote the development of systems of care for all children with special health care needs consistent with Social Security Act, Title V, by participating in long range planning activities including:

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

(3) (No change.)

(e) Committee abolished. By January 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 18 members.

(1) The composition of the committee shall include six consumer representatives, three special health care needs representatives, and nine nonconsumer representatives.

(A) (No change.)

(B) Special health care needs representatives include family members of children with special health care needs or adults with disabilities. The family members or adults may also be service providers.

(C) Nonconsumer members include service providers for children with special health care needs who are enrolled as CIDC or Medicaid providers, representatives of professional associations whose members provide services to children with special health care needs and their families, representatives from institutions of higher education with expertise in public health and children with special health care needs, and other service providers who deliver services to children with special health care needs. Nonconsumer members may also be family members of children with special health care needs or adults with disabilities.

(2) (No change.)

(3) Since the composition of the committee as it existed on November 1, 1998, is changed under this section, existing members shall continue to serve until the board appoints members under the new composition.

(g) Terms of office. The term of office of each member shall be six years.

(1) Members shall be appointed for staggered terms so that the terms of six 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 January 1 of each odd-numbered year.

(1) Each officer shall serve until December 31st of each even-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 become 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 members are assigned.

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

(k) (No change.)

(l) Procedures. Roberts Rules of Order, Newly Revised, shall be the basis of parliamentary decisions except where otherwise provided by law or rule.

(l) - (3) (No change.)

(4) The committee shall make decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.

(5) (No change.)

(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 the 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.

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Chapter 49. Oral Health Improvement Services Program

25 TAC §49.16

The Texas Department of Health (department) adopts an amendment to §49.16 concerning the Oral Health Services Advisory Committee (committee) with changes to the proposed text as published in the September 25, 1998, issue of the *Texas Register* (23 TexReg 9691).

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 that state the purpose of each committee, describe the 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 be abolished unless the governing body of the agency affirmatively votes to continue to the committee in existence.

In 1995, the Texas Board of Health (board) established a rule relating to the Oral Health Services Advisory Committee. The committee provides advice to the board on matters relating to the operation of the state dental program and Texas Health Steps (EPSDT) dental services, and assists those programs and others in the department that require professional dental expertise. The rule states that the committee will automatically be abolished on January 1, 1999. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until January 1, 2003.

The section amends provisions relating to the operation of the committee. Specifically language is revised to state that the committee is established under the Health and Safety Code, §11.016 which allows the board to establish advisory committees; to reference the Government Code; to update references to Texas Health Steps services; to continue the committee until January 1, 2003; to require the presiding officer and the assistant presiding officer of the committee to be selected by the chairman of the board for a period of two years; to allow a temporary vacancy in an office 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 for certain approval. These changes will clarify procedures for the committee and emphasize the advisory nature of the committee.

No comments were received on the proposal during the comment period; however, the department is making minor changes due to staff comments to clarify the intent and improve the accuracy of the section.

Change: Concerning §49.16(a)(1) the word "the" was added before the name of the committee.

Change: Concerning §49.16(c) and (d), the reference to the Texas Health Steps dental program has been changed to Texas Health Steps dental services.

Change: Concerning §49.16(h)(3), the language was revised to reference the appointment, rather than election, of a presiding officer.

Change: Concerning §49.16(h)(4), the language was revised to recognize that the committee would temporarily fill only the position of the assistant presiding officer, if vacant. If the position of presiding officer was vacant, the assistant presiding officer serves pursuant to subsection (h)(3).

Change: Concerning §49.16(h)(7), the language was revised so that the chairman of the board may appoint officers at any time after the effective date of the rule.

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.

§49.16. Oral Health Services Advisory Committee.

(a) The committee. An advisory committee shall be appointed under and governed by this section.

(1) The name of the committee shall be the Oral Health Services Advisory Committee.

(2) The committee is established under the Health and Safety Code, §11.016, which allows the Texas Board of Health (board) to establish advisory committees.

(b) Applicable law. The committee is subject to the Government Code, Chapter 2110, concerning state agency advisory committees.

(c) Purpose. The purpose of the committee is to provide advice to the board on matters relating to operation of the state dental program and Texas Health Steps dental services, and to assist those programs and others in the department that require professional dental expertise.

(d) Tasks.

(1) The committee shall advise the board concerning rules relating to operation of the state dental program and Texas Health Steps dental services.

(2) The committee shall perform the following duties:

(A) (No change.)

(B) act as a liaison between the dental profession of Texas and the state and Texas Health Steps dental services;

(C) increase participation in the state and Texas Health Steps dental services among Texas dentists;

(D) advise/recommend items for improving the operation of the state and Texas Health Steps dental services;

(E)-(F) (No change.)

(3) (No change.)

(e) Review and duration. By January 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) (No change.)

(g) Terms of office. The term of office of each member shall be six years.

(1) Members shall be appointed for staggered terms so that the terms of a substantially equivalent number of consumer and nonconsumer 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 January 1 of each odd-numbered year.

(1) Each officer shall serve until December 31st of each even-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 members are 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 include:

(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)-(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 the 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.

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Chapter 56. Family Planning

Subchapter A. Program Information

25 TAC §56.104

The Texas Department of Health (department) adopts an amendment to §56.104 concerning the Family Planning Advisory Committee (committee) with changes to the proposed text as published in the September 25, 1998, issue of the *Texas Register* (23 TexReg 9693).

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, state the 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 in existence.

In 1995, the Texas Board of Health (board) established a rule relating to the Family Planning Advisory Council. The committee provides advice to the board and the department in the area of comprehensive family planning services. The committee process affords the opportunity for participation in the development, implementation, and evaluation of the program by persons broadly representative of all significant elements of the population to be served, and by persons in the community knowledgeable about the needs for family planning services. The rule states that the committee will automatically be abolished on January 1, 1999. The board has now reviewed and evaluated the committee and has determined that the committee should continue into existence until January 1, 2003.

This section amends provisions relating to the operation of the committee. Specifically, the name of the committee is revised and language is revised to state that the committee is established under the Health and Safety Code, §11.016 which allows the board to establish advisory committees; to reference the Government Code; to continue the committee until January 1, 2003; to address changes to the composition of the committee by adding an additional consumer member; 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 establish the federally required advisory committee on educational and informational material as a subcommittee of the Family Planning Advisory Committee; and 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. 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 §56.104(f)(3), the language was revised to acknowledge that the composition of the committee is changing from the composition described in the rules existing on November 1, 1998.

Change: Concerning §56.104(h)(3), the language was revised to reference the appointment, rather than election, of a presiding officer.

Change: Concerning §56.104(h)(4), the language was revised to recognize that the committee would temporarily fill only the position of the assistant presiding officer, if vacant. If the position of presiding officer was vacant, the assistant presiding officer serves pursuant to subsection (h)(3).

Change: Concerning §56.104(h)(7), the language was revised so that the chairman of the board may appoint officers at any time after the effective date of the rule.

The following comments were received concerning the proposed section. Following each comment is the department's response and any resulting change(s).

Comment: Two commenters recommended continuation of the committee.

Response: The department agrees and is continuing the committee as it had proposed to do. No change was made as a result of this comment.

Comment: Concerning §56.104(f)(2)(A), one commenter stated that the composition of the committee should include seven family planning consumers, with at least two male representatives.

Response: The department disagrees. Five family planning consumers, with at least one male representative, represent one-third of the 15 member committee. This is one more consumer member than on the current committee. The department believes that five members is adequate representation of the general public. If increasing the number of consumers would increase the committee to 17, the department believes that a committee of that size might be less effective than a smaller committee of 15. No change was made as a result of this comment.

Comment: Concerning §56.104(h), one commenter stated that the committee should elect its presiding officer. One commenter stated that the committee should elect its presiding and assistant presiding officers. One commenter stated that the committee should elect its presiding and assistant presiding officers with the board's approval. One commenter was concerned about how the board chairman would have adequate knowledge of the committee members to be able to select the officers and wanted an understanding of the selection process.

Response: The department disagrees with the first three commenters. Because the committee is advisory to the board, it is appropriate for the board chairman to determine who shall serve as the presiding and assistant presiding officer. The board will be developing a procedure for selection of officers, which selection may involve input from knowledgeable individuals on appropriate individuals for the officers. No change was made as a result of these comments.

Comment: One commenter expressed concerns about how to best provide for interaction between the committee, the board, and department staff, especially senior level family planning staff.

Response: The board and department staff recognize the benefit received from the valuable insight and advice provided by the committee and its members. The department will explore with the committee at its next meetings how to ensure effective interaction and communication. No change was made as a result of this comment.

The commenters were Planned Parenthood of Central Texas, Planned Parenthood Association of Lubbock, Inc., and South Plains Community Action Association. The commenters were neither for or against the rule in its entirety; however, they raised questions and offered comments concerning provisions in the rules.

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.

§56.104. Family Planning Advisory Committee.

(a) The committee. An advisory committee shall be appointed under and governed by this section.

(1) The name of the committee shall be the Family Planning Advisory Committee.

(2) The committee is established under the Health and Safety Code, §11.016 which allows the Board of Health (board) to establish advisory committees.

(3) The committee shall comply with the requirements of 42 United States Code §300a-4, 42 Code of Federal Regulations §59.6, and the Title X Program Guidelines for Project Grants for Family Planning Services by appointment of a subcommittee to review and approve informational and educational materials developed or made available under Title X of the Public Health Service Act.

(b) Applicable law. The committee is subject to the Government Code, Chapter 2110, concerning state agency advisory committees.

(c) (No change.)

(d) Tasks.

(1) (No change.)

(2) The committee shall advise the board concerning rules relating to the family planning program under Titles V, XIX, and XX of the Social Security Act and Title X of the Public Health Service Act.

(3) (No change.)

(e) Committee abolished. By January 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.

(1) The composition of the committee shall include five family planning consumer representatives and ten professional representatives. The composition of the committee shall reflect the diversity of the state's citizens and consumers, with regard to ethnicity, race, age, gender, residence, and economic status. Each member shall represent this diversity on behalf of all the citizens of the state in all the committee's deliberations and decisions, not simply represent a narrowly defined constituency.

(2) The members of the committee shall be appointed by the board as follows:

(A) five family planning consumers, with at least one male representative; and

(B) (No change.)

(3) Since the composition of the committee as it existed on November 1, 1998, is changed under this section, existing members shall continue to serve until the board appoints members under the new composition.

(g) Terms of office. The term of office of each member shall be six years, except for the Regional Coordinating Committee Chairperson, who shall be appointed for a two-year term.

(1) Members shall be appointed for staggered terms so that the terms of members shall 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 January 1 of each odd-numbered year.

(1) Each officer shall serve until December 31st of each even-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 at least semiannually 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 members are assigned.

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

(k)-(l) (No change.)

(m) Subcommittees. The committee may establish subcommittees as necessary to assist the committee in carrying out its duties.

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

(5) The committee shall appoint a subcommittee to review and approve Title X informational and educational material as required by federal law.

(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 November 23, 1998.

TRD-9817868
Susan K. Steeg
General Counsel
Texas Department of Health
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Chapter 127. Registry for Providers of Health-Related Services

25 TAC §127.1, §127.4

The Texas Department of Health (department) adopts amendments to §127.1 and §127.4, concerning the voluntary registry for providers of health-related services without changes to the proposed text as published in the July 31, 1998, issue of the *Texas Register* (23 TexReg 7698), and therefore the sections will not be republished.

The amended sections cover request for placement of an occupation on the registry, and fees. Specifically, the amendment to §127.1 allows the department to require a request fee be paid by state-wide health-related professional organizations with members whom it officially recognizes as providers of a specific health-related service, or at least 200 persons employed or used as providers of a specific health-related service at the time the request is filed. The amendment to §127.4 sets forth the request fee and increases the fees for the initial application and annual reapplication.

No comments were received on the proposal during the comment period.

The amendments are adopted under Texas Health and Safety Code, §12.014, which provides the department with the authority to adopt reasonable fees to cover the cost of establishing and maintaining a registry; 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.

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 129. Opticians' Registry

25 TAC §§129.1–129.5, 129.8–129.13

The Texas Department of Health (department) adopts amendments to §§129.1-129.5 and 129.8 -129.13 concerning the voluntary registration and regulation of dispensing opticians without changes to the proposed text as published in the July 31, 1998, issue of the *Texas Register* (23 TexReg 7698), and therefore the sections will not be republished.

The amended sections provide for the effective regulation and voluntary registration of dispensing opticians. Specifically, the sections change the term advisory council to advisory committee; define advisory committee and all definitions are listed with numbers in new Texas Register format as required by 1 Texas Administrative Code §91.1 effective February 17, 1998; require that an official copy of the minutes be provided to the advisory committee within 30 days after approval; eliminate language regarding reimbursement for expenses because it is not applicable; allow the department to accept personal checks; eliminate references to an examination administered by the department; reduce the number of hours required for single registration from 7 to 5 and dual registration from 14 to 10; change the term license to registration; add language concerning the non-renewal of a registration if the registration has been suspended for failure to pay child support; allow the department to accept address changes via phone, mail, fax, E-mail or in person; delete the requirement of a duly executed affidavit; add language to reference the procedure for assessing administrative penalties; delete unnecessary language related to procedures for revocation, suspension, or denial of an application; and add language requiring registrants to comply with the Texas Contact Lens Prescription Act, Texas Civil Statutes, Article 4552-A, unless exempt.

No comments were received on the proposal during the comment period.

The amendments are adopted under Texas Civil Statutes, Article 4551-1, §5 which provides the Board of Health (board) with the authority to adopt rules to implement registration procedures; and Texas Health and Safety Code §12.001, which provides the board with the authority to adopt rules for the performance of each 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 135. Ambulatory Surgical Centers

The Texas Department of Health (department) adopts the repeal of §§135.41 - 135.43, §135.51, §135.52, and §§135.61 - 135.67; and new §§135.41 - 135.42 and §§135.51 - 135.54, concerning the licensing of ambulatory surgical centers (ASCs). New §§135.41, 135.42 and 135.51 - 135.54 are adopted with changes to the proposed text as published in the July 17, 1998 issue of the *Texas Register* (23 TexReg 7327). Repealed §§135.41 - 135.43, §§135.51 - 135.52, and §§135.61 - 135.67 are adopted without changes and therefore will not be republished.

The sections cover fire prevention, protection, and safety; handling and storage of gases, anesthetics, and flammable liquids; and physical plant and construction requirements for ASCs including existing and new construction.

The sections which are being repealed were initially adopted in October 1986, with an effective date of November 5, 1986, to implement the Texas Ambulatory Surgical Center Licensing Act (Act), Health and Safety Code, Chapter 243, created by the 69th Legislature, 1985. Existing language contains references to national standards and codes issued and published between the years of 1977 - 1985 by the following nationally recognized organizations: National Fire Protection Association (NFPA); American Institute of Architects; National Association of Plumbing Heating Cooling Contractors; American National Standards Institute (ANSI); American Society of Heating, Refrigerating and Air Conditioning Engineers; American Society for Testing and Materials; National Council on Radiation Protection; International Conference of Building Officials (Uniform Building Code); International, Inc. (Standard Building Code); and Underwriters' Laboratories. These organizations have revised their standards since 1985 and the references contained in the existing sections are obsolete. In addition, the existing rules contain obsolete references to organizations which no longer publish the referenced standard or no longer have regulatory oversight. For instance, the General Services Commission referenced in the current rules no longer has regulatory oversight of the elimination of architectural barriers. This function is now performed by the Texas Department of Licensing and Regulation, effective September 1, 1993. Sections 135.41 - 135.43, 135.51 - 135.52, and 135.61 - 135.67 have been repealed to reorganize and update the construction and design rules for ASCs to reflect current practices and standards recognized by professional health care facility architects and engineers.

The new sections reflect the reorganization of existing rules and include updated references and language which conform to the nationally recognized construction and design codes and standards and to the changes in state requirements relating to architectural barriers adopted by the Texas Department of Licensing and Regulation. The revised standards contain several changes, and in some instances, more stringent requirements for new construction and renovation, but also in some instances, the revised standards are less restrictive and will provide more flexibility to architects and engineers designing, constructing, or

renovating an ASC. A summary of these changes is explained as follows.

New §135.41 incorporates requirements from existing §135.26(c)(3) and §135.51(b)(3)-(6), §135.51(b)(1)(A), §135.51(c)(4), and §35.51(g)(1), and adds new requirements relating to fire prevention, protection, and general safety. Existing requirements have been updated and clarified. This section includes requirements for: fire protection standards; reporting of fires; smoking policy; fire extinguishing systems; fire protection and evacuation plan; fire drills, fire alarm system; fire department access; fire department protection; safety officer; maintaining a fire safe environment; and electrical systems. This section requires compliance with certain provisions of NFPA 101, "Code for Safety to Life from Fire in Buildings and Structures," 1997 edition; NFPA 13, "Standard for Installation of Sprinkler Systems," 1996 edition; NFPA 10, "Standard for Portable Fire Extinguishers," 1994 edition; NFPA 72, "National Fire Alarm Code," 1996 edition; and NFPA 70, "National Electrical Code," 1996 edition. These NFPA codes and standards have been revised to reflect current acceptable standards.

New §135.42 incorporates requirements from existing §135.51(e)(1), and adds new requirements relating to handling and storage of gases, anesthetics, and flammable liquids. This section includes requirements for flammable germicides, flammable and nonflammable gases and liquids, and gas fired appliances. This section requires compliance with certain provisions of NFPA 325, "Guide to Fire Hazard Properties of Flammable Liquids, Gases, and Volatile Solids," 1994 edition; NFPA 99, Chapter 4, "Standard for Health Care Facilities," 1996 edition, and Chapter 8, "Gas Equipment"; and NFPA 54, "National Fuel Gas Code," 1996 edition. These NFPA codes and standards have been revised to reflect current acceptable standards.

New §135.51 incorporates requirements from existing §135.52 and §135.61(a)(3), and adds new requirements for construction at an existing ASC. This section includes: compliance requirements for existing facilities; construction requirements for remodeling and additions; and construction requirements for previously licensed ASCs which have been vacated or used for other purposes. Licensed ASCs which are not remodeling, altering, or adding to the facility have a choice to maintain compliance with, at a minimum, the standards under which it was licensed, or may maintain compliance with NFPA 101, §13-6, "Existing Ambulatory Health Care Facilities," 1997 edition. All remodeling, renovations, additions, and alterations to an existing licensed ASCs must comply with new §135.52 relating to construction requirements for new ASCs.

New §135.52 incorporates existing requirements from §135.43(a)(4), §135.51(g)(3), §135.61, §135.63 - §135.66, and adds new requirements for construction of new ASCs. This section includes: location and site requirements for an ASC; building design and construction requirements; spatial requirements; detail requirements; finish requirements; elevator requirements; and mechanical requirements. The location and site requirements for a new ASC cover accessibility, means of egress, hazardous and undesirable locations, paved roads and walkways, and parking. The building design and construction requirements for a new ASC must comply with updated codes and standards which reflect current acceptable standards (NFPA and American Institute of Architects standards). New and updated design and construction requirements have been included for multi-occupancy buildings; foundations; physical environment; separate freestanding buildings (not for 7 patient use); public facilities; reception area; consultation room; fire protection for laboratories that use chemicals; laundry and linen processing areas; preoperative patient holding room; fluoroscopy room (if provided); staff clothing change area; sterilizing facilities; surgical suite; treatment room; details (corridors, labeled doors, glazing, ceiling heights, toilet room accessories, hand washing facilities, radiation protection, and rooms with heat producing equipment); finishes (floor, wall, ceiling, penetrations, hanging fabrics (curtains); elevators (new, existing, elevator machine rooms, car size, shaft doors, controls and alarms (and accessibility of), leveling, operation, location, testing and certification); mechanical requirements (mechanical systems; air-conditioning, heating and ventilating systems; steam and hot and cold water systems; plumbing fixtures; piping systems; and thermal and acoustical insulation); and electrical material and equipment (fire safety, installation and testing and certification, electrical safeguards, wiring, lighting, receptacles, equipment, wet patient locations, grounding requirements, new call systems, essential electrical system, and fire alarm system).

New §135.52 requires compliance with specific standards of NFPA 101, "Code for Safety to Life from Fire in Buildings and Structures," 1997 edition; NFPA 99, "Health Care Facilities," 1996 edition; NFPA 45, "Standards on Fire Protection for Laboratories Using Chemicals," 1996 edition; NFPA 80, "Standard for Fire Doors and Fire Windows," 1995 edition; NFPA 701, "Standard Methods of Fire Tests for Flame-Resistant Textiles and Films," 1996 edition; NFPA 90A, "Standard for the Installation of Air Conditioning and Ventilating Systems," 1996 edition, or 90B, "Standard for the Installation of Warm Air Heating and Air-conditioning Systems," 1996 edition, as applicable; NFPA 72, Chapter 5, "National Fire Alarm Code," 1996 edition; NFPA 13, "Standard for Installation of Sprinkler Systems," 1996 edition; NFPA 255, "Standard Method of Test of Surface Burning Characteristics of Building Materials, 1996 edition; NFPA 70, "National Electrical Code," 1996 edition; NFPA 110, "Standard for Emergency and Standby Power Systems, 1996 edition; Uniform Building Code, 1997 edition; Texas Accessibility Standards (TAS) of the Architectural Barriers Act; Americans With Disabilities Act of 1990; Medical Physics Act, Texas Civil Statutes, Article 4512n; American Society of Mechanical Engineers and the American National Standards Institute (ASME/ANSI) A17.1, "Safety Code for Elevators and Escalators," 1990 edition; American Society of Heating, Refrigerating, and Air-conditioning Engineers (ASHRAE), Inc., Standard 52, "Gravimetric and Dust Spot Procedures for Testing Air Cleaning Devices Used in General Ventilation for Removing Particulate Matter," 1992 edition; Underwriters' Laboratories, Inc., Standard 181, "Factory-Made Duct Materials and Air Duct Connectors"; National Standard Plumbing Code, 1996 edition; Health and Safety Code, Chapter 755, Boiler Code; ASHRAE's Handbook of Fundamentals, 1993 edition; and other specifically stated requirements which were developed by the department's Health Facility Licensing Division's architectural staff. These NFPA codes and other standards have been revised to reflect current acceptable standards.

New §135.53 incorporates requirements from existing §135.62 and adds new requirements for preparation, submittal, review and approval of plans. This section covers preparation of preliminary plans (area map, site plan, floor plans, construction type and fire rating, outline specifications); functional program narrative; submission of preliminary plans; preparation of

construction documents (architectural plans, fire safety plans, equipment drawings, structural drawings, mechanical drawings, electrical drawings); correction of final plan deficiencies; construction approval; construction document changes; special submittals (designer certified construction documents, fast-track projects, fire sprinkler systems); construction and inspections (major construction, construction commencement notification, completion, certification of sprinkler system installations; construction inspections); approval for occupancy; resubmittal of construction documents; and project cancellation. This section incorporates current practices which are not presently addressed in the existing rules, and new requirements not currently practiced for: submittal of an area map; calculations for smoke compartment area in floor plans; floor plan for construction in existing facilities; outline specifications; functional program narrative; fire safety plans; special submittals; construction inspections; resubmittal of construction documents; and project cancellations.

New §135.54 replaces the tables in existing §135.67 and adds tables for piped oxygen, medical gas and vacuum systems, and flame spread and smoke production limitations.

In addition to the specific changes, other changes have been made to clarify the intent of existing language.

The purpose of the sections will be to ensure that the design, construction, and renovation of ASCs are performed in accordance with the most current standards nationally recognized by architects and engineers to be the benchmark for physical plant integrity and life safety from fire.

SUMMARY OF CONTACT WITH STAKEHOLDERS: Prior to the formal proposal of these rules, the department requested and received an analysis of the impact on the cost of construction from O'Connell, Robertson, and Associates, Austin, Texas. Following publication of the proposed rules in the Texas Register, the department mailed copies of the rules to the following entities: ARCON, Beaumont, Texas; Collins Reisenbichler Architects, Dallas, Texas; Page Southerland Page, Dallas; The Polkinghorn Group, Austin, Texas; Hightower/Alexander, Bellaire, Texas; Smith Seckman Reid, Inc., Houston, Texas; Page Southerland Page, Austin, Texas; Page Southerland Page, Houston, Texas; Earl Swensson Associates, Nashville, Tennessee; Norman Patten Associates, Cedar Hills, Texas; Raymond Harris and Associates, Dallas, Texas; Sterling Barnett Little, Arlington, Texas 76011; ARCON Healthcare, Nashville, Tennessee; and all licensed ambulatory surgical centers. These entities were informed of the public hearing scheduled for August 17, 1998 in Austin, Texas at that time.

SUMMARY OF COMMENTS: The following is a summary of comments received during the comment period which ended August 31, 1998. A public hearing was held on August 17, 1998, in Austin, Texas. No public comment was received at the hearing. Following each comment are the department's response and any resulting changes(s).

1. COMMENT: Concerning proposed §135.41(e)(1), posting requirements for fire prevention, protection, and safety, a commenter suggested that the language "prominently displayed in public areas" be changed to "prominently displayed by elevators." The commenter's rationale was that employees are familiar with their evacuation routes and procedures and will assist patients and visitors, and believed that no one will take the time to use the signs if an evacuation event occurs.

1. RESPONSE: The department disagrees. The requirement is consistent with the Department of Health and Human Services Fire Safety Survey Report for Ambulatory Surgical Centers (Medicare). No change was made as a result of the comment.

2. COMMENT: Concerning proposed §135.41(f), fire drills (fire prevention, protection, and safety), a commenter stated that "The philosophy of NFPA is to fight fire in place. Evacuation is a last resort procedure. Some specialized units do require evacuation simulations or drills, and then, only annually." The commenter suggested that an annual requirement would be more realistic than to require it at every fire drill.

2. RESPONSE: The department disagrees. The requirement does not stipulate evacuation of areas during drills. The department requires only simulation of evacuation. The movement of infirm or bedridden patients to safe areas or to the exterior of the building shall not be required. This requirement is consistent with the NFPA 101, §12-7.1.2, 1997, and the Department of Health and Human Services Fire Safety Survey Report for Ambulatory Surgical Centers (Medicare). No change was made as a result of the comment.

3. COMMENT: Concerning proposed §135.41(f), fire drills (fire prevention, protection, and safety), a commenter stated that Joint Commission on Accreditation of Healthcare Organizations (JCAHO) allows simulation of a fire alarm and drills when a tenant leases space in which a hospital conducts a drill or whenever the alarm sounds for building lease tenants. The commenter believes that the standard would be more appropriate for a stand alone facility.

3. RESPONSE: The department disagrees. The requirements are for ASCs regardless of whether it is a stand alone or a shared occupancy. The requirements of the JCAHO are recognized as guidelines for the organization and the members, but the requirements of NFPA 101, §12-7.1.2, 1997, and the Department of Health and Human Services Fire Safety Survey Report for Ambulatory Surgical Centers (Medicare) are more stringent. Coordination with other occupancies may be necessary. No change was made as a result of the comment.

4. COMMENT: Concerning §135.51(b)(2), minor remodeling or alterations (construction requirements for an existing ASC), a commenter asked if the word "partitions" refers only to load-bearing partitions.

4. RESPONSE: The department agrees clarification is needed and has changed the language to include both load bearing members and partitions.

5. COMMENT: Concerning §135.52(a), location (construction requirements for new ASCs), a commenter posed the question "If an ASC is a distinct separate part of an existing hospital, can both the hospital and ASC share facilities such as waiting rooms, public toilets, drive-under canopies, etc. as required by §135.52(d)."

5. RESPONSE: An ambulatory surgical center may be a distinct separate part of an existing hospital and could share a common entry, but must maintain a separate waiting area with appropriate facilities associated with a waiting area as required by §135.52(d)(1)(B)(i)-(iii). No change was made as a result of the comment.

6. COMMENT: Concerning §135.52(a)(3)(C), health and safety hazards (construction requirements for new ASCs), a commenter stated that the requirement appears to be very sub-

jective and would be very hard to enforce. The commenter requested that the term "hazardous" be further defined. Another commenter stated that the language was "very ambiguous."

6. RESPONSE: The department disagrees and considers the rule reasonable. The rule is consistent with American Institute of Architects (AIA) guidelines. No change was made as a result of the comment.

7. COMMENT: Concerning §135.52(a)(4)(A), nuisance producing sites (construction requirements for new ASCs), a commenter stated "Although it is admirable not to locate an ASC near a nuisance producing site, it may be difficult to enforce compliance with this requirement. The mere economics of developing an ASC project would dictate the location either in an existing medical neighborhood, medical offices, etc." The commenter believes that this rule would probably not be necessary in light of the probable development locations for ASCs.

7. RESPONSE: The department disagrees. The intent of the rule is in the best interest of the public. No change was made as a result of the comment.

8. COMMENT: Concerning §135.52(a)(4)(B), flood plains (construction requirements for new ASCs), a commenter stated this requirement should be left up to the local zoning restrictions by the authority having jurisdiction. The commenter believes that it should be obvious that an architect would not want to locate a building in a flood plain and that generally the local municipality (unless unincorporated) will not issue a building permit for buildings located in flood plains.

8. RESPONSE: The department disagrees. The location of an ASC should be based on availability of services to the community served. If located on a flood plain, services will not be available during a flood. The intent of the rule is in the best interest of the public. No change was made as a result of the comment.

9.COMMENT: Concerning §135.52(b)(1), paved walkways (construction requirements for new ASCs), a commenter believes that this requirement will probably be best left to Texas Accessibility Standards (TAS) since an accessible paved walkway is required from public roads if public transportation is provided (with a stop on the property). Example, it may be impractical to require a walkway along a highway if the facility is located back from the highway. Most people entering ASCs do not walk to these facilities. The commenter suggested that an adequate sidewalk system from the parking lot to the building entrances is probably more desirable and practical. If, however, public transportation is provided to the site, then these walkways will be required under the TAS standards.

9. RESPONSE: The department agrees and has revised §135.52(b)(1) accordingly.

10.COMMENT: Concerning §135.52(b)(2)(A), off-street parking for patients, visitors, employees and staff (construction requirements for new ASCs), a commenter stated that while it is commendable to provide one parking space for each staff and each patient expected at the maximum occupancy, this requirement is too subjective and would be hard to enforce particularly since occupancy of the facilities may not be known at the time the working drawings are produced. Simply saying, the extra spaces for visitors are too subjective. The commenter suggested that this requirement be left up to the local authority having jurisdiction (occupancy of the building and current zoning).

10. RESPONSE: The department agrees that clarification is needed and has revised §135.52(b)(2)(A) to require a minimum ratio of two spaces for each operating room, one space for each staff member and one visitor's space for each operating room.

11.COMMENT: Concerning §135.52(c)(1)(B), special design provisions, (construction requirements for new ASCs), a commenter stated that the special design provisions for tornados and floods are not practical. Buildings can be designed to be hurricane-resistant; however, no building standards are actually applicable for tornados and floods. The commenter recommended that these catastrophes be struck from the language. Another commenter stated that the language was "very ambiguous."

11. RESPONSE: The department disagrees with both commenters. Special design features as predicated by local or state authority having jurisdiction are required to be considered in locations known to be subject to adverse weather conditions for the protection of the occupants. No change was made as a result of the comment.

12. COMMENT: Concerning §135.52(c)(2), foundations (construction requirements for new ASCs), a commenter suggested that a testing laboratory will probably be best to issue the final report instead of a soils engineer since a soils engineer generally produces the Soils Report (Geotechnical Investigation). A testing lab is generally the firm onsite during the actual construction.

12. RESPONSE: The department disagrees because a licensed professional engineer must be responsible for structural design, including the soils bearing capacity; therefore the engineer must be responsible for retaining a laboratory to provide soils testing on an as needed basis. No change was made as a result of the comment.

13. COMMENT: Concerning §135.52(c)(2), foundations (construction requirements for new ASCs), a commenter stated that the requirement that "All footing shall extend to a depth of not less than 1 foot - 0 inches below maximum frost line" is excessive, and suggested that six inches should be sufficient for frost line penetration.

13. RESPONSE: The department agrees that the 1 foot - 0 inches requirement may be excessive. The Standard Building Code and Uniform Building Code stipulates the depth of the frost line must be considered. Therefore, the department has deleted the language relating to the depth of the footing to allow the local building authorities and the architect or professional engineer of record to comply with state or local codes.

14. COMMENT: Concerning §135.52(c)(4), state handicapped requirements (construction requirements for new ASCs), a commenter stated that Texas Department of Licensing and Regulations (TDLR) approval often cannot be secured prior to department plan approval.

14. RESPONSE: The department agrees. The language has been revised to require proof of plan submittal to the Texas Department of Licensing and Regulation (TDLR).

15. COMMENT: Concerning §135.52(c)(10), energy conservation (construction requirements for new ASCs), a commenter asked how utilization of energy will be measured for mechanical/electrical components. The commenter believes this requirement to be very subjective, and that most design professionals will naturally accommodate this, and suggested that standards

need to be established (i.e., State of California) if this is to be an enforceable provision.

15. RESPONSE: The department agrees. The department believes that "efficient utilization of energy" should be determined by overall efficiency, operational cost, and life cycle costing. All recognized engineering practices should be followed to achieve the most economical and effective results. To reduce utility costs, facility design shall utilize energy conserving procedures including recovery devices, variable air volume, load shedding, systems shut down or reduction of ventilation rates (when specifically permitted) in certain areas when unoccupied insofar as patient care is not jeopardized. Mechanical ventilation shall be arranged to take advantage of outside air supply by using an economizer cycle when appropriate to reduce heating and cooling system loads. Innovative design that provides for additional energy conservation while meeting the intent of this section for acceptable patient care will be considered. The department has clarified the language to reflect this.

16. COMMENT: Concerning §135.52(d)(1)(A), entrance (construction requirements for new ASCs), a commenter stated that the requirement for drive under canopy will be met with disdain by many building owners. The commenter further stated that this requirement will make building an ASC in an existing structure very difficult to retrofit and exceedingly costly. Another commenter stated "The intricacies regarding accessibility should be left to the TAS. A drive-through canopy for loading and unloading passengers may be excessive and an encumbrance on many office building or medical facilities. This may be impractical in many locations. Although the goal is to have an accessible entrance, a covered accessible entrance should not be a requirement. Of the numerous licensed ASC facilities that our firm has designed, none would be able to meet this requirement."

16. RESPONSE: The department agrees and has deleted the requirement for a drive under canopy. However, the requirement for protection from inclement weather remains.

17. COMMENT: Concerning §135.52(d)(6), pharmacy (construction requirements for new ASCs), a commenter stated that since the pharmacy is used only for drug storage, it should not be required to have a hand washing sink.

17. RESPONSE: The department disagrees on the basis that other functions beyond the storage of medication may occur in the pharmacy area. Other duties might include distribution, compounding, preparation of parental and enteral products, and other procedures requiring asepsis control. The language has been revised to clarify that a sink may be located in or convenient to the pharmacy room or alcove.

18. COMMENT: Concerning §135.52(d)(7)(A) and (9)(A), preoperative patient holding room and the recovery room (construction requirements for new ASCs), a commenter stated that the requirement to have these areas separate and distinct from each other is a very costly requirement in terms of space, circulation, and support. The commenter believes that this is appropriate for hospitals, but would be overkill in an ambulatory setting and that it greatly penalizes the owner by not allowing any economics of dual use of space or employees. The commenter further believes that this could not help but double the amount of support spaces provides, thus adding unnecessary costs to the building. By keeping these areas separate the ability to "swing" a Holding Area to Recovery is lost. The commenter also noted that these two spaces are basically set up the same as far as physical attributes are provided.

18. RESPONSE: The department disagrees and considers the standard reasonable. The requirement for separate preop and postop patient holding areas is an existing standard. No change was made as a result of the comment.

19. COMMENT: Concerning §135.52(d)(7)(B)(iii), preoperative patient holding room (construction requirements for new ASCs), a commenter asked if the patients' belongings can be placed in a bag (furnished by the ASC) and kept beneath the patient's stretcher or in an area near recovery or second stage recovery.

19. RESPONSE: The department requires that space be made available to secure patients' personal effects. Placing a patient's personal belonging beneath the patient's stretcher or in an area near recovery or second stage recovery does not ensure that the patient's personal belongings are secure. The method implemented by a facility to secure personal effects shall be the decision of the facility. Designated space (patient lockers) reduces the chances of misplacing a patient's personal effects and provides one secure area that can be monitored. No change was made as a result of the comment.

20. COMMENT: Concerning §135.52(d)(7)(B) and (9)(B), preoperative patient holding room and the recovery room (construction requirements for new ASCs), a commenter believes that a minimum of two patient stations per operating room for the recovery room is excessive. The commenter's facility has two operating rooms which are usually operated by a single surgeon, and that just like the requirements for preoperative patient holding room, one patient station per operating room is more than sufficient. The commenter stated "The time that a patient spends in preop usually matches the time that the patient spends in postop, so it only makes sense that the same number of stations should be required." The commenter expressed concern that this new requirement would be impossible to comply with short of major construction without knocking out exterior walls into space he does not have. Another commenter also believes that the requirement for two patient stations is excessive for an ASC setting and expensive unless the preop holding areas could double for these uses when needed.

20. RESPONSE: The department disagrees and considers the rule reasonable. The requirement for two recovery beds per operating room is an existing requirement. No change was made as a result of the comment.

21. COMMENT: Concerning §135.52(d)(7)(B)(ii), patient station/preoperative patient holding room (construction requirements for new ASCs), a commenter stated that a minimum clearance of 6 feet - 0 inches between gurneys and beds seems to be excessive. The commenter believes the old requirement of 3 feet - 0 inches should be adequate particularly in multi-gurney situations and that this requirement will result in preop and postop rooms being much larger. The commenter further stated that "Although we see the value in providing plenty of clearance around the bed, this room will not have patients occupying it for long periods of time, such as a hospital room with an extended stay." Another commenter stated "The 6 feet - 0 inches minimum requirement between patient beds in the postop recovery room is probably excessive. Although the patient will be recovering, other arrangements might be able to be accommodated to give flexibility to the room arrangement. The result of 6 feet - 0 inches between beds will dramatically increase the size of the recovery room."

21. RESPONSE: The department has reconsidered and agrees that 6 feet between preoperative patient holding beds is excessive and has revised the language to require 4 feet - 6 inches in §135.52(d)(7)(B)(ii) and (d)(9)(B)(i)-(ii). The department has also changed the requirement for a clear space of "3 feet" at the foot of the gurney or bed in the patient stations of the preop and recovery room to "4 feet" to allow adequate space for the passage of gurneys or beds for easier transport of patients.

22. COMMENT: Concerning §135.52(d)(9), recovery room (construction requirements for new ASCs), a commenter stated that this room should be termed "Post Anesthetic Care Unit (PACU)."

22. RESPONSE: The department disagrees. The word "recovery" for an ASC is more applicable than "Post Anesthetic Care Unit," because not all ASCs use anesthetic agents. No change was made as a result of the comment.

23. COMMENT: Concerning §135.52(d)(10)(B)(i) and (iii), staff changing area (construction requirements for new ASCs), a commenter supported the requirement for separate male and female dressing rooms in larger facilities; however, the commenter believes that a single operating room ASC probably does not have the staff to warrant separate dressing rooms. The commenter further stated "Although privacy is important, this could be accomplished by an adjacent toilet. It seems strange to provide separate dressing rooms yet a shower can be shared by both male and female dressing rooms." The commenter suggested that a simple solution could be to build a shower into the toilet room and allow a single dressing area (which is common in many medical facilities); and to distinguish between large and small ASCs for these requirements.

23. RESPONSE: The department agrees that toilet facilities and shower facilities may be unisex when properly designed, but disagrees that dressing room can be shared. The language relating to the staff changing area has been clarified to require the following rooms and accommodations: male dressing room with lockers; female dressing room with lockers; toilet room(s) with a water closet and hand washing facilities; and shower room. The toilet room and the shower room may be shared if accessible to both male and female dressing rooms.

24. COMMENT: Concerning §135.52(d)(12)(B)(i), receiving/decontamination room (construction requirements for new ASCs), a commenter asked if the sterile suite soiled work room which is required under §135.52(d)(13)(B)(iii), can function as the receiving/decontamination room. Another commenter stated that the soiled work room should be combined with the receiving/decontamination room. The commenter failed to given a reason.

24. RESPONSE: The department agrees that the facility can be designed to allow the functions of the soiled work room and the receiving/decontamination room to be combined. The language has been revised to reflect this.

25. COMMENT: Concerning §135.52(d)(12)(B)(ii), clean assembly/workroom (construction requirements for new ASCs), a commenter believes that hand washing facilities should not be required in this room, because the employee working the two CSPD (Central Sterile Processing Department, i.e., soiled work/sterile work) rooms removes his or her apron and then washes his or her hands in the receiving/decontamination room prior to going into the clean assembly/work room.

25. RESPONSE: The department disagrees and considers the rule reasonable. The rule is also in accordance with AIA guidelines. No change was made as a result of the comment.

26. COMMENT: Concerning §135.52(d)(12)(B)(iv), sterile equipment storage (construction requirements for new ASCs), a commenter stated that this storage should be divided with the surgical equipment storage as follows: 1) equipment storage, for items used in operating rooms, but never sterilized; and 2) surgical equipment/instrumentation storage, for items that must be sterilized prior to use in the operating room. The commenter further stated that these two rooms should not be combined "unless" the sterilized surgical equipment/instrumentation items are kept on a covered cart.

26. RESPONSE: The department disagrees and considers the standard reasonable. The intent of the rule was to provide storage for sterile supplies. The procedures used to store sterile/clean supplies shall be established by the facilities. No change was made as a result of the comment.

27. COMMENT: Concerning §135.52(d)(12)(B)(i)-(v), on-site sterilizing facilities (construction requirements for new ASCs), a commenter believes that having individual and separate rooms for receiving/decontamination, clean assembly/work, sterile storage, sterile equipment storage, and a cart storage for larger facilities is ideal; however, for small ASCs, some of these functions can be combined. The commenter suggested that small ASCs be exempt or allowed to combine certain functions. The commenter further believes that it is important to not restrict all ASCs with the same regulations when spacial considerations should be adjusted to the volume of services provided.

27. RESPONSE: The department disagrees and considers the rule reasonable. The intent of the rule is to protect the patient regardless of the size of the ASC. All ASCs are required to provide the same level of protection. All the spaces are interrelated and the particular design of each function will depend on the owner's preference and functional design. However, the department allowed for the soiled work room and the receiving/decontamination room to be combined as previously discussed in Response 24.

28. COMMENT: Concerning §135.52(d)(13)(B)(v), scrub facilities (construction requirements for new ASCs), a commenter stated that no reference was made to the requirement for a view window at the scrub station permitting observation of surgery room interior, and asked if this was intentionally omitted or if it was an oversight.

28. RESPONSE: The department intentionally omitted any requirement for a view window at the scrub station and the operating room; however, this does not preclude an ASC from having one. No change was made as a result of the comment.

29. COMMENT: Concerning §135.52(d)(13)(B)(viii), surgical suite/anesthesia workroom (construction requirements for new ASCs), a commenter asked "Can the storage racks for cylinders be located in the medical gas room?" The commenter further asked "Why bring soiled items into this room when they should be taken to receiving/decontamination?"

29. RESPONSE: The department agrees that clarification is needed and has included requirements for a medical gas storage room in new clause (ix) of §135.52(d)(13)(B). Subsequent clauses have been renumbered.

30. COMMENT: Concerning proposed §135.52(d)(13)(B)(x), stretcher storage area (construction requirements for new ASCs), a commenter stated that ASC's typically do not have more stretchers than preop and recovery cubicles and asked why stretcher storage is required? Another commenter stated "While it is good to not encumber your corridor widths, a stretcher storage area probably is redundant considering some of the other storage areas."

30. RESPONSE: The department disagrees and considers the standard reasonable. The rule is also in accordance with AIA guidelines. No change was made as a result of the comment.

31. COMMENT: Concerning §135.52(e)(4)(A), grab bars (construction requirements for new ASCs), a commenter stated that the language requires grab bars to be provided at toilets and showers, but it is not clear as to the number, length, and mounting location required at water closets and showers. The commenter asked if the intention was to provide grab bars in locations similar to the TAS, i.e., one grab bar on the back wall, and one grab bar on the side wall of each water closet; and horizontal grab bars on the back wall and control wall of the shower stalls. Another commenter suggested allowing TAS to determine the grab bar sizes for toilet room accessories.

31. RESPONSE: The department agrees that clarification is needed and has included language which requires compliance with TAS.

32. COMMENT: Concerning §135.52(e)(7), radiation protection (construction requirements for new ASCs), a commenter requested that the second and third sentences be deleted and the last sentence rewritten because the Bureau of Radiation Control (BRC) does not review or approve shielding calculations for radiographic installations. Shielding calculations for therapy units/accelerators must be submitted to the BRC prior to equipment use. A certificate of registration is required for use of any x-ray machine. The commenter suggested the following language change: "Radiation Protection. Shielding shall be designed, tested, and approved by a medical physicist licensed under the Medical Physicist Act, Texas Civil Statutes, Article 4512n. The ASC must obtain a certificate of registration issued by the Bureau of Radiation Control to use radiation machines."

32. RESPONSE: The department agrees and has changed the language in §135.52(e)(7) as suggested by the commenter.

33. COMMENT: Concerning §135.52(f)(1)(C), threshold and expansion joints (construction requirements for new ASCs), a commenter stated that a great majority of manufactured threshold and expansion joint covers rest on top of the floor surface, and do not provide a flush transition between adjacent floor surfaces as proposed. The commenter suggested modifying wording to be similar to that of the TAS, §4.13.8, which says "Thresholds at doorways shall not exceed 3/4 inch in height for exterior sliding doors or 1/2 inch for other type doors. Raised thresholds and floor level changes at accessible doorways shall be beveled with a slope no greater than 1:2." The commenter further suggested that similar wording could be used for expansion joint covers.

33. RESPONSE: The department agrees and has revised the language to be consistent with TAS.

34. COMMENT: Concerning §135.52(h)(5)(C)(xii), ventilation for anesthetizing locations (construction requirements for new ASCs), a commenter believes that the requirement for smoke evacuation in the operating rooms is overkill for ASCs, injects unnecessary cost, and causes complicated control systems for the less-skilled-than-hospital maintenance staff. The commenter further stated that even though the installation of windows is an alternative, the eventual expansion of the facility will result in severe construction cost hardships in the alternative patient care facilities. The commenter strongly recommends that smoke evacuation be reconsidered for ambulatory surgery facilities consistent with the existing regulations.

34. RESPONSE: The department disagrees and considers the rule reasonable. When a medical gas system is provided, it is required to comply with Level 1 installation. Anesthetizing locations are required to comply with the ventilation requirements of NFPA 99, §5-4.1.3, 1996 (smoke purge system). No change was made as a result of the comment.

35. COMMENT: Concerning §135.52(h)(7)(A), boilers (construction requirements for new ASCs), a commenter stated the regulations appear to require standby or redundant boiler capacity, which is the same as required for hospital construction. If electrical heat is used, it is implied the electrical generator must power the strip heaters. Redundant boiler capacity is not seen as critical for ASCs. The commenter questioned that since ASCs close each day and the patients are gone, why burden the facility cost with redundant boilers or oversized generators when a facility will not have long term or even overnight patients present? The commenter stated "The 25 degree Fahrenheit rule will only apply to extreme southern coastal parts of Texas. No other state in which we have done ASC facilities have required redundant boiler capacity including Florida."

35. RESPONSE: The department agrees that clarification is needed and has clarified the language to apply to "when" boilers are provided.

36. COMMENT: Concerning §135.52(i)(17)(B), fuel storage capacity (construction requirements for new ASCs), a commenter stated "Eight hours of fuel for continuous operation of an emergency generator is twice that of the previous requirement. Eight hours of fuel is probably good for remote facility locations; however, within a major metropolitan area, eight hours service is extensive. This requirement can certainly be accommodated by generators with larger fuel tanks; however, if the generator is exercised as required, constant refueling of the fuel tanks would be required on the part of the ASC. Eight hours seems to be an excessive amount of time to run a generator for its intended purpose of completing an operation and removing a patient from a facility without power."

36. RESPONSE: The department disagrees and considers the standard reasonable for possible emergency situations. No change was made as a result of the comment.

37. COMMENT: Concerning §135.53(b)(1)(A), area map (preparation, submittal, review, and approval of plans), a commenter believes that the requirement to provide an area map with a two-mile radius of an ASC site to note any hazardous or undesirable locations seems to be too restrictive and that most major hospitals are located in areas that have an undesirable location within a two-mile radius. The commenter suggested that this should be left up to the developer or entity developing an ASC and that local zoning and authorities having jurisdiction should provide a safeguard for the intent of this rule.

37. RESPONSE: The department agrees and the two-mile radius has been changed to require a 500-foot radius.

38. COMMENT: Concerning §135.53(b)(1)(D), construction type and fire rating (preparation, submittal, review, and approval of plans), a commenter stated that the requirement for building sections illustrating construction type and fire rating for preliminary submission seems to be premature and recommended that this requirement be moved to the construction document submission requirements.

38. RESPONSE: The department disagrees and considers the rule reasonable. The details differ for the various construction types. It is reasonable to request construction details at the preliminary plan level. No change was made as a result of the comment.

39. COMMENT: Concerning §135.53(c)(1)(C)(i)-(iv), equipment drawings (preparation, submittal, review, and approval of plans), a commenter stated "When executing the construction documents, many times the architect will not know where all the final equipment will be located by the medical facility. Generally, the electrical locations are estimated. To draw in movable equipment on the plan seems somewhat impossible if not impractical. Although locating equipment (in place) is desirable (i.e., examination tables, urology x-ray, etc.), other portable equipments, such as anesthesia machines are not practical particularly since they will constantly be moved within the facility." The commenter believes that this requirement is impractical to enforce and would be relatively meaningless since that architect has little control of the equipment in the facility.

39. RESPONSE: The department disagrees and considers the rule reasonable because it will assist the owner and the department in determining if adequate spaces are provided. No change was made as a result of the comment.

40. COMMENT: Concerning §135.53(d)(1), designer certified construction documents (preparation, submittal, review, and approval of plans), a commenter requested clarification of this requirement. The commenter stated that it does not clearly explain the purpose behind and when these certified documents will be used in lieu of the normal submission process.

40. RESPONSE: The department agrees that clarification is needed and has modified the catch title to read "Designer certification."

41. COMMENT: Concerning the rules in general, a commenter believes that the proposed rules appear to be the basic requirements for an Acute Care Hospital. While the commenter concurs with the basis of all the requirements, the commenter requested that the department take into account that the very reason for an ambulatory surgery situation is to provide a simpler, more inexpensive, setting for appropriate surgeries. The commenter further stated that by completely recreating an acute care setting, this seems to jeopardize the likelihood of small or rural type clinics being possible due to the costs and complexity of the code requirements. Another commenter stated that it was his premise that ASCs are not hospitals, do not require all the building system redundancy of hospitals, and thus one would expect resulting lower construction costs in parallel with the direction of health care and managed cost containment. In addition, the commenter considers patients to be ambulatory and highlights the fact that the facilities do not operate 24 hours a day.

41. RESPONSE: The department disagrees. The rules reflect NFPA standards applicable to ASCs. No change was made as a result of the comments.

42. COMMENT: Concerning the rules in general, a commenter questioned why the length of stays (23-hour, 59-minute stays) has not been addressed.

42. RESPONSE: These rules currently under revision relate to construction standards. The direct care standards which include the definition of an ASC are not proposed for revision. The direct care standards will be revised at a later date.

In addition to the changes made as a result of comments, department staff made the following changes to the rules.

1. CHANGE: Concerning §135.41, fire prevention, protection, and safety, introductory language was added after the section title creating what is called "an implied subsection (a)." This resulted in subsequent reformatting of the section. Proposed subsections (a)- (l) are now paragraphs (1) - (12). Several sentences were grammatically restructured for clarity. The term "by a nationally recognized testing laboratory" was deleted from proposed subsection (g) now paragraph (7) because testing labs do not install or maintain fire alarm systems (licensed fire alarm companies do this).

2. CHANGE: Concerning §135.42, handling and storage of gases, anesthetics, and flammable liquids, Introductory language was added after the section title creating what is called "an implied subsection (a)." This resulted in subsequent reformatting of the section. Proposed subsections (a) - (c) are now paragraphs (1) - (3).

3. CHANGE: Section 135.51(b), remodeling and additions (construction requirements for an existing ambulatory surgical center), contained two incorrect references to "§139.52." These references were changed to cite the correct reference "§135.52."

4. CHANGE: Concerning §135.51(b)(1), building equipment alterations or installations (construction requirements for an existing ambulatory surgical center), the reference to "§135.53(c)(3)" was considered to be too specific and was changed to "§135.53" to refer to the entire section.

5. CHANGE: Concerning §135.51(b)(2), minor remodeling or alterations (construction requirements for an existing ambulatory surgical center), several sentences were reworded for clarification.

6. CHANGE: Concerning §135.51(b)(3), major remodeling or alterations (construction requirements for an existing ambulatory surgical center), a sentence was added to clarify that construction of major projects may not begin until the requirements of paragraph (3) have been met..

7. CHANGE: Concerning §135.51(b)(3)(B)(ii), phasing of construction in existing facilities (construction requirements for an existing ambulatory surgical center), the term "Construction" was added before the words "Dust and vapor barriers" for clarification purposes.

8. CHANGE: Concerning §135.52, (construction requirements for an existing ambulatory surgical center), several sentences have been restructured for clarification purposes and references were added for clarification. None of these changes reflect significant changes.

9. CHANGE: Concerning §135.52(d)(1)(H), wheelchair storage space or alcove (construction requirements for new ASCs), the word "alcove" was added to permit an alcove to be designated for storage of wheelchairs.

10. CHANGE: Concerning §135.52(d)(4)(B)(i), laboratory/special requirements (construction requirements for new ASCs), the words "a room with" were added because an on-site laboratory is optional, but when provided, a dedicated room reduces contamination of specimens and serves to shield other patients from lab procedures, sights , and odors.

11. CHANGE: Concerning §135.52(d)(5)(B)(ii), off-site linen processing (construction requirements for new ASCs), language was added to address the soiled linen holding room which in required in the surgical suite. The language stipulates that the soiled linen holding may be combined with the soiled workroom required in the surgical suite.

12. CHANGE: Concerning §135.52(d)(9)(D), second stage recovery (construction requirements for new ASCs), language was added to address the provision for an open ward configuration for second stage recovery which may be used and is often provided in ASCs. An explanation of clearances has been established and is consistent with clearances specified in preop and recovery locations already stated within the rules.

13. CHANGE: Concerning §135.52(d)(10), staff clothing change area (construction requirements for new ASCs), language was added as subparagraph (C) to address a surgical lounge when provided.

14. CHANGE: Concerning §135.52(d)(11) and (11)(B), soiled workroom (construction requirements for new ASCs), the requirement to provide a soiled utility room when an examination room is located inn the ASC has been deleted. Patient examinations do not generate contaminated, soiled instruments, bandages and materials as do treatment procedures. The requirement to link soiled utility rooms to examination rooms is deemed excessive.

15. CHANGE: Concerning §135.52(d)(12)(B)(iv), sterile equipment storage (construction requirements for new ASCs), the citation within the second sentence was corrected to refer to "paragraph (13)(B)(vii) of this subsection."

16. CHANGE: Concerning §135.52(d)(12)(B)(v), cart storage room or alcove (construction requirements for new ASCs), the word "alcove" was added to permit an alcove to be designated for storage of distribution carts.

17. CHANGE: Concerning §135.52(d)(13)(B)(iv), clean linen storage (construction requirements for new ASCs), language was added to allow storage of clean linen in a closet or a storage room.

18. CHANGE: Concerning §135.52(d)(13)(B)(x), area for emergency crash cart storage (construction requirements for new ASCs), the words "and surgical rooms" were deleted to provide consistency with the rest of the rules.

19. CHANGE: Concerning §135.52(d), spatial requirements (construction requirements for new ASCs), spatial requirements were added for an examination room if provided. The requirements have been added at §135.52(d)(15). Proposed §135.52(d)(15) was renumbered as §135.52(d)(16).

20. CHANGE: Concerning §135.52(h)(5)(C)(i)(I)-(II), ventilation system requirements (construction requirements for new ASCs), the language relating to temperatures and humidities for operating and recovery rooms was rewritten to clarify the language.

21. CHANGE: Concerning §135.52(h)(5)(C)(ii), ventilation system requirements (construction requirements for new ASCs), the language relating to thermometers and humidity gauges was rewritten to clarify the language.

22. CHANGE: Concerning §135.52(h)(5)(C)(iii)(II), protection of ducts penetrating fire and smoke partitions (construction requirements for new ASCs), the language was added to reference NFPA 101, §12-6.3.7.3, relating to Exceptions.

23. CHANGE: Concerning §135.52(h)(5)(C)(iii)(II)(-b-), protection of ducts penetrating fire and smoke partitions (construction requirements for new ASCs), the word "may" was changed to "shall" to clarify that the intent of the language was a requirement and not an option.

24. CHANGE: Concerning §135.52(h)(6)(A)(ii), piping systems and plumbing fixture requirements (construction requirements for new ASCs), the requirement for "autopsy tables" was deleted because they are not necessary in an ASC.

25. CHANGE: Concerning §135.52(i)(11)(F), x-ray film illuminators (construction requirements for new ASCs), the language was changed to require x-ray film illuminators capable of handling "two" not "four" films simultaneously.

26. CHANGE: Concerning §135.52(i)(16)(A) and (B), nurse calling systems (construction requirements for new ASCs), language was added to require activation of the nurse emergency calling system in a nourishment station, if one is provided.

27. CHANGE: Concerning §135.52(i)(17)(A), essential electrical system (construction requirements for new ASCs), the language relating to a Type 3 essential electrical system was deleted because only Type 1 essential electrical system is allowed.

28. CHANGE: Concerning §135.54(b), table for filter efficiencies for ventilating and air conditioning systems, the information under the "Area Designation" column relating to "Operating, and recovery rooms" was changed to "Operating, recovery, and treatment rooms."

29. CHANGE: Concerning §135.54(c), table for station outlets for oxygen, vacuum (suction), and medical air systems, the language relating to various procedures that are performed in an operating room were deleted because it was not necessary.

MINOR EDITORIAL CHANGES: In addition to the specific changes discussed previously, the department made several editorial changes for clarification purposes.

LIST OF COMMENTERS: The following entities provided comments on the proposed rules: Phoenix Design Group, Nashville, Tennessee; Earl Swensson, Architect, Nashville, Tennessee; Longview Ambulatory Surgical Center, Longview, Texas; AR-CON Architects, LLP, Beaumont, Texas; Bureau of Radiation Control, Texas Department of Health, Austin, Texas; Polk-inghorn Group Architects, Inc., Austin, Texas; Raymond Harris and Associates, Architects, Dallas, Texas; and Frank J. Grady, M.D., Assoc., Lake Jackson, Texas. The commenters were generally in favor of the rules, but offered suggestions for change and requested clarification as addressed in the summary of comments.

Subchapter B. General Construction Requirements for Ambulatory Surgical Centers

25 TAC §§135.41–135.43

The repeals are adopted under the Texas Ambulatory Surgical Center Licensing Act, Health and Safety Code, Chapter 243, which provides the Board of Health (board) with the authority to adopt rules governing the licensing and regulation of ASCs; and §12.001, which provides the board with the authority to adopt rules to implement 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
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Subchapter B. Safety Requirements for New and Existing Ambulatory Surgical Centers

25 TAC §135.41, §135.42

The new sections are adopted under the Texas Ambulatory Surgical Center Licensing Act, Health and Safety Code, Chapter 243, which provides the Board of Health (board) with the authority to adopt rules governing the licensing and regulation of ASCs; and §12.001, which provides the board with the authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health.

§135.41. Fire Prevention, Protection, and Safety.
An ambulatory surgical center (ASC) shall comply with the provisions of this section with respect to fire prevention, protection, and safety.

(1) Fire inspections. An ASC shall comply with local fire codes.

(2) Fire reporting. An ASC shall report all occurrences of fire in writing no later than 10 calendar days following the occurrence to the director, Health Facility Licensing Division (HFL), Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756 or faxed to (512) 834-6714. Any fire occurrence causing injury to a person shall be reported no later than the next business day to the director, HFL, by fax or overnight mail, to the address or fax number previously mentioned in this paragraph.

(3) Smoking policy. An ASC shall adopt, implement and enforce a written smoking policy. The policy shall include the minimum provisions of National Fire Protection Association 101, Code for Safety to Life from Fire in Buildings and Structures, 1997 edition (NFPA 101), §12-7.4. All documents published by National Fire Protection Association (NFPA) as referenced in this section may be obtained by writing or calling the NFPA at the following address or telephone number: National Fire Protection Association, 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269-9101 or (800) 344-3555.

(4) Fire extinguishing systems. An ASC shall adopt, implement, and enforce a written policy for periodic inspection, testing and maintenance of firefighting equipment, portable fire extinguishers, and when installed sprinkler systems. If installed, fire sprinkler systems shall comply with National Fire Protection Association 13, Standard for the Installation of Sprinkler Systems, 1996 edition (NFPA 13). Portable fire extinguishers shall comply with National Fire Protection Association 10, Standard for Portable Fire Extinguishers, 1994 edition (NFPA 10).

(5) Fire protection and evacuation plan. An ASC shall develop a written plan for the protection of patients in the event of fire and their evacuation from the building when necessary in accordance with NFPA 101, §12-7. Copies of the plan shall be made available to all staff.

(A) Posting requirements. An ASC shall prominently display evacuation floor plans in public areas, readily visible to patients, employees, and visitors.

(B) Annual training. An ASC shall conduct an annual training program to instruct all personnel in the location and use of firefighting equipment.

(6) Fire drills. An ASC shall conduct at least one fire drill per shift, per quarter. Each drill shall include activation of the fire alarm system, simulation of evacuation of patients and other occupants, and the use of firefighting equipment. Fire exit drills shall incorporate the minimum requirements of NFPA 101, §§12-7.1.2. through 12-7.2.3. The ASC shall maintain documentation of its compliance with this subsection.

(7) Fire alarm system. A fire alarm system shall be installed, maintained and tested, in accordance with National Fire Protection Association 72, National Fire Alarm Code, 1996 edition (NFPA 72) standard and NFPA 101, §12-6.3.4.

(8) Fire department access. Driveways shall be provided for access of fire fighting apparatus and rescue vehicles. Such driveways shall be maintained and kept free from all obstructions.

(9) Fire department protection. An ASC shall comply with local fire department access requirements. When an ASC is located outside of the service area of the public fire protection, arrangements shall be made for the nearest fire department to respond in case of an emergency.

(10) Safety officer. An ASC shall have a designated safety officer who is knowledgeable in safety practices of health care facilities. An ASC shall afford sufficient time to the safety officer to carry out the functions of the safety program. The ASC shall develop written safety policies and procedures which shall be approved by the governing body and medical staff and made available to all employees.

(11) Maintaining a fire safe environment. The building and premises shall be maintained free of accumulations of combustible and extraneous materials not necessary for the day-to-day operation of the center.

(12) Electrical systems. Electrical systems shall be installed and maintained in a safe condition in accordance with National Fire Protection Association 70, National Electrical Code, 1996 edition (NFPA 70). All documents published by National Fire Protection Association (NFPA) as referenced in this section may be obtained by writing or calling the NFPA at the following address or telephone number: National Fire Protection Association, 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269-9101 or (800) 344-3555.

§135.42. Handling and Storage of Gases, Anesthetics, and Flammable Liquids.

An ASC shall comply with the requirements of this section for handling and storage of gas, anesthetics, and flammable liquids.

(1) Flammable germicides. Flammable germicides shall not be used for preoperative preparation of the surgical field.

(2) Flammable and nonflammable gases and liquids. The determination of flammability of liquids and gases shall be in accordance with the National Fire Protection Association, "Guide to Fire Hazard Properties of Flammable Liquids, Gases, and Volatile Solids," 1994 edition, (NFPA 325). All documents published by National Fire Protection Association (NFPA) as referenced in this section may be obtained by writing or calling the NFPA at the following address or telephone number: National Fire Protection Association, 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269-9101 or (800) 344-3555.

(A) Nonflammable gases shall be stored and distributed in accordance with National Fire Protection Association 99 (NFPA 99), Chapter 4, "Standard for Health Care Facilities," 1996 edition. Examples of nonflammable gases include, but are not limited to, oxygen and nitrous oxide. Medical gases and liquefied medical gases shall be handled in accordance with NFPA 99, Chapter 8, "Gas Equipment."

(B) Flammable gas systems intended for use in laboratories and piping systems for fuel gases shall comply with requirements of NFPA 99, §4-6.

(C) Flammable and combustible liquids intended for use in laboratories shall comply with NFPA 99, §10-7.

(D) Other flammable agents shall be stored in accordance with NFPA 99, Chapter 6.

(3) Gas fired appliances. The installation, use, and maintenance of gas fired appliances and gas piping installations shall comply with the NFPA 54, National Fuel Gas Code, 1996 edition. The use of portable gas heaters and unvented open flame heaters is prohibited.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter C. Existing Ambulatory Surgical Centers

25 TAC §135.51, §135.52

The repeals are adopted under the Texas Ambulatory Surgical Center Licensing Act, Health and Safety Code, Chapter 243, which provides the Board of Health (board) with the authority to adopt rules governing the licensing and regulation of ASCs; and §12.001, which provides the board with the authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health.

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Subchapter C. Physical Plant and Construction Requirements for New and Existing Ambulatory Surgical Centers

25 TAC §§135.51–135.54

The new sections are adopted under the Texas Ambulatory Surgical Center Licensing Act, Health and Safety Code, Chapter 243, which provides the Board of Health (board) with the authority to adopt rules governing the licensing and regulation of ASCs; and §12.001, which provides the board with the authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health.

§135.51. Construction Requirements for an Existing Ambulatory Surgical Center.

(a) Compliance.

(1) A licensed ambulatory surgical center (ASC) which is licensed prior to the effective date of these rules is considered to be an existing licensed ASC and shall continue, at a minimum, to meet the licensing requirements under which it was originally licensed.

(2) In lieu of meeting the requirements in paragraph (1) of this subsection, an existing licensed ASC may, instead, comply with National Fire Protection Association (NFPA) 101, Code for Safety to Life from Fire in Buildings and Structures, §13-6, "Existing Ambulatory Health Care Facilities," 1997 edition.

(3) All documents published by NFPA as referenced in this section may be obtained by writing or calling the NFPA at the following address or telephone number: National Fire Protection Association, 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269-9101 or (800) 344-3555.

(b) Remodeling and additions. All remodeling, renovations, additions and alterations to an existing ASC shall be done in accordance with the requirements for new construction in §135.52 of this title (relating to Construction Requirements for New Ambulatory Surgical Centers). When existing conditions make such changes impractical, the department may grant a conditional approval of minor deviations from the requirements of §135.52 of this title, if the intent of the requirements is met and if the care, safety and welfare of patients will not be jeopardized. The operation of the ASC, accessibility of individuals with disabilities, and safety of the patients shall not be jeopardized by a condition(s) which is not in compliance with these sections.

(1) Building equipment alterations or installations. Any alteration or any installation of new building equipment, such as mechanical, electrical, plumbing, fire protection, or piped medical gas

system shall comply with the requirements for new construction and may not be replaced, materially altered, or extended in an existing ASC until complete plans and specifications have been submitted to the department, and the department has reviewed and approved the plans and specifications in accordance with §135.53 of this title (relating to Preparation, Submittal, Evaluation and Approval of Plans).

(2) Minor remodeling or alterations. Minor remodeling or alterations within an existing ASC which do not involve alterations to load bearing members and partitions, change functional operation, affect fire safety, add or subtract services, or involve any of the major changes listed in paragraph (3) of this subsection are considered to be minor projects and require evaluation and approval by the department. An ASC shall submit a written request for evaluation, a brief description of the proposed changes, and sketches of the area being remodeled. Based on such submittal, the department will evaluate and determine whether any additional submittals or inspections are required. The department will notify the ASC upon approval.

(3) Major remodeling or alterations. All remodeling or alterations which involve alterations to load bearing members or partitions, change functional operation, affect fire safety, or add or delete services, are considered major projects. An ASC shall comply with this paragraph prior to beginning construction of major projects.

(A) Submittal of plans. Plans shall be submitted in accordance with §135.53 of this title for all major remodeling or alterations.

(B) Phasing of construction in existing facilities. Projects involving alterations of or additions to existing buildings shall be programmed and phased so that on-site construction will minimize disruptions of existing functions.

(i) Access, exit access, fire protection and all necessary functions shall be maintained so that the safety of the occupants will not be jeopardized during construction.

(ii) Construction, dust and vapor barriers shall be provided to separate areas undergoing demolition and construction from occupied areas.

(iii) Temporary sound barriers shall be provided where intense, prolonged construction noises will disturb patients or staff in the occupied portions of the building.

(c) Previously licensed ASCs. A previously licensed ASC which has been vacated or used for other purposes shall comply with all the requirements for new construction contained in §135.52 of this title in order to be licensed.

§135.52. Construction Requirements for New Ambulatory Surgical Centers.

(a) Ambulatory surgical center (ASC) location. An ASC may be a distinct separate part of an existing hospital, it may occupy an entire separate independent structure, or it may be located within another building such as an office building or commercial building.

(1) Accessibility. The location of a proposed new ASC shall be easily accessible for service vehicles and fire protection apparatus.

(2) Means of egress. An ASC shall have at least two exits remotely located in accordance with National Fire Protection Association (NFPA) 101, Code for Safety to Life from Fire in Buildings and Structures, 1997 edition, §12-6.2.4.1. When a required means of egress from the ASC is through another portion of the building, that means of egress shall comply with the requirements of NFPA 101 which are applicable to the occupancy of that other building. Such means of egress shall be open, available, unlocked, unrestricted, and lighted at all times during the ASC hours of operation.

(3) Hazardous location.

(A) Underground and above ground hazards. A new ASC or an addition(s) to an existing ASC may not be constructed near a hazardous location. Hazardous locations include underground liquid butane or propane, liquid petroleum or natural gas transmission lines, high pressure lines, or under high voltage electrical lines.

(B) Fire hazards. A new ASC may not be built within 300 feet of above ground or underground storage tanks containing liquid petroleum or other flammable liquids used in connection with a bulk plant, marine terminal, aircraft refueling, bottling plant of a liquefied petroleum gas installation, or near other hazardous or hazard producing areas.

(C) Health and safety hazards. A new ASC may not be located in a building(s) which, because of its location, physical condition, state of repair, or arrangement of facilities, would be hazardous to the health or safety of the patients.

(4) Undesirable locations.

(A) Nuisance producing sites. A new ASC may not be located near nuisance producing sites such as industrial sites, feed lots, sanitary landfills, or manufacturing plants which produce excessive noise or air pollution.

(B) Flood plains. Construction of new ASCs shall be avoided in designated flood plains. Where such is unavoidable, access and required ASC components shall be constructed above the designated flood plain. This requirement also applies to new additions to existing ASCs or portions of facilities which have been licensed previously as ASCs, but which have been vacated or used for other purposes. This requirement does not apply to remodeling of existing licensed ASCs.

(b) ASC site. The ASC site shall include paved roads, walkways, and parking in accordance with the requirements set out in this subsection.

(1) Paved roads and walkways.

(A) Paved roads shall be provided within lot lines for access from public roads to the main entrance and to service entrances.

(B) Finished surface walkways shall be provided for pedestrians. When public transportation or walkways serve the site, finished surface walkways or paved roads shall extend from the public conveyance to the building entrance.

(2) Parking.

(A) Off street parking shall be provided at the minimum ratio of two spaces for each operating room, one space for each staff member and one visitor's space for each operating room.

(B) Handicapped parking. Parking spaces for handicapped persons shall be provided in accordance with the Texas Accessibility Standards of the Architectural Barriers Act, Texas Civil Statutes, Article 9102, administered by the Texas Department of Licensing and Regulation (TDLR) and shall be in addition to the parking spaces required by subparagraph (A) of this paragraph.

(c) Building design and construction requirements. Every building and every portion thereof shall be designed and constructed to sustain all dead and live loads in accordance with accepted engineering practices and standards and local governing building codes. Where there is no local governing building code, one of the following codes shall govern: Uniform Building Code, 1997 edition, published by the International Conference of Building Officials, 5360 Workman Mill Road, Whittier, California 90601, telephone (562) 699-0541; or the Standard Building Code, 1997 edition, published by the Southern Building Code Congress International, Inc., 900 Montclair Road, Birmingham, Alabama 35213-1206, telephone (205) 591-1853.

(1) General architectural requirements. All new construction, including conversion of an existing building to an ASC or establishing a separately licensed ASC within another existing building, shall comply with NFPA 101, §12-6. and this section.

(A) Construction types for multiple building occupancy.

(i) When an ASC is part of a larger building which complies with NFPA 101, §12-6.1.6. for (fire resistance) construction type, the designated ASC shall be separated from the remainder of the building with a minimum of 1-hour fire rated construction.

(ii) Multistory buildings. When an ASC is located in a multistory building of two or more stories, the entire building shall meet the construction requirements of NFPA 101, §12-6.1.6.3. An ASC may not be located in a multistory building which does not comply with the minimum construction requirements of NFPA 101, §12-6.1.6.3.

(iii) Single story buildings. When an ASC is part of a one-story building that does not comply with the construction requirements of NFPA 101, §12-6.1.6.2, the ASC must be separated from the remainder of the building with a 2-hour fire rated construction. The designated ASC portion shall have the construction type upgraded to comply with NFPA 101, §12-6.1.6.2.

(B) Special design provisions. Special provisions shall be made in the design of a facility if located in a region where local experience shows loss of life or extensive damage to buildings resulting from hurricanes, tornadoes, or floods.

(2) Foundations. Foundations shall rest on natural solid bearing if satisfactory bearing is available. Proper soil-bearing values shall be established in accordance with nationally recognized requirements. If solid bearing is not encountered at practical depths, the structure shall be supported on driven piles or drilled piers designed to support the intended load without detrimental settlement, except that one-story buildings may rest on a fill designed by a soils engineer. When engineered fill is used, site preparation and placement of fill shall be done under the direct full-time supervision of the soils engineer. The soils engineer shall issue a final report on the compacted fill operation and certification of compliance with the job specifications.

(3) Physical environment. A physical environment that protects the health and safety of patients, personnel, and the public shall be provided in each facility. The physical premises of the facility and those areas of the facility's physical structure that are used by the patients (including all stairwells, corridors, and passageways) shall meet the local building and fire safety codes and the requirements of this chapter.

(4) State handicapped requirements. An ASC shall be designed in accordance with the Texas Accessibility Standards of the Architectural Barriers Act, Texas Civil Statutes, Article 9102. The Texas Department of Licensing and Regulations (TDLR) rules at Title 16 Texas Administrative Code, Chapter 68, require plans to be submitted to TDLR for their approval. Proof of plan submittal to TDLR shall be provided to the Texas Department of Health.

(5) Federal handicapped requirements. An ASC shall comply with the Americans with Disabilities Act of 1990, Public Law 101-336, 42 United States Code, Chapter 126, and Title 36 Code of Federal Regulations, Part 1191, Appendix A, Accessibility Guidelines for Buildings and Facilities.

(6) Other regulations. Certain projects may be subject to other regulations, including those of federal, state, and local authorities. The more stringent standard or requirement shall apply when a difference in requirements exists.

(7) Exceeding minimum requirements. Nothing in these sections shall be construed to prohibit a better type of building construction, more exits, or otherwise safer conditions than the minimum requirements specified in these sections.

(8) Equivalency. Nothing in these sections is intended to prevent the use of systems, methods, or devices of equivalent or superior quality, strength, fire resistance, effectiveness, durability, and safety to those prescribed by these sections, provided technical documentation which demonstrates equivalency is submitted to the department for approval.

(9) Separate freestanding buildings (not for patient use). Separate freestanding buildings for nonpatient use which are located at least 20 feet from the ASC building such as the heating plant, boiler plant, repair workshops, or general storage may be designed and constructed in accordance with other applicable occupancy classification requirements listed in NFPA 101.

(10) Energy conservation. In new facilities or existing facilities with additions or renovated areas, mechanical, electrical, and plumbing, systems and components shall be selected for efficient utilization of energy which is determined by overall efficiency, operational cost, and life cycle costing.

(d) Spatial requirements.

(1) Administration and public areas.

(A) Entrance. Entrances shall be located at grade level, be accessible to individuals with disabilities, and protected from inclement weather for loading and unloading passengers. When an ASC is located on a floor above grade level, elevators shall be accessible and shall meet the requirements of subsection (g) of this section.

(B) Waiting area. A waiting area or lobby shall be provided which includes the following rooms and items:

(i) accessible public toilet facilities;

(ii) a public telephone(s); and

(iii) a drinking fountain(s).

(C) Reception area. A designated reception area with desk or counter shall be provided.

(D) Interview space(s). Space shall be provided for private interviews relating to social services, credit, or admission.

(E) General or individual office(s). An office(s) shall be provided for business transactions, records, and administrative and professional staff.

(F) Medical records area. Medical record storage space shall be located within a secure designated area under direct visual supervision of administrative staff.

(G) General storage room.

(i) A minimum of 50 square feet per operating room shall be provided exclusive of soiled holding, sterile supplies, clean storage, drug storage, locker rooms, and surgical equipment storage. General storage may be located in one or more rooms or closets and shall be located within the administrative and/or public areas.

(ii) General storage room(s) shall be separated from adjacent areas by fire-rated construction in accordance with the NFPA 101, §§26-3.2.1 and 26-3.2.2.

(H) Wheelchair storage space or alcove. Storage space for wheelchairs shall be provided and shall be out of the direct line of traffic.

(2) Engineering services and equipment areas. Equipment rooms with adequate space shall be provided for mechanical and electrical equipment. These areas shall be separate from public, patient, and staff areas.

(3) Janitor's closet. In addition to the janitor's closet exclusive to the surgery suite, a sufficient number of janitor's closets shall be provided throughout the facility to maintain a clean and sanitary environment. The closet shall contain a floor receptor or service sink and storage space for housekeeping supplies and equipment.

(4) Laboratory.

(A) General. Laboratory facilities shall be provided within the ASC or through a contractual arrangement with a hospital or accredited laboratory.

(B) Special requirements. When the laboratory is located on-site the following minimum items shall be provided:

(i) a room with work counter, utility sink, and storage cabinets or closet(s); and

(ii) specimen collection facilities. For dip stick urinalysis, urine collection rooms shall be equipped with a water closet and lavatory. Blood collection facilities shall have space for a chair, work counter and hand washing facilities.

(C) Code compliance. An on-site laboratory shall comply with the following codes.

(i) Construction for fire protection in laboratories employing quantities of flammable, combustible, or other hazardous material shall be in accordance with the National Fire Protection Association 99, Health Care Facilities, 1996 edition, (NFPA 99).

(ii) Laboratories shall comply with the requirements of NFPA 99, "Health Care Facilities," 1996 edition, Chapter 10, as applicable and the requirements of NFPA 45, "Standards on Fire Protection for Laboratories Using Chemicals," 1996 edition, as applicable.

(5) Laundry and linen processing area(s). Laundry and linen processing may be done within the center or off-site at a commercial laundry.

(A) On-site linen processing. When on-site linen processing is provided, soiled and clean processing operations shall be separated and arranged to provide a one-way traffic pattern from soiled to clean areas. The following rooms and items shall be provided:

(i) a soiled linen processing room which includes areas for receiving, holding, sorting, and washing;

(ii) a clean linen processing room which includes areas for drying, sorting, folding, and holding prior to distribution;

(iii) supply storage cabinets in the soiled and clean linen processing rooms; and

(iv) hand washing facilities within the soiled linen processing room.

(B) Off-site linen processing. When linen is processed off-site, the following rooms or items shall be provided:

(i) a storage room for clean linen located within the surgical suite. Clean linen storage may be combined with the clean work room; and

(ii) a soiled linen holding room or area located within the surgical suite. Soiled linen holding may be combined with the soiled workroom.

(6) Pharmacy. A pharmacy work room or alcove shall be provided and located separate from patient and public areas and under the direct supervision of staff. A work counter, refrigerator, medication storage and locked storage for biologicals and drugs shall be provided. Hand washing facilities shall be located in or convenient to the pharmacy room or alcove.

(7) Preoperative patient holding room.

(A) General. A preoperative holding area shall be provided and arranged in a one-way traffic pattern so that patients entering from outside the surgical suite can change, gown, and move directly into the restricted corridor of the surgical suite. The holding area shall be separate from recovery and the restricted corridor.

(B) Patient station. A minimum of one patient station per operating room shall be provided.

(i) A minimum area of 60 square feet shall be provided for each patient station.

(ii) When a gurney or bed is used, the minimum clearance from the gurney or bed to a sidewall may not be less than three feet. A space of four feet shall be provided at the foot of the gurney or bed and the minimum clearance between gurneys or beds may not be less than four feet six inches.

(iii) Space shall be made available for storing and securing patient's personal effects.

(C) Patient toilet. A toilet room with water closet and hand washing facilities shall be provided. The toilet room may be shared with the recovery room, if conveniently located to both.

(D) Special requirements. Hand washing facilities and a counter or shelf space for writing shall be provided for staff use within or convenient to the preop area. Staff hand washing facilities shall be separate from and in addition to patient toilet accommodations.

(8) Radiology.

(A) General. Basic diagnostic procedures shall be provided within the ASC or through a contractual arrangement with a hospital or an accredited diagnostic service.

(B) Special requirements. When radiology services are provided on-site, the following minimum facilities shall be provided:

(i) film processing facilities;

(ii) viewing and administrative areas; and

(iii) storage facilities for exposed film located in rooms or areas constructed in accordance with the NFPA 101, §26-3.2.1 and §26-3.2.2.

(C) Fluoroscopy room. When fluoroscopy services are provided on site, a toilet room with water closet and hand washing facilities shall be directly accessible to the room.

(9) Recovery room.

(A) General. A recovery room shall be distinct and separate from preoperative areas. The recovery room shall be arranged to provide a one way traffic pattern from the restricted surgical corridor to recovery and then to second stage recovery or discharge.

(B) Patient station(s). A minimum of two patient stations per operating room shall be provided.

(i) When a gurney or bed is used, the minimum clearance from the gurney or bed to a sidewall may not be less than three feet. A space of not less than four feet shall be provided at the foot of each gurney or bed.

(ii) The minimum clearance between gurneys and beds may not be less than four feet six inches.

(C) Patient toilet. A toilet room with water closet and hand washing facilities shall be provided. The toilet room may be shared with the preoperative patient holding area, if conveniently located to both.

(D) Second stage recovery. A separate supervised room or area shall be provided for patients who are able to leave the recovery/post-anesthesia room, but need additional time for all vital signs to be stabilized to the point where the patient may leave the facility. This area may be combined with the waiting area required by paragraph (1)(B) of this subsection.

(i) When individual rooms are provided for second stage recovery, the rooms shall have an area of at least 60 square feet. When such rooms include a bed or recliner, a minimum clearance of three feet at the foot and on each side of the bed or recliner shall be provided.

(ii) When an open or ward area is provided for second stage recovery, the minimum clearance from the bed or recliner to the side wall may not be less than three feet; and a space of four feet hall be provided at the foot of each bed or recliner. The minimum clearance between beds or recliners may not be less than four feet six inches.

(10) Staff clothing change area.

(A) General. The change area shall be designed to provide a one-way traffic pattern so that personnel entering from outside the surgical suite can change, gown, and move directly into the restricted corridor of the surgical suite.

(B) Staff changing area. A staff changing area shall be provided. The area shall include the following rooms and accommodations:

(i) male dressing room with lockers;

(ii) female dressing room with lockers;

(iii) toilet room(s) with water closet and hand washing facilities (may be shared if accessible to both male and female dressing rooms); and

(iv) shower room(s) (may be shared if accessible to both male and female dressing rooms).

(C) Surgical lounge. When provided, a lounge for surgical staff shall be located to permit use without leaving the surgical suite. These facilities may be integrated with the staff changing areas.

(11) Soiled workroom. In addition to the soiled workroom provided in the surgical suite, a separate soiled workroom(s) shall be required when a treatment room is provided, except as allowed in subparagraph (B) of this paragraph.

(A) Special requirements. The workroom(s) shall contain a clinical sink or equivalent flushing type fixture, work counter, designated space for waste and linen receptacles, and hand washing facilities.

(B) Shared functions. The soiled workroom required in support of a treatment room may be combined with a surgical suite soiled work room with two means of entry. A separate door into the soiled workroom shall serve a treatment room located outside the surgical suite.

(12) Sterilizing facilities. A system for sterilizing equipment and supplies shall be provided. Sterilizing procedures may be done on-site or off-site, or disposables may be used to satisfy functional needs.

(A) Off-site sterilizing. When sterilizing is provided off-site and disposables and prepackage surgical supplies are used, the following rooms shall be provided near the operating room.

(i) Soiled holding room. A room for receiving contaminated/soiled material and equipment from the operating room shall be provided. The room shall be physically separate from all other areas of the suite. The room shall include a work counter(s) or a table(s), clinical sink or equivalent flushing type fixture, equipment for initial disinfection and preparation for transport to off-site sterilizing, and hand washing facilities. The soiled holding room may be combined with the surgical suite soiled workroom.

(ii) Clean workroom. A clean workroom shall be provided for the exclusive use of the surgical suite. The workroom shall contain a work counter, with space for receiving, disassembling and organizing clean sterile supplies, storage cabinets or shelving, and hand washing facilities.

(iii) Sterilizer equipment. Sterilizer equipment shall be located in a separate room convenient to the operating room(s), in an alcove adjacent to the restricted corridor, or in the clean workroom.

(B) On-site sterilizing facilities. When sterilizing facilities are provided on-site they shall be located near the operating room and provide the following rooms.

(i) Receiving/decontamination room. The receiving/decontamination room shall be physically separate from all other areas of the surgical suite. The room shall include a work counter(s) or table(s), clinical sink or equivalent flushing type fixture, equipment for initial sterilization/disinfection, and hand washing facilities. Pass-through doors, windows, and washer/sterilizer decontaminators shall serve in delivering material to the clean workroom. The receiving/decontamination room may be combined with the surgical suite soiled workroom.

(ii) Clean/assembly workroom. The clean/assembly workroom shall include a counter(s) or table(s) with space for organizing, assembling, and packaging of medical/surgical supplies and equipment, equipment for terminal sterilizing, and hand washing facilities. Clean and soiled work areas shall be physically separated.

(iii) Sterile storage. A storage room for clean and sterile supplies shall be provided. The storage room shall have adequate areas and counters for breakdown of manufacturers' clean/sterile medical/surgical supplies. This room may be combined with the clean assembly/workroom.

(iv) Sterile equipment storage. An equipment storage room shall be provided. Sterile storage equipment may be combined with surgical equipment storage, but space provided for sterile equipment must be in addition to the 30 square feet per operating room requirement in paragraph (13)(B)(vii) of this subsection.

(v) Cart storage room or alcove. The storage space for distribution carts shall be adjacent to clean and sterile storage area(s) and close to main distribution points.

(13) Surgical suite. The surgical suite shall be arranged to preclude unrelated traffic through the suite. The surgical suite shall contain at least one operating room and all surgical service areas required under subparagraph (B) of this paragraph.

(A) Operating room. The operating room(s) shall have a clear floor area of at least 240 square feet exclusive of fixed or moveable cabinets, counters, or shelves. The minimum clear dimension between built-in cabinets, counters, and shelves shall be 14 feet.

(B) Surgical service areas.

(i) Control station. A control station shall be located to permit direct visual surveillance of the restricted corridor and traffic which enters the surgical suite.

(ii) Restricted corridor. The restricted corridor shall serve as the primary passageway for staff and patients within the surgical suite. The following rooms and areas when provided or required by NFPA 101 shall have direct access to the restricted corridor:

(I) preoperative patient holding area;

(II) operating room(s);

(III) recovery room;

(IV) soiled workroom;

(V) clean workroom;

(VI) janitor's closet;

(VII) equipment storage;

(VIII) sterilizing facilities;

(IX) staff clothing change area;

(X) anesthesia workroom; and

(XI) area for emergency crash cart.

(iii) Soiled workroom. A soiled workroom shall be provided for the exclusive use of the surgical suite staff. The workroom shall contain a clinical sink or equivalent flushing type fixture, work counter, designated space for waste and linen receptacles, and hand washing facilities. The soiled workroom may not have direct connection with operating room(s) or other sterile activity room(s).

(iv) Clean linen storage. A storage room or closet shall be provided for storing clean linen.

(v) Scrub facilities. A scrub sink shall be provided near the entrance to each operating room. Scrub facilities shall be arranged to minimize incidental splatter on nearby personnel or carts. One scrub station with dual faucets and separate controls may serve two adjacent operating rooms.

(vi) Janitor's closet. A janitor's closet shall be provided for the exclusive use of the surgical suite. The closet shall contain a floor receptor or service sink and storage space for housekeeping supplies and equipment.

(vii) Equipment storage. A room, alcove, or designated shall be provided for storing equipment and supplies used in the surgical suite. The storage room or area shall be a minimum of 30 square feet per operating room.

(viii) Anesthesia workroom. When anesthesia is administered, an anesthesia workroom shall be provided for cleaning, testing, and storing anesthesia equipment. The room shall contain a work counter, hand washing facilities, racks for cylinders, and separate storage for clean and soiled items.

(ix) Medical gas storage room. When provided or required by NFPA 101, a medical gas storage room shall comply with the requirements of NFPA 99, Chapter 4.

(x) Area for emergency crash cart. An area or alcove located out of traffic and convenient to the operating room(s) shall be provided for an emergency crash cart.

(xi) Stretcher storage area. An area or alcove shall be located convenient for use and out of the direct line of traffic for the storage of stretchers. Stored stretchers shall not encroach on corridor widths.

(14) Treatment room.

(A) A treatment room is not required, but when provided, it may be used for minor procedures that use only local anesthetics.

(B) The treatment room shall have a clear floor area of at least 100 square feet exclusive of fixed or moveable cabinets, counters, or shelves.

(C) The treatment room shall contain an examination table, a counter for writing, and hand washing facilities.

(15) Examination room. An examination room is not required, but when provided, the room shall have:

(A) a minimum clear floor area of at least 80 square feet exclusive of fixed or moveable cabinets, counters, or shelves; and

(B) a work counter with space for writing and hand washing facilities.

(16) Waste processing. Space and facilities shall be provided for the safe and sanitary storage and disposal of waste by incineration, mechanical destruction, compaction, containerization, removal, or a combination of these techniques as appropriate for the material being handled.

(e) Details.

(1) Corridors.

(A) Public corridor. The minimum clear and unobstructed width of a public corridor shall be at least four feet.

(B) Communicating corridor. The communicating corridor shall be used to convey patients by stretcher, gurney, or bed.

(i) The communicating corridor shall link the preoperative holding area, operating rooms(s), and recovery room(s), and shall be continuous to at least one exit.

(ii) The minimum clear and unobstructed width of the communicating corridor shall be eight feet.

(2) Doors and windows.

(A) Door types. Doors at all openings between corridors and rooms or spaces subject to occupancy shall be swing type. Elevator doors are excluded from this requirement.

(B) Door swing. Doors, except doors to spaces such as small closets which are not subject to occupancy, shall not swing into corridors in a manner that might obstruct traffic flow or reduce the required corridor width. Large walk-in type closets are considered as occupiable spaces.

(C) Patient access doors. The minimum width of doors for patient access to examination and consultation rooms shall be three feet. The minimum width of doors requiring access for beds and gurneys (preoperative holding area, operating room, recovery room) shall be three feet eight inches.

(D) Emergency access. At least one door into a patient use toilet room shall swing outward or have hardware to permit access from the outside in an emergency.

(E) Labeled doors. Labeled fire doors shall be listed by an independent testing laboratory and shall meet the construction requirement for fire doors in NFPA 80, "Standard for Fire Doors and Fire Windows," 1995 edition. Reference to a labeled door shall be construed to include labeled frame and hardware.

(F) Glazing. Glass doors, sidelights, borrowed lights, and windows located within 12 inches of a door jamb or with a bottom-frame height of less than 18 inches above the finished floor shall be glazed with safety glass or plastic glazing material that will resist breaking and will not create dangerous cutting edges when broken. Similar materials shall be used for wall openings unless otherwise required for fire safety. Safety glass, tempered glass, or plastic glazing materials shall be used for shower doors, bath enclosures, interior windows, and doors (which have glazing).

(3) Ceiling heights. The minimum ceiling height shall be eight feet with the following exceptions.

(A) Rooms containing ceiling-mounted light fixtures or equipment. Operating rooms or other rooms containing ceiling-mounted light fixtures or equipment shall have ceiling heights of not less than nine feet. Additional ceiling height may be required to accommodate special fixtures or equipment.

(B) Minor rooms. Ceilings in storage rooms, toilet rooms, and other minor rooms shall be not less than seven feet six inches.

(C) Special requirements. Suspended tracks, rails, pipes, signs, lights, door closures, exit signs, and other fixtures that protrude into the path of normal traffic shall be not less than six feet eight inches above the finished floor.

(4) Toilet room accessories.

(A) Grab bars. Grab bars shall be provided at water closets and showers in accordance with the TAS.

(B) Mirrors. Mirrors may not be installed at hand washing fixtures where asepsis control and sanitation requirements would be lessened by hair combing.

(5) Hand washing facilities. Location and arrangement of fittings for hand washing facilities shall permit their proper use and operation. Hand washing fixtures with hands free controls shall be provided in each examination room, preoperative area, recovery room, soiled utility room, fluoroscopy room, clean work room, and toilet room. Particular care shall be given to the clearances required for blade-type operating handles. Lavatories and hand washing facilities shall be securely anchored to withstand an applied vertical load of not less than 250 pounds on the front of the fixture. In addition to the specific areas noted, hand washing facilities shall be conveniently located for staff use in rooms and areas noted under spacial requirements in subsection (d) of this section and throughout the center where patient care services are provided.

(6) Hand drying. Provisions for hand drying shall be included at all hand washing facilities except scrub sinks. Hot air dryers or individual paper units shall be provided and must be enclosed in such a way as to provide protection against dust or soil. Paper dispensing units shall provide for single unit dispensing.

(7) Radiation protection. Shielding shall be designed, tested, and approved by a medical physicist licensed under the Medical Physics Act, Texas Civil Statutes, Article 4512n. The ASC must obtain certificate of registration issued by the Bureau of Radiation Control to use radiation machines.

(8) Rooms with heat producing equipment. Rooms containing heat producing equipment such as mechanical and laundry rooms shall be insulated and ventilated to prevent floors of any occupied room located above it from exceeding a temperature differential of 10 degrees Fahrenheit above the ambient room temperature.

(f) Finishes.

(1) Floor finishes.

(A) General. Floor materials shall be easily cleanable, wear resistant, and appropriate for the location involved. In areas subject to frequent wet cleaning methods, floor materials shall not be physically affected by germicidal and cleaning solutions. Floors that are subject to traffic while wet, such as shower areas and certain work areas, shall have nonslip surfaces.

(B) Operating rooms and sterilizing facility(ies).

(i) Floor finishes shall be seamless, be tightly sealed to the wall without voids, and be impervious to water.

(ii) Base materials shall be coved and integral with the floor.

(iii) Welded joint flooring is acceptable.

(C) Threshold and expansion joint covers. Thresholds at doorways may not exceed 3/4 inch in height for exterior sliding doors or 1/2 inch for other type doors. Raised thresholds and floor level changes at accessible doorways shall be beveled with a slope no greater than 1:2. Expansion joint covers may not exceed 1/2 inch in height and shall have beveled edges with a slope no greater than 1:2.

(2) Wall finishes. Wall finishes shall be smooth, washable, moisture resistant, and cleanable by standard housekeeping practices. Wall finishes shall be in compliance with the requirements of NFPA 101, §26-3.3, relating to flame spread.

(A) Finishes at plumbing fixtures. Wall finishes shall be water resistant in the immediate area of plumbing fixtures.

(B) Wet cleaning methods. Wall finishes in areas subject to frequent wet cleaning methods shall be impervious to water, tightly sealed; and without voids.

(3) Ceiling finishes.

(A) General. All occupied rooms and spaces shall be provided with finished ceilings, unless otherwise noted. Ceilings which are a part of a rated roof and ceiling assembly or a floor-ceiling assembly shall be constructed of listed components (by a nationally recognized testing laboratory) and installed in accordance with the listing.

(B) Monolithic ceilings. Ceilings in operating rooms and sterilizing facilities shall be monolithic from wall to wall, smooth and without fissures, open joints, or crevices and with a washable and moisture impervious finish.

(C) Special requirements. Finished ceilings may be omitted in mechanical and equipment spaces, shops, and similar spaces unless required for fire-resistive purposes.

(4) Floor, wall, and ceiling penetrations. Floor, wall, and ceiling penetrations by pipes, ducts, and conduits shall be tightly sealed to minimize entry of dirt particles, rodents, and insects. Joints of structural elements shall be similarly sealed.

(5) Cubicle curtains, draperies, and other hanging fabrics. Cubicle curtains, draperies, and other hanging fabrics shall be noncombustible or flame retardant and shall pass both the small scale and large scale test of NFPA 701, "Standard Methods of Fire Tests for Flame-Resistant Textiles and Films," 1996 edition. Copies of laboratory test reports for installed materials shall be submitted to the department at the time of the final construction inspection.

(g) Elevators. All buildings that have patient services located on other than the main entrance floor shall have electric or electrohydraulic elevators. The elevators shall be installed in sufficient quantity, capacity, and speed to ensure that the average interval of dispatch time will not exceed one minute, and average peak loading can be accommodated.

(1) Requirements for new elevators. New elevators shall be installed in accordance with the requirements of A17.1, "Safety Code for Elevators and Escalators," 1990 edition, published by the American Society of Mechanical Engineers and the American National Standards Institute (ASME/ANSI A17.1). All new elevators shall conform to the Fire Fighters' Service Requirements of ASME/ANSI A17.1 requirements of NFPA 101, Section 7-4.4. All documents published by the ASME/ANSI as referenced in this section may be obtained by writing the ANSI, United Engineering Center, 345 East 47th Street, New York, N.Y. 10017.

(2) Requirements for existing elevators. Existing elevators shall comply with the ASME/ANSI A17.1, Safety Code for Existing Elevators and Escalators, 1990 edition. All existing elevators having a travel distance of 25 feet or more above or below the level that best serves the needs of emergency personnel for fire fighting or rescue purposes shall conform to Fire Fighters' Service Requirements of ASME/ANSI A17.3 as required by NFPA 101, Section 7-4.5.

(3) Elevator machine rooms. Elevator machine rooms that contain solid-state equipment for elevators having a travel distance of more than 50 feet above the level of exit discharge or more than 30 feet below the level of exit discharge shall be provided with independent ventilation or air-conditioning systems with the capability to maintain an operating temperature during fire fighter service operations. The operating temperature shall be established by the elevator equipment manufacturer's specifications and shall be posted in each such elevator machine room. When standby power is connected to the elevator, the machine room ventilation or air conditioning shall be connected to standby power. These requirements are not applicable to existing elevators.

(4) Elevator car size.

(A) Minimum elevator car size shall be five feet wide and five feet deep.

(B) When an operating room(s) is located on a floor other than the preoperative and recovery floors a hospital-type elevator shall be provided. Cars of hospital-type elevators shall be at least five feet eight inches wide by nine feet deep.

(5) Elevator and elevator shaft doors. When light beams are used for operating door opening devices, the beams shall be used in combination with door edge devices and shall be interconnected with a system of smoke detectors. The light control feature shall be disengaged when smoke is detected in any elevator lobby.

(A) The smallest elevator car door opening shall be at least three feet wide and seven feet high.

(B) The elevator car door opening for a hospital-type elevator shall be at least 44 inches wide and seven feet high.

(6) Type of controls and alarms. Elevator call buttons, controls, and door safety stops shall be of a type that will not be activated by heat or smoke.

(7) Leveling. All elevators shall be equipped with an automatic leveling device of the two-way automatic maintaining type with an accuracy of one-half inch.

(8) Operation. All elevators, except freight elevators, shall be equipped with a two-way key operated service switch permitting cars to bypass all landing button calls and be dispatched directly to any floor.

(9) Accessibility of controls and alarms. Elevator controls, alarm buttons, and telephones shall be accessible to wheelchair occupants.

(10) Location. Elevators shall not open to an exit.

(11) Testing. An ASC shall have all elevators and escalators routinely and periodically inspected and tested in accordance with ASME/ANSI A17. All elevators equipped with fire fighter service shall be subject to a monthly operation with a written record of the findings made and kept on the premises as required by NFPA 101, §7-4.8.

(12) Certification. An ASC shall obtain a certificate of inspection evidencing that the elevators and related equipment were inspected in accordance with the requirements in Health and Safety Code (HSC), Chapter 754, Subchapter B, and determined to be in compliance with the safety standards adopted under HSC, §754.014, administered by the Texas Department of Licensing and Regulation. The certificate of inspection shall be on record in each center.

(h) Mechanical requirements. This subsection contains requirements for mechanical systems; air-conditioning, heating and ventilating systems; steam and hot and cold water systems; plumbing fixtures; piping systems; and thermal and acoustical insulation.

(1) Cost. All mechanical systems shall be designed for overall efficiency and life cycle costing, including operational costs.

Recognized engineering practices shall be followed to achieve the most economical and effective results except that in no case shall patient care or safety be sacrificed for conservation.

(2) Equipment location. Mechanical equipment may be located indoors or outdoors (when in a weatherproof enclosure), or in a separate building(s).

(3) Vibration isolation. Mechanical equipment shall be mounted on vibration isolators as required to prevent unacceptable structure-borne vibration. Ducts, pipes, etc. connected to mechanical equipment which is a source of vibration shall be isolated from the equipment with vibration isolators.

(4) Performance and acceptance. Prior to completion and acceptance of the facility, all mechanical systems shall be tested, balanced, and operated to demonstrate to the design engineer or his representative that the installation and performance of these systems conform to the requirements of the plans and specifications.

(A) Material lists. Upon completion of the contract, the owner shall be provided with parts lists and procurement information with numbers and description for each piece of equipment.

(B) Instructions. Upon completion of the contract, the owner shall be provided with instructions in the operational use of systems and equipment as required.

(5) Heating, ventilating, and air conditioning (HVAC) systems.

(A) All central HVAC systems shall comply with and shall be installed in accordance with the requirements of NFPA 90A, "Standard for the Installation of Air Conditioning and Ventilating Systems," 1996 edition, or NFPA 90B, "Standard for the Installation of Warm Air Heating and Air-Conditioning Systems," 1996 edition, as applicable and the requirements contained in this subparagraph. Air handling units serving two or more rooms are considered to be central units. All documents published by NFPA as referenced in this section may be obtained by writing or calling the NFPA at the following address or telephone number: National Fire Protection Association, 1 Batterymarch Park, P.O. Box 9101, Quincy, MA 02269-9101 or (800) 344-3555.

(B) Non-central air handling systems, i.e., individual room units that are used for heating and cooling purposes (e.g., fan-coil units, heat pump units) shall be equipped with permanent (cleanable) or replaceable filters. The filters shall have a minimum efficiency of 68% weight arrestance. These units may be used as recirculating units only. All outdoor air requirements shall be met by a separate central air handling system with the proper filtration, as required in Table 1 in §135.54(a) of this title (relating to Tables).

(C) Ventilation system requirements. All rooms and areas in the center shall have provision for positive ventilation. Fans serving exhaust systems shall be located at the discharge end and shall be conveniently accessible for service. Exhaust systems may be combined, unless otherwise noted, for efficient use of recovery devices required for energy conservation. The ventilation rates shown in Table 1 of §135.54(a) of this title shall be used only as minimum requirements since they do not preclude the use of higher rates that may be appropriate.

(i) Temperatures and humidities. The designed capacity of the systems shall be capable of providing the following ranges of temperatures and humidities.

(I) Operating room. The systems serving the operating room shall be capable of maintaining a temperature range between 68 and 75 degrees Fahrenheit and a relative humidity range between 45% and 60%.

(II) Recovery room. The system serving the recovery room shall be capable of maintaining a temperature of 75 degrees Fahrenheit and a relative humidity range between 45% and 60%.

(III) Other areas. The indoor design temperature in all other patient care areas shall be 75 degrees Fahrenheit with relative humidity of not less than 30%.

(ii) Thermometers and humidity gauges. Each operating room and recovery room shall have temperature and humidity indicating devices mounted at eye level.

(iii) Air handling duct requirements. Fully ducted supply, return and exhaust air systems shall be provided for all patient care areas. Combination systems, utilizing both ducts and plenums for movement of air in these areas shall not be permitted.

(I) X-ray protection. Ducts which penetrate construction intended for X-ray or other ray protection shall not impair the effectiveness of the protection.

(II) Protection of ducts penetrating fire and smoke partitions. Combination fire and smoke leakage limiting dampers (Class II) shall be installed in accordance with manufacturer's instructions for all ducts penetrating 1-hour rated fire and smoke partitions required by NFPA 101, §12-6.3.7 (not required in ASCs meeting the provisions of NFPA 101, §12-6.3.7.3, Exception).

(-a-) Fail-safe installation. Combination smoke and fire dampers shall close on activation of the fire alarm system by smoke detectors installed and located as required by NFPA 72, Chapter 5, "National Fire Alarm Code," 1996 edition; NFPA 90A, Chapter 4; and NFPA 101, §12-6.3.7; the fire sprinkler system; and upon loss of power. Smoke dampers shall not close by fan shut-down alone. This requirement applies to all existing and new installations.

(-b-) Interconnection of air handling fans and smoke dampers. Air handling fans and smoke damper controls shall be interconnected so that closing of smoke dampers will not damage the ducts.

(-c-) Frangible devices. The use of frangible (nonresetting) devices for shutting smoke dampers shall not be permitted.

(iv) Outside air intake locations.

(I) Outside air intakes shall be located at least 25 feet from exhaust outlets of ventilating systems, combustion equipment stacks, medical-surgical vacuum systems, plumbing vents, or areas which may collect vehicular exhaust or other noxious fumes. (Prevailing winds and proximity to other structures may require other arrangements).

(II) Plumbing and vacuum vents that terminate five feet above the level of the top of the air intake may be located as close as 10 feet to the air intake.

(III) The bottom of outside air intakes shall be located not less than six feet above ground level. The bottom of outside air intakes located on a roof shall be not less than three feet above a roof level.

(v) Air exhaust outlets. Exhaust outlets from areas having ethylene oxide sterilizers and other contaminants shall be above the roof level and arranged to exhaust upward.

(vi) Pressure relationship. Ventilation systems shall be designed and balanced to provide pressure relationships contained in Table 1 of §135.54(a) of this title. For reductions and shut down of ventilation systems when a room is unoccupied, the provisions in Note 4 of Table 1 of §135.54(a) of this title shall be followed.

(vii) Supply grilles. Supply grilles in operating rooms shall be located on the ceiling or on a wall near the ceiling and bottoms of return air grilles shall be located not more than 12 inches above the finished floor nor less than six inches. At least two return air outlets shall be provided in each operating room on opposing walls.

(viii) Ventilation start-up requirements. Air handling systems shall not be operated without the proper installation of the filter in accordance with the manufacturer recommendation or instruction. This includes the 90% efficiency filters where required. Ducts shall be cleaned thoroughly by an air duct cleaning contractor when the air handling systems have been operated without the required filters in place. This includes construction operations.

(ix) Humidifier location. When duct humidifiers are located upstream of the final filters, they shall be located at least 15 feet from the filters. Duct work with duct-mounted humidifiers shall be provided with a means of removing water accumulation. An adjustable high-limit humidistat shall be located downstream of the humidifier to reduce the potential of condensation inside the duct. All duct takeoffs should be sufficiently downstream of the humidifier to ensure complete moisture absorption. Reservoir-type water spray or evaporative pan humidifiers shall not be used.

(x) Filtration requirements. All air handling units shall be equipped with filters having efficiencies equal to, or greater than, those specified in Table 2 of §135.54(b) of this title. Filter efficiencies shall be average efficiencies tested in accordance with American Society of Heating, Refrigerating, and Air-conditioning Engineers (ASHRAE), Inc., Standard 52, "Gravimetric and Dust Spot Procedures for Testing Air Cleaning Devices Used in General Ventilation for Removing Particulate Matter," 1992 edition. All joints between filter segments, and between filter segments and the enclosing ductwork, shall have gaskets and seals to provide a positive seal against air leakage. All documents published by ASHRAE as referenced in this section may be obtained by writing or calling the ASHRAE, Inc. at the following address or telephone number: ASHRAE, Inc., 1791 Tullie Circle, N. E., Atlanta, GA 30329; telephone (404) 636-8400.

(I) Location of multiple filters. When two filter beds are required by Table 2 of §135.54(b) of this title, filter bed No. 1 shall be located upstream of the air-conditioning equipment, and filter bed No. 2 shall be located downstream of the supply fan or blowers.

(II) Location of single filters. Where only one filter bed is required by Table 2 of §135.54(b) of this title, it shall be located downstream of the supply fan.

(III) Duct linings. Internal linings shall not be used in ducts, terminal boxes, or other air system components supplying operating rooms and post anesthesia recovery rooms unless terminal filters of at least 90% efficiency are installed downstream of linings. This requirement shall not apply to mixing boxes and acoustical traps that have approved nonabrasive coverings over such linings.

(xi) Pressure monitoring devices. A manometer or draft gauge shall be installed across each filter bed having a required efficiency of 75% or more, including laboratory hoods requiring high efficiency particulate air (HEPA) filters.

(xii) Ventilation for anesthetizing locations. Ventilation for anesthetizing locations (defined in NFPA 99, §2-2) shall comply with NFPA 99, §13-4.1.2.1 and the requirements of subclauses (I) and (II) of this clause.

(I) Smoke removal systems for anesthetizing locations (surgical suites). Supply and exhaust systems for windowless anesthetizing locations shall be arranged to automatically exhaust smoke and products of combustion, prevent recirculation of smoke originating within the surgical suite, and prevent the circulation of smoke entering the system intakes, without in either case interfering with the exhaust function of the system as required by NFPA 99, §5-4.1.3.

(II) Smoke exhaust grilles. Exhaust grilles for smoke evacuation systems shall be ceiling-mounted or on the wall near the ceiling.

(D) Thermal and acoustical insulation for air handling systems. Asbestos insulation shall not be used.

(i) Thermal duct insulation. Air ducts and casings with outside surface temperature below the ambient dew point or temperature above 80 degrees Fahrenheit shall be provided with thermal insulation.

(ii) Insulation in air plenums and ducts. When installed, linings in air ducts and equipment shall meet the Erosion Test Method described in Underwriters' Laboratories, Inc., Standard 181, "Factory-Made Duct Materials and Air Duct Connectors." This document may be obtained from the Underwriters' Laboratories, Inc., 333 Pfingsten Road, Northbrook, IL 60062-2096.

(iii) Insulation flame spread and smoke developed ratings. Interior and exterior insulation, including finishes and adhesives on the exterior surfaces of ducts and equipment, shall have a flame spread rating of 25 or less and a smoke developed rating of 50 or less as required by NFPA 90A, Chapters 2 and 3.

(iv) Frangible insulation. Insulation of soft and spray-on types shall not be used where it is subject to air currents or mechanical erosion or where loose particles may create a maintenance or health problem.

(6) Piping systems and plumbing fixture requirements. All piping systems and plumbing fixtures shall be designed and installed in accordance with the requirements of the National Standard Plumbing Code published by the National Association of Plumbing-Heating-Cooling Contractors (PHCC), 1996 edition, and this paragraph. The National Standard Plumbing Code may be obtained by writing or calling the PHCC at the following address or telephone number: Plumbing-Heating-Cooling Contractors, P. O. Box 6808, Falls Church, VA 22040; telephone (800) 533-7694.

(A) Water supply piping systems. Water supply piping systems shall be designed to supply water at sufficient pressure to operate all fixtures and equipment during maximum demand.

(i) Valves. Each water service main, branch main, riser, and branch to a group of fixtures shall be valved. Stop valves shall be provided at each fixture.

(ii) Backflow preventers. Backflow preventers (vacuum breakers) shall be installed on hose bibs, laboratory sinks, janitor sinks, bedpan flushing attachments, and on all other fixtures to which hoses or tubing can be attached.

(iii) Flushing valves. Flush valves installed on plumbing fixtures shall be of a quiet operating type, equipped with silencers.

(iv) Water storage tanks. Water storage tanks shall be fabricated of corrosion-resistant metal or lined with noncorrosive material.

(B) Fire sprinkler systems. When provided, fire sprinkler systems shall comply with the requirements of NFPA 101, Section 7-7 and the requirements of this clause. All fire sprinkler systems shall be designed, installed, and maintained in accordance with the requirements of NFPA 13, "Standard for the Installation of Sprinkler Systems," 1996 edition, and shall be certified as required by §135.53(e)(4) of this title (relating to Preparation, Submittal Review, and Approval of Plans).

(C) Piped nonflammable medical gas and clinical vacuum systems. When provided, piped nonflammable medical gas and clinical vacuum system installations shall be designed, installed and certified in accordance with the requirements of NFPA 99, Section 4-3 for Level I systems and the requirements of this subparagraph.

(i) Outlets. Nonflammable medical gas and clinical vacuum outlets shall be provided in accordance with Table 3 of §135.54(c) of this title.

(ii) Installer qualifications. All installations of the medical gas piping systems shall be done only by, or under the direct supervision of a holder of a master plumber license or a journeyman plumber license with a medical gas piping installation endorsement issued by the Texas State Board of Plumbing Examiners.

(iii) Installer tests. Prior to closing of walls, the installer shall perform an initial pressure test, a blowdown test, a secondary pressure test, a cross-connection test, and a purge of the piping system as required by NFPA 99.

(iv) Qualifications for conducting verification tests and inspections. Verification tests and inspections by a party, other than the installer, shall be conducted by individuals who are technically competent and experienced in the field of piped medical gas systems.

(v) Verification tests. Upon completion of the installer inspections and tests and after closing of walls, verification tests of the medical gas piping systems, the warning system, and the gas supply source shall be conducted. The verification tests shall include a cross-connection test, valve test, flow test, piping purge test, piping purity test, final tie-in test, operational pressure tests, and medical gas concentration test.

(vi) Verification test requirements. Verification tests of the medical gas piping system and the warning system, shall be performed on all new piped medical gas systems, additions, renovations, or repaired portions of an existing system. All systems that are breached and components that are added, renovated, or replaced shall be inspected and appropriately tested. The breached portions of a system shall be repaired with all new components in the immediate zone or area located upstream of the point or area of intrusion and downstream to the end of the system or at a properly installed isolation valve.

(vii) Warning system verification tests. Verification tests of piped medical gas systems shall include tests of the source alarms and monitoring safeguards, master alarm systems, and the area alarm systems.

(viii) Source equipment verification tests. Source equipment verification tests shall include medical gas supply sources (bulk and manifold) and the compressed air source systems (compressors, dryers, filters, and regulators).

(ix) Written certification. Written certification for piped medical gas and vacuum systems including the supply sources and warning systems shall be provided by a party technically competent and experienced in the field of medical gas pipeline testing. The certification shall document compliance with NFPA 99 and the integrity of the completed system. The written certification shall be submitted directly to the ASC and the installer. A copy shall be available at final department construction inspection.

(x) Facility responsibility. Before new piped medical gas systems, additions, renovations, or repaired portions of an existing system are put into use, ASC medical personnel shall verify that the gas delivered at the outlet corresponds with labeling required at each outlet.

(xi) Documentation of medical gas and clinical vacuum outlets. Documentation of the installed, modified, extended or repaired medical gas piping system shall be submitted to the department by the same party certifying the piped medical gas systems. The number and type of medical gas outlets (e.g., oxygen, vacuum, medical air, nitrogen, nitrous oxide) shall be documented and arranged tabularly by room numbers and room types.

(D) Waste anesthetic gas disposal (WAGD) systems. Each space routinely used for administering inhalation anesthesia shall be provided with a WAGD system as required by NFPA 99, §4-3.3.

(7) Steam and hot water systems.

(A) Boilers. When provided, boilers shall have the capacity, based upon the net ratings published by the Hydronics Institute or another acceptable national standard, to supply the normal heating, hot water, and steam requirements of all systems and equipment. The number and arrangement of boilers shall be such that, when one boiler breaks down or routine maintenance requires that one boiler be temporarily taken out of service, the capacity of the remaining boiler(s) shall be sufficient to provide hot water service for clinical and patient use; steam for sterilization; and heating for operating, recovery, and critical care rooms. However, reserve capacity for facility space heating of noncritical care areas such as administrative areas, is not required in geographical areas where a design dry bulb temperature equals 25 degrees Fahrenheit or higher as based on the 99% design value shown in the Handbook of Fundamentals, 1993 edition, published by ASHRAE, Inc.

(i) Valves. Supply and return mains and risers of cooling, heating, and process steam systems shall be valved to isolate the various sections of each system. Each piece of equipment shall be valved at the supply and return ends except that vacuum condensate returns need not be valved at each piece of equipment.

(ii) Boiler certification. When required, the ASC shall ensure compliance with Texas Department of Licensing and Regulation, Boiler Section, Texas Boiler Law, 1995 (Health and Safety Code, Chapter 755, Boilers), which requires certification documentation for boilers to be posted on site at each boiler installation.

(B) Hot water system. Hot water distribution system serving all patient care areas shall be under constant recirculation to provide continuous hot water at each hot water outlet.

(i) Capacity of water heating equipment. Water heating equipment shall have sufficient capacity to supply water for all clinical needs based on accepted engineering practices using actual number and type of fixtures and for heating, when applicable.

(ii) Water temperature measurements. Water temperatures shall be measured at hot water point of use or at the inlet to processing equipment. Hot water temperature at point of use for patients, staff and visitors shall not exceed 110 degrees Fahrenheit.

(8) Drainage systems. Building sewers shall discharge into a community sewage system. Where such a system is not available, a facility providing sewage treatment must conform to applicable local and state regulations.

(A) Above ground piping. Soil stacks and roof drains installed above ground within buildings shall be drain-waste-vent (DWV) weight or heavier and shall be: copper pipe, copper tube, cast iron pipe, polyvinyl chloride (PVC) schedule 40 pipe, or galvanized iron pipe. Buildings or portions of buildings remodeled to an ASC need not comply with this requirement.

(B) Underground piping. All underground building drains shall be cast iron soil pipe, hard temper copper tube (DWV or heavier), acrylonitrile-butodiene-styrene (ABS) plastic pipe (DWV Schedule 40 or heavier), PVC pipe (DWV Schedule 40 or heavier), or extra strength vitrified clay pipe (VCP) with compression joints or couplings. Underground piping shall have at least 12 inches of earth cover or comply with local codes. Existing building or portions of buildings that are being remodeled need not comply with this subparagraph.

(C) Drains for chemical wastes. Separate drainage systems for chemical wastes (acids and other corrosive materials) shall be provided. Materials acceptable for chemical waste drainage systems shall include chemically resistant glass pipe, high silicone content cast iron pipe, VCP, plastic pipe, or plastic lined pipe.

(9) Thermal insulation for piping systems and equipment. Asbestos insulation shall not be used.

(A) Insulation shall be provided for the following:

(i) boilers, smoke breeching, and stacks;

(ii) steam supply and condensate return piping;

(iii) hot water piping and all hot water heaters, generators, converters, and storage tanks;

(iv) chilled water, refrigerant, other process piping, equipment operating with fluid temperatures below ambient dew point, and water supply and drainage piping on which condensation may occur. Insulation on cold surfaces shall include an exterior vapor barrier; and

(v) other piping, ducts, and equipment as necessary to maintain the efficiency of the system.

(B) Flame spread. Flame spread shall not exceed 25 and smoke development rating shall not exceed 50 for pipe insulation as determined by an independent testing laboratory in accordance with NFPA 255, "Standard Method of Test of Surface Burning Characteristics of Building Materials," 1996 edition.

(10) Plumbing fixtures. Plumbing fixtures shall be made of nonabsorptive, acid resistant materials and shall comply with the recommendations of the National Standard Plumbing Code, 1996 edition, and this paragraph.

(A) Sink and lavatory controls. All lavatories used by medical and nursing staff and by patients shall be trimmed with valves which can be operated without the use of hands. Blade handles used for this purpose shall not be less than four inches in length. Single lever or wrist blade devices may be used.

(B) Clinical sink traps. Clinical sinks shall have an integral trap in which the upper portion of a visible trap seal provides a water surface.

(C) Sinks for disposal of plaster of paris. Sinks that are used for the disposal of plaster of paris shall have a plaster trap.

(D) Back flow or siphoning. All plumbing fixtures and equipment shall be designed and installed to prevent the back-flow or back-siphonage of any material into the water supply. The over-the-rim type water inlet shall be used wherever possible. Vacuum-breaking devices shall be properly installed when an over-the-rim type water inlet cannot be utilized.

(E) Drinking fountain. Each drinking fountain shall be designed so that the water issues at an angle from the vertical, the end of the water orifice is above the rim of the bowl, and a guard is located over the orifice to protect it from lip contamination.

(F) Sterilizing equipment. All sterilizing equipment shall be designed and installed to prevent not only the contamination of the water supply but also the entrance of contaminating materials into the sterilizing units.

(G) Hose attachment. No hose shall be affixed to any faucet if the end of the hose can become submerged in contaminated liquid unless the faucet is equipped with an approved, properly installed vacuum-breaker.

(H) Bedpan washers and sterilizers. When provided, bedpan washers and sterilizers shall be designed and installed so that both hot and cold water inlets shall be protected against back-siphonage at maximum water level.

(I) Flood level rim clearance. The water supply spouts for lavatories and sinks required in patient care areas shall be mounted so that its discharge point is a minimum of five inches above the rim of the fixture.

(J) Scrub sink controls. Freestanding scrub sinks and lavatories used for scrubbing in procedure rooms shall be trimmed with foot, knee, or ultrasonic controls. Single lever wrist blades are not acceptable at scrub sinks.

(K) Floor drains or floor sinks. Where floor drains or floor sinks are installed, they shall be of a type that can be easily cleaned by removal of the cover. Removable stainless steel mesh shall be provided in addition to a grilled drain cover to prevent entry of large particles of waste which might cause stoppages.

(L) Under counter piping. Under counter piping and above floor drains shall be arranged (raised) so as not to interfere with cleaning of the floor below the equipment.

(i) Electrical requirements. All electrical material and equipment, including conductors, controls, and signaling devices, shall be installed in compliance with applicable sections of the NFPA 70, "National Electrical Code," 1996 edition, §517-50; NFPA 99, Chapter 13; the requirements of this subsection; and as necessary to provide a complete electrical system. Electrical systems and components shall be listed by nationally recognized listing agencies as complying with available standards and shall be installed in accordance with the listings and manufacturer's instructions.

(1) All fixtures, switches, sockets, and other pieces of apparatus shall be maintained in a safe and working condition.

(2) Extension cords and cables shall not be used for permanent wiring.

(3) All electrical heating devices shall be equipped with a pilot light to indicate when the device is in service, unless equipped with a temperature limiting device integral with the heater.

(4) All equipment, fixtures, and appliances shall be properly grounded in accordance with NFPA 70.

(5) Under-counter electrical installations shall be arranged (raised) to not interfere with cleaning of the floor below the equipment.

(6) Installation testing and certification.

(A) Installation testing. The electrical installations, including grounding continuity, fire alarm, nurses calling system and communication systems, shall be tested to demonstrate that equipment installation and operation is appropriate and functional. A written record of performance tests on special electrical systems and equipment must show compliance with applicable codes and standards and shall be available to the department upon request.

(B) Installation certification. Certifications, in affidavit form, signed by a registered electrical engineer attesting that the electrical service, electrical equipment, and electrical appliances have been installed in compliance with the approved plans and applicable standards, shall be submitted to the department upon request.

(7) Electrical safeguards. Shielded isolation transformers, voltage regulators, filters, surge suppressors, and other safeguards shall be provided as required where power line disturbances are likely to affect fire alarm components, data processing, equipment used for treatment, and automated laboratory diagnostic equipment.

(8) Services and switchboards. Main switchboards shall be located in an area separate from plumbing and mechanical equipment and shall be accessible to authorized persons only. Switchboards shall be convenient for use, readily accessible for maintenance, away from traffic lanes, and located in dry, ventilated spaces free of corrosive or explosive fumes, gases, or any flammable material. Overload protective devices must operate properly in ambient temperatures.

(9) Panelboard. Distribution panels containing circuit breakers which control lighting and power to essential and normal electrical circuits shall be located within the ASC.

(10) Wiring. All conductors for controls, equipment, lighting and power operating at 100 volts or higher shall be installed in metal or metallic raceways in accordance with the requirements of NFPA 70, Article 517. All surface mounted wiring operating at less than 100 volts shall be protected from mechanical injury with metal raceways to a height of seven feet above the floor. Conduits and cables shall be supported in accordance with NFPA 70, Article 300.

(11) Lighting.

(A) Lighting intensity for staff and patient needs shall comply with guidelines for health care facilities set forth in the Illuminating Engineering Society of North America (IES) Handbook published by the Illuminating Engineering Society of North America, 345 east 47th Street, New York, NY 10017.

(i) Consideration should be given to controlling light intensity and wavelength to prevent harm to the patient's eyes.

(ii) Approaches to buildings and parking lots, and all spaces within buildings shall have fixtures that can be illuminated as necessary. All rooms including storerooms, electrical and mechanical equipment rooms, and all attics shall have sufficient artificial lighting so that all spaces shall be clearly visible.

(iii) Consideration should be given to the special needs of the elderly. Excessive contrast in lighting levels that makes effective sight adaptation difficult shall be minimized.

(B) Means of egress and exit sign lighting intensity shall comply with NFPA 101, §§5-8, 5-9 and 5-10.

(C) Electric lamps which may be subject to breakage or which are installed in fixtures in confined locations when near woodwork, paper, clothing, or other combustible materials, shall be protected by wire guards, or plastic shields.

(D) Ceiling mounted surgical and examination light fixtures shall be suspended from rigid support structures mounted above the ceiling.

(E) Operating rooms shall have general lighting in addition to local lighting provided by special lighting units at the surgical tables. Each fixed special lighting unit at the tables, except for portable units, shall be connected to an independent circuit.

(F) X-ray film illuminators for handling at least two films simultaneously shall be provided in each operating room and special procedure room.

(12) Receptacles. Only listed hospital grade grounding receptacles shall be used in the operating rooms and post anesthesia recovery area. This does not apply to special purpose receptacles.

(A) Installations of multiple ganged receptacles shall not be permitted in patient care areas.

(B) All receptacles powered from the critical branch shall be colored red.

(C) Replacement of malfunctioning receptacles and installation of new receptacles powered from the critical branch in existing facilities shall be accomplished with receptacles of the same distinct color as the existing receptacles.

(D) In locations where mobile X-ray or other equipment requiring special electrical configuration is used, the additional receptacles shall be distinctively marked for the special use.

(E) Each receptacle shall be grounded to the reference grounding point by means of a green insulated copper equipment grounding conductor in accordance with NFPA 70, §517-13.

(F) Each operating room and special procedure room shall have at least four duplex receptacles located convenient to the head of the procedure table and one receptacle on the other walls.

(G) Appliances shall be grounded in accordance with NFPA 99, Chapter 9.

(H) A minimum of one duplex receptacle in each wall shall be installed in each work area or room other than storage or lockers. Each examination and work table shall have access to a minimum of two duplex receptacles.

(13) Equipment.

(A) The following shall be powered from the Type I essential electrical system in accordance with the requirements of NFPA 99, §3-4.2.2.3 when such a system is required for safe operation of the ASC referenced in paragraph (17) of this subsection.

(i) Boiler accessories including feed pumps, heat-circulating pumps, condensate return pumps, fuel oil pumps, and waste heat boilers shall be connected to the equipment system.

(ii) Ventilating system serving preoperative areas, operating rooms, and post anesthesia recovery rooms shall be connected to the equipment system in accordance with the requirements of NFPA 99, Chapter 3.

(B) Laser equipment shall be installed according to manufacturer recommendations and shall be registered with the Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

(14) Wet patient care location. Wet patient care locations shall be protected against shock in accordance with the requirements of NFPA 99, §3-3.2.1.2(f).

(15) Grounding requirements. Fixed electrical equipment shall be grounded in accordance with the requirements of NFPA 99, §3-3.1.2 and NFPA 70, Article 517-13.

(16) Nurses calling systems.

(A) A nurse emergency calling system shall be installed in all toilets used by patients to summon nursing staff in an emergency. Activation of the system shall sound an audible signal which repeats every five seconds at a staffed location and shall activate a distinct visible signal outside of toilet room where the call originated. The visible and audible signals shall be cancelable only at the patient calling station. Activation of the system shall also activate distinct visible signals in the clean workroom, in the soiled workroom, and if provided, in the nourishment station.

(B) A staff emergency assistance calling system station shall be located in each operating room, treatment room, examination room, recovery and preoperative holding area to be used by staff to summon additional help in an emergency. Activation of the system shall sound an audible signal at a staffed location, indicate type and location of call on the system monitor and activate a distinct visible signal in the corridor at the door. Additional visible signals shall be installed at corridor intersections in multi-corridor facilities. Distinct visible and audible signals shall be activated in the clean workroom, in soiled workroom, and if provided, in the nourishment station.

(17) Essential electrical system. The essential electrical system shall comply with the requirements of NFPA 99, §13-3.3.2.

(A) A Type 1 essential electrical system shall be installed, maintained and tested in each facility in accordance with requirements of NFPA 99, Section 3-4; NFPA 101, §12.6.2.9; and National Fire Protection Association 110, Standard for Emergency and Standby Power Systems, 1996 edition.

(B) Fuel storage capacity for an on-site generator for a Type 1 essential electrical system shall allow continuous operation, under full load for eight hours and six months of testing as required by NFPA 99, §3-4.4.1.1(b).

(18) Fire alarm system. A fire alarm system which complies with the requirements of NFPA 101, §12-6.3.4; NFPA 70, Article 760; and NFPA 72, Chapter 3 requirements, shall be provided in each facility.

(A) Fire alarm system shall be installed by or under direct supervision of a fire alarm installer licensed by the State Fire Marshal.

(B) The ASC shall submit a copy of the Fire Alarm Installation Certificate (State Fire Marshal's form FML 009 040392) to the department for all new installations and for any material changes to the existing systems.

§135.53. Preparation, Submittal, Review, and Approval of Plans.

(a) General. Plans and specifications describing the construction of new buildings and additions to or renovations and conversions of existing buildings shall be prepared by design professionals. A functional program narrative which describes the medical procedures to be performed at the facility shall be prepared and submitted by medical professionals.

(b) Preliminary documents. Preliminary documents shall consist of preliminary plans, a functional program narrative and outline specifications. The functional program shall describe, in detail, staffing, patient types, hours of operation, function and space relationships, transfer provisions and availability of offsite services. These documents shall contain sufficient information to establish the project scope, description of functions to be performed, project location, required fire safety and exiting requirements, building construction type, compartmentation showing fire and smoke barriers, services, and the usage of all spaces, areas, and rooms on every floor level.

(1) Preparation of preliminary plans. Preliminary plans shall be of a sufficiently large scale to clearly illustrate the proposed design but not less than one-eighth inch equals one foot. Preliminary plans shall provide the following information.

(A) Area map. A map of the area within a 500 foot radius of the ASC site shall be provided and any hazardous and undesirable location noted in §135.52(a)(3) and (4) of this title (relating to Construction Requirements for New Ambulatory Surgical Centers) shall be identified.

(B) Site plan. A site plan shall be submitted and shall indicate the location of the proposed building(s) in relation to property lines, existing buildings or structures, access and approach roads, and parking areas and drives. Any overhead or underground utilities or service lines shall also be indicated. Any extreme variations in grade shall be indicated.

(C) Floor plans.

(i) New facilities. Each floor plan shall indicate and identify all individual spaces, doors, windows and means of egress. The total floor area on each level involved in construction shall be shown on the drawings. Each smoke compartment area shall be calculated and shown.

(ii) Existing facilities. An overall floor plan showing existing spaces, smoke partitions, smoke compartments, and exits and their relationship to the new construction shall be submitted on all renovations or additions to an existing facility. Plans for remodeling of spaces above or below the level of discharge shall include the level of discharge floor plan which shows all exits at that level. When there are two different levels of discharge, plans for both levels shall be submitted.

(D) Construction type and fire rating. Building sections shall be provided to illustrate construction type and fire protection rating. Section(s) shall be drawn at a scale sufficiently large to clearly present the proposed construction system.

(E) Outline specifications. Outline specifications shall contain a general description of the construction; materials; and finishes not shown on the drawings; type of heating, ventilation and air conditioning system; and type of essential electrical system.

(2) Functional program narrative. The narrative shall outline and describe the medical procedure(s) to be performed and shall describe the scope of the project, type of construction (existing or proposed) as stated in National Fire Protection Association 101, Code for Safety to Life from Fire in Buildings and Structures, 1997 edition (NFPA 101), §12-6.1.6, published by the National Fire Protection Association (NFPA), functional description of each space (may be shown on plans), energy conservation measures included in building, mechanical and electrical designs. All documents published by the NFPA as referenced in this section may be obtained by writing or calling the NFPA at the following address and telephone number: Post Office Box 9101, 1 Batterymarch Park, Quincy, Massachusetts 02269-9101, (800) 344-3555.

(3) Submission of preliminary plans. One set of preliminary plans and outline specifications covering the construction of new buildings, additions, or renovations to existing buildings, shall be submitted to the Texas Department of Health (department) for review and approval. For convenience, preliminary plans may be of a reduced size or scale.

(A) Preliminary plans and specifications must be accompanied by a completed Application for Plan Review.

(B) All deficiencies noted in the preliminary plan review shall be satisfactorily resolved. Written department approval of preliminary plans must be obtained prior to proceeding with final plans and specifications. This requirement also applies to fast-track projects.

(c) Construction documents. Construction documents or final plans and specifications shall be submitted to the department for review and approval prior to the start of construction. All final plans and specifications shall be appropriately scaled and signed by a registered architect and professional engineers licensed by the State of Texas.

(1) Preparation of construction documents. Construction documents shall be well prepared so that clear and distinct prints may be obtained, shall be accurately and adequately dimensioned, and shall include all necessary explanatory notes, schedules, and legends and shall be adequate for contract purposes. Compliance with model building codes and this chapter shall be indicated. The type of construction, as classified by NFPA 20, "Standard on Types of Building Construction," 1995 edition, shall be provided for existing and new facilities. Final plans shall be drawn to a sufficiently large scale to clearly illustrate the proposed design but not less than one-eighth inch equals one foot. All rooms shall be identified by usage on all plans (architectural, fire safety, mechanical, electrical, etc.) submitted. Separate drawings shall be prepared for each of the following branches of work.

(A) Architectural plans. Architectural drawings shall include the following:

(i) a site plan showing all new topography, newly established levels and grades, existing structures on the site (if any), new buildings and structures, roadways, walks, and the extent of the areas to be landscaped. All structures which are to be removed under the construction contract and improvements shall be shown. A general description of the immediate area surrounding the site shall be provided;

(ii) a plan of each floor and roof with identification of all spaces;

(I) when a new ASC is to be located above the ground floor (above level of exit discharge) of a multi-story building, whether new or existing, a floor plan of the entire floor containing the ASC and every floor below shall be submitted. These floor plans shall clearly show exits, such as stairs, to grade discharge. A roof plan shall also be submitted for the building; and

(II) when an existing ASC which is located above the ground floor (level of exit discharge) is to be remodeled and/or expanded, then only the plan of that floor and a plan of the floor of exit discharge need be submitted;

(iii) schedules of doors, windows, and finishes;

(iv) elevations of each facade;

(v) sections through building; and

(vi) scaled details as necessary.

(B) Fire safety plans. Fire safety plans shall be provided in addition to the architectural floor plan(s) for all newly constructed or renovated ASCs. Plans shall be of a sufficiently large scale to clearly illustrate the proposed design but not less than one-sixteenth inch equals one foot and shall include the following information:

(i) separate fire safety plans indicating the designated smoke compartments required by NFPA 101, §12-6.3.7, location of fire rated walls, location and fire resistance rating of each fire and smoke damper, and the required means of egress (corridors, stairs, exits, exit passageways);

(ii) location of all required fire alarm devices, including all fire alarm control panels, manual pull stations, audible and visual fire alarm signaling devices, smoke detectors (ceiling and duct mounted), fire alarm annunciators, fire alarm transmission devices, fire sprinkler flow switches and control valve supervisory switches on each of the floor plans; and

(iii) areas protected with fire sprinkler systems (pendant, sidewall or upright, normal or quick response, and temperature rating shall be indicated), stand pipe system risers and sizes with valves and inside and outside fire department connections, fire sprinkler risers and sizes, location and type of portable fire extinguishers.

(C) Equipment drawings. Equipment drawings shall include the following:

(i) all equipment that is necessary for the operation of the ASC as planned. The design shall indicate provisions for the installation of large and special items of equipment and for service accessibility;

(ii) fixed equipment which is permanently affixed to the building or which must be permanently connected to a service distribution system designed and installed during construction for the specific use of the equipment. The term "fixed equipment" includes items such as sterilizers, communication systems, and built-in casework (cabinets);

(iii) movable equipment (equipment not described in clause (ii) of this subparagraph as fixed). The term "moveable equipment" includes wheeled equipment, plug-in type monitoring equipment, and relocatable items; and

(iv) equipment which is not included in the construction contract but which requires mechanical or electrical service connections or construction modifications. The equipment described in this clause shall be identified on the drawings to ensure its coordination with the architectural, mechanical, and electrical phases of construction.

(D) Structural drawings. Structural drawings shall include:

(i) plans for foundations, floors, roofs, and all intermediate levels;

(ii) a complete design with sizes, sections, and the relative location of the various members;

(iii) a schedule of beams, girders, and columns;

(iv) dimensioned floor levels, column centers, and offsets;

(v) details of all special connections, assemblies, expansion joints; and

(vi) special openings and pipe sleeves dimensioned or otherwise noted for easy reference.

(E) Mechanical drawings. Documentation for selection of the type of heating and cooling system based on requirements contained in §135.52(h)(1) of this title (relating to Construction Requirements for New Ambulatory Surgical Centers) shall be included with the mechanical plans. Mechanical drawings shall include:

(i) complete ventilation systems (supply, return, exhaust), all fire and smoke partitions, locations of all dampers, registers, and grilles, air volume flow at each device, and name identification of all spaces;

(ii) boilers, chillers, heating and cooling piping systems (steam piping, hot water, chilled water), and associated pumps;

(iii) cold and warm water supply systems, water heaters, storage tanks, circulating pumps, plumbing fixtures, emergency water storage tank(s), and special piping systems such as for deionized water;

(iv) nonflammable medical gas piping (oxygen, compressed medical air, vacuum systems, nitrous oxide), emergency shut-off valves, pressure gages, alarm modules, gas outlets;

(v) drain piping systems (waste and soiled piping systems, laboratory drain systems, roof drain systems);

(vi) fire protection piping systems (sprinkler piping systems, fire standpipe systems, water or chemical extinguisher piping system if used);

(vii) piping riser diagrams, equipment schedules, control diagrams or narrative description of controls, filters, and location of all duct mounted smoke detectors; and

(viii) laboratory exhaust and safety cabinets.

(F) Electrical drawings. Electrical drawings shall include:

(i) electrical service entrance with service switches, service feeders to the public service feeders, and characteristics of the light and power current including transformers and their connections;

(ii) location of all normal electrical system and essential electrical system conduits, wiring, receptacles, light fixtures, switches and equipment which require permanent electrical connections, on plans of each building level;

(iii) light fixtures marked distinctly to indicate connection to critical or life safety branch circuits or to normal lighting circuits;

(iv) outlets marked distinctly to indicate connection to critical, life safety or normal power circuits;

(v) telephone and communication, fixed computers, terminals, connections, outlets, and equipment;

(vi) nurses calling system showing all stations, signals, and annunciators on the plans;

(vii) in addition to electrical plans, single line diagrams prepared for:

(I) complete electrical system consisting of the normal electrical system and the essential electrical system including the on-site generator(s), transfer switch(es), emergency system (life safety branch and critical branch), equipment system, panels, subpanels, transformers, conduit, wire sizes, main switchboard, power panels, light panels, and equipment for additions to existing buildings, proposed new ASCs, and remodeled portions of existing ASCs. Feeder and conduit sizes shall be shown with a schedule of feeder breakers or switches; and

(II) complete nurses calling system with all stations, signals, annunciators, etc. with room number noted by each device and indicating the type of system (nurses regular calling system, nurses emergency calling system, or staff emergency assistance calling system); and

(III) a single line diagram of the complete fire alarm system showing all control panels, signaling and detection devices and the room number where each device is located; and

(viii) schedules of all panels indicating connection to life safety branch, critical branch, equipment system or normal system, and connected load at each panel.

(2) Correction of final plan deficiencies. All deficiencies noted in the final plan review shall be satisfactorily resolved before approval of project for construction will be granted.

(3) Construction approval. Construction shall not begin until written approval by the department is received by the owner of the ASC.

(4) Construction document changes. Any changes to construction documents which affect or change the function, design, or designated use of an area shall be submitted to the department for approval prior to authorization of the modifications.

(d) Special submittals.

(1) Designer certification. In an effort to shorten the plan review and approval process, design professionals may submit, at the discretion of the department, a set of final construction documents, the department's completed checklist of licensing requirements and a certification letter which states that the plans and specifications, based on the department's checklist comply with the requirements of this chapter. Project certification letter and checklist shall be signed by the architect and engineer(s) of record.

(2) Fast-track projects. Submittal of fast-track projects shall be at the discretion of the department and shall be submitted in not more than three separate packages. Each package shall be approved by the department before construction is begun on that package.

(A) First package. The first package shall include:

(i) a map showing the location of the proposed site and the adjacent surrounding area, at least two miles in radius,

which identifies any hazardous and undesirable location noted in §135.52(a)(3) of this title;

(ii) preliminary architectural plans and a detailed building site plan showing all adjacent streets, site work, underslab mechanical, electrical, and plumbing work, and related specifications; and

(iii) foundation and structural plans.

(B) Second package. The second package shall include complete architectural plans and details with specifications and fire safety plans as described in subsection (c)(1)(A) and (c)(1)(B) of this section.

(C) Third package. The third package shall include complete mechanical, electrical, equipment and furnishings, and plumbing plans and specifications, as described in subsection (c)(1)(E)-(F) of this section.

(3) Fire sprinkler systems. Fire sprinkler systems, when provided, shall comply with the requirements of NFPA 13, "Standard for the Installation of Sprinkler Systems," 1996 edition. Fire sprinkler systems shall be designed or reviewed by an engineer who is registered by the Texas State Board of Registration for Professional Engineers in fire protection specialty or is experienced in hydraulic design and fire sprinkler system installation. A short resume shall be submitted if registration is not in fire protection specialty.

(A) Fire sprinkler working plans, complete hydraulic calculations and water supply information shall be prepared in accordance with NFPA 13, §§6-1, 6-2 and 6-3, for new fire sprinkler systems, alterations of and additions to existing systems.

(B) Installation certification of changes to an existing system is not required when such change involves only the relocation of fewer than 20 heads.

(C) One set of fire sprinkler working plans (sealed by the engineer), calculations and water supply information shall be forwarded to the department together with the engineer's certification letter stating that the sprinkler system design complies with the requirements of NFPA 13. Certification of the fire sprinkler system design shall be submitted prior to system installation.

(c) Construction and inspections.

(1) Major construction. Construction, of other than minor alterations, shall not commence until the final plan review deficiencies have been satisfactorily resolved, the appropriate licensing fee has been paid, and the department has issued a letter granting approval to begin construction. Such authorization does not constitute release from the requirements contained in this chapter. If the construction takes place in or near occupied areas of an existing ASC, adequate provision shall be made for the safety and comfort of occupants during construction.

(2) Construction commencement notification. The architect of record shall provide written notification to the department when construction will commence.

(3) Completion. Construction shall be completed in compliance with the construction documents including all addenda or modifications approved for the project.

(4) Certification of sprinkler system installations. Upon completion of the fire sprinkler system installation and any required corrections, written certification by the engineer, stating that the fire sprinkler system is installed in accordance with NFPA 13 requirements, shall be submitted prior to or with the written request for the final construction inspection of the project.

(5) Construction inspections. The department shall determine the number of required inspections necessary to complete all proposed construction projects. Normally, a minimum of two construction inspections of the project shall be scheduled for the purpose of verifying compliance with requirements contained in §135.51 of this title (relating to Construction Requirements for an Existing Ambulatory Surgical Centers) and §135.52 of this title and the approved plans and specifications.

(A) Intermediate and final inspections shall be requested only by the architect of record or the licensee by the submission of an "Application for Construction Inspection" form supplied by the department. The department must receive such request for inspections at least three weeks prior to the requested inspection date. To save time, these inspection request forms may be faxed to the department. Inspection requests by contractors will not be honored.

(i) The intermediate construction inspection shall be requested at approximately 80% completion. All major work above the ceiling shall be essentially completed at the time of the intermediate inspection but ceilings should not yet be installed.

(ii) The final construction inspection shall be requested by the architect of record or the licensee at 100% completion. One-hundred percent completion means that the project is completed to the extent that all equipment is operating in accordance with specifications, all necessary furnishings are in place, and patients could be admitted and treated in all areas of the project. Requests for final inspections shall follow the same procedure as noted above for the 80% intermediate inspection.

(B) During the final construction inspection by the department, the inspector will determine if the project can be approved for patient occupancy. If the inspector finds that it cannot be approved for occupancy, the facility will have to schedule another final inspection after corrections are made. If the inspector finds only a few minor deficiencies which do not jeopardize patient health, safety and welfare, the inspector may approve the project for occupancy based on an acceptable written "Plan of Correction" signed by the licensee. Depending on the number and nature of the deficiencies cited in a "Plan of Correction," the inspector may require that a "follow-up" reinspection be conducted to confirm correction of all deficiencies cited.

(6) Approval for occupancy. Patients shall not occupy a new structure or a remodeled or renovated space until the appropriate approval has been received from the local building and fire authorities and until all required documentation has been received by the department.

(7) Resubmittal of construction documents. When construction is delayed for longer than one year from the plan approval date, construction documents shall be resubmitted to the department for review and approval. The plans shall be accompanied by a new Application for Plan Review.

(8) Project cancellation. The licensee or the owner shall notify the department in writing when a project has been canceled or abandoned.

§135.54. Tables.

(a) Table 1. Ventilation and Pressure Relationship Requirements.

Figure: 25 TAC, §135.54(a)

(b) Table 2. Filter Efficiencies for Ventilation and Air-Conditioning Systems.
Figure: 25 TAC, §135.54(b)

(c) Table 3. Station Outlets for Oxygen, Vacuum (Suction), and Medical Air Systems.
Figure: 25 TAC, §135.54(c)

(d) Table 4. Flame Spread and Smoke Production Limitations for Interior Finishes.
Figure: 25 TAC, §135.54(d)

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 November 23, 1998.

TRD-9817928
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: December 13, 1998
Proposal publication date: July 17, 1998
For further information, please call: (512) 458–7236

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Subchapter D. New Construction Requirements for Ambulatory Surgical Centers

25 TAC §§135.61–135.67

The repeals are adopted under the Texas Ambulatory Surgical Center Licensing Act, Health and Safety Code, Chapter 243, which provides the Board of Health (board) with the authority to adopt rules governing the licensing and regulation of ASCs; and §12.001, which provides the board with the authority to adopt rules to implement 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 229. Food and Drug

Subchapter X. Licensure of Device Distributors and Manufacturers

25 TAC §§229.432, 229.433, 229.441, 229.443

The Texas Department of Health (department) adopts amendments to §§229.432, 229.433, 229.441, and 229.443, concerning the licensure of device distributors and manufacturers. The amendments adopt by reference 21 Code of Federal Regulations (CFR), Parts 814, 820, 897 and Subchapter J. The sections are adopted without changes to the proposed text as published in the July 31, 1998, issue of the *Texas Register* (23 TexReg 7704), and therefore, the sections will not be republished.

The amendments clarify and update minimum standards for device distributors and manufacturers in order to conform with the U.S. Food and Drug Administration (FDA) Modernization Act of 1997 and with revisions to the good manufacturing practices established by the FDA. The amendments define more clearly the department's authority to inspect and copy device distributor and manufacturer records currently required by federal regulations. Furthermore, the amendments adopt federal regulations for distributors and manufacturers of cigarettes and smokeless tobacco products. The amendments also contain language to clarify and conform the definitions of "distributor" and "manufacturer" with the statutory intent in Health and Safety Code, Chapter 431.

No comments were received regarding the amended sections as proposed.

The amendments are adopted under Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of this chapter, 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.

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 295. Occupational Health

Subchapter C. Texas Asbestos Health Protection

25 TAC §§295.31-295.35, 295.37-295.62, 295.64–295.66, 295.68-295.71, 295.73,

The Texas Department of Health (department) adopts amendments to §§295.31 - 295.35, 295.37 - 295.56, 295.58 - 295.62, 295.64 - 295.65, 295.68 - 295.71, 295.73, and new 295.57 and 295.66 concerning licensing and accreditation for asbestos activities in public and commercial buildings. Sections 295.31 - 295.34, 295.37 - 295.38, 295.40 - 295.43, 295.45, 295.47 - 295.51, 295.54 - 295.62, 295.64 - 295.66, and 295.68 are adopted with changes to the proposed text as published in the May 29, 1998, issue of the *Texas Register* (23 TexReg 5619). Sections 295.35, 295.39, 295.44, 295.46, 295.52 - 295.53, 295.69 - 295.71, and 295.73 are adopted without changes and therefore will not be republished.

These rules will bring Texas into compliance with the U.S. Environmental Protection Agency's (EPA) Model Accreditation Plan (MAP). It is necessary for Texas to come into compliance with the EPA in order to regain the authority to approve our own training providers. Obtaining this authorization from EPA will also enable Texas to remain eligible to receive future federal funding for the state asbestos accreditation program to help ensure that all of our asbestos workforce is properly trained to abate asbestos correctly and therefore help ensure public health from unnecessary exposure to asbestos fibers.

The rules conform with the Environmental Protection Agency's Asbestos School Hazard Reauthorization Act (ASHARA) and the MAP which require asbestos related work in public and commercial buildings be performed by accredited persons. Specifically, all buildings subject to the MAP would also be subject to Texas Asbestos Health Protection Rules (TAHPR). Industry groups affected by the proposed amendments have voiced their opinion concerning the department enforcing the MAP under the TAHPR and agree with it as long as the state rules are no more stringent than the MAP. The final rules are not more stringent.

These rules provide for new definitions, new requirements for accreditation and deaccreditation in commercial buildings, requirements to pass an exam before a license is issued, new requirements for apprenticeship, requirement for a class photo for training courses, added pollution liability insurance, new demolition and renovation notification fee schedule, more specific guidance for sampling for asbestos, and more specific guidance for abatement project clearance procedures.

The following is a summary of comments received. Following each comment is the department's response.

Comment: Concerning the rule changes in general, two commenters suggested separating the scope for commercial buildings in order to eliminate the need to reference commercial buildings and public buildings in the same sections of the rules and reduce the confusion.

Response: The department agrees that this would make the rules easier to follow. However, the extent of the changes necessary to properly accomplish this is too substantial to make at this time. This will be strongly considered for future changes. No change was made as a result of these comments.

Comment: Concerning §295.31(c)(1)(B), one commenter felt that the exclusion of industrial and manufacturing facilities in this section was confusing.

Response: The exclusion in this section is from the requirements associated with a public building since an industrial or manufacturing facility is not a public building. These facilities are subject to the requirements of subsection (c)(2) and (c)(3). No change was made as a result of this comment.

Comment: Concerning §295.31(c)(1)(B), one commenter suggested that language be added to ensure that pipelines, manholes, vaults, or similar structures, facilities, or installations that are not contained within and integral to a commercial or industrial building are not included in the definition of public and commercial buildings.

Response: The definition of public building already excludes commercial buildings. The definition of commercial building says the interior space which includes exterior hallways connecting buildings, porticos, and mechanical systems used to condition interior space is subject to these rules. This definition is directly from the MAP and has been changed so as not to be redundant in that public buildings have been taken out of the definition by the absence of such buildings as office buildings, apartment buildings, colleges, museums, airports, etc., because these buildings already fit the definition of the public building. If a pipe is part of the building system then it is part of the building. Because the definition includes mechanical systems that condition the interior space, those systems, such as cooling towers which are not contained within the building are part of the commercial building. No change was made as a result of this comment.

Comment: Concerning §295.31(c)(2), several commenters said that §295.34(c) is more stringent than NESHAP and recommended that it be changed to agree with NESHAP. Two commenters suggested to add the following: "Work practices and accreditation requirements for asbestos related activities in commercial buildings shall be at least as stringent as, but no more stringent than applicable federal laws and regulations."

Response: The department agrees. Section 295.34(c)(2) required that an inspection is performed by an accredited inspector for facilities as well as in commercial buildings. This would be more stringent for NESHAP facilities, and facilities have therefore been addressed in a new §295.34(c)(3).

Comment: Concerning §295.31(c)(3), several commenters stated that the exception listed for §295.64 subsections (a)-(e) and (i)-(j) is incorrect and should be for §295.64(f) and (g). Another commenter said that §295.64(c) does not apply for accreditation for operations and maintenance which is a TAHPA requirement only.

Response: The department agrees and adds that §295.64(h) also does not apply and has made the corrections to §295.31(c)(3). Regarding operations and maintenance being a TAHPA requirement only, the department has reworded §295.64(c) to indicate accreditation can be obtained without licensing.

Comment: Concerning §295.31(c)(3), several commenters stated that the reference to §295.34 should be limited to subsections (e) and (g). The other subsections apply to NESHAP and TAHPA only.

Response: The department agrees and adds that §295.34(c) applies as well, and added subsections (c), (e), and (g) to §295.34 in §295.31(c)(3). When the other regulations require a survey in a commercial building, that survey must be performed by an accredited inspector.

Comment: Concerning §295.31(c)(3), two commenters recommended adding "...295.66 and 295.68 apply. Work practices and accreditation requirements for asbestos related activities shall be at least as stringent as, but no more stringent than applicable federal laws and regulations for buildings which are not otherwise subject to this title".

Response: The department disagrees. By choosing these words, a minimum standard is set for compliance. This is the minimum that the person is required to do and the maximum that he can do. To use the suggested language seeks to regulate the department instead of the person performing the abatement and further ties the hands of the abater to do only the minimum or be in violation by going beyond. If the regulated community does not wish the department to impose higher standards in this instance, they only have to look at the final language. It

sets a minimum standard. There is nothing here that gives the department the authority to impose greater standards. No change was made as a result of this comment.

Comment: Concerning §295.31(c)(3), one commenter asked what "in a manner consistent with" means.

Response: The department intends to enforce the requirements of the MAP. Where the MAP requires accreditation and a license is not required, then the minimum accreditation will be required.

Comment: Concerning §295.32, several commenters asked about the status of some definitions of "Act, Air monitoring, AHERA, AIHA, Asbestos, Asbestos abatement, Asbestos abatement activity, Asbestos abatement supervisor, Asbestos abatement contractor, Asbestos consulting activities, Asbestos-containing waste material, Asbestos exposure, Asbestos project design, Asbestos-related activity, Asbestos removal, Asbestos survey, Board, Building owner, CFR, Commercial asbestos, Commissioner, Containment, Department, Designated person, Encapsulation, Enclosure, EPA, Environmental Protection Agency (EPA) regulations, Facility, Facility owner, Friable material, HVAC, Independent third-party Air monitor, Individual, Installation, License, Licensee, Management plan, Model accreditation plan, NESHAP, NIOSH, NVLAP, Operations and maintenance (O&M) contractor, Operations and maintenance (O&M) manual, OSHA, OSHA Regulations, PAT, PCM, PLM, Person, Public building, Regulated area, Renovation, TEM, Transportation of asbestos containing material (ACM), and Working days".

Response: The department had omitted these definitions from the rules as no change was being proposed to them. However since the new numbering system is now required, those definitions should have been included with the associated new numbers. These unchanged definitions are therefore included in this final rule together with the appropriate changes in numbering.

Comment: Concerning §295.32, one commenter suggested adding a definition for "licensed" as follows: an accredited person granted a license by TDH to perform in a field of asbestos related activities as required by and in a manner consistent with these rules.

Response: The department does not see the need to add a definition for a term which is intrinsic. The requirements for licensure in §295.31(e) and the use of the term "licensed" preceding asbestos abatement contractor, asbestos inspector, asbestos training provider, etc., are used in a way that does not need further definition. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(1), one commenter suggested adding the phrase, "or who has taken the refresher courses specified in the MAP" after the sentence which ends "within the last year."

Response: A approved asbestos model accreditation plan training course includes applicable refresher courses. The department has changed this definition to include state approved courses.

Comment: Concerning proposed §295.32(2) now renumbered to §295.32(3), definition of "Adequately wet," several commenters suggested that the definition be more specific to describe that for material to be adequately wet it must be wet "clear through with no dry material". Two commenters suggested deleting the last sentence of the definition to reduce ambiguity. One commenter suggested that it is extremely difficult, if not impossible to wet certain material "all the way through."

Response: The department agrees, and has made changes to the definition, now listed as new (3) in order to convey that no part of the material may be dry. The department agrees that not all material can be wetted "all the way through". However, every effort must be made to adequately wet material, and where it is possible to wet the material all the way through, it must be done.

Comment: Concerning proposed §295.32(3) now renumbered to §295.32(13), definition of "Asbestos-containing building material (ACBM)," one commenter suggested that the definition is not necessary, since it is virtually the same as Asbestos-containing material. One commenter suggests that friable ACBM could better be described as the release of asbestos fibers, fibrils, bundles and/or clusters.

Response: The department disagrees that the definition is unnecessary. There is a need to keep the definition to establish the difference between a material that is asbestos containing and an asbestos containing building material in order to be in compliance with the MAP, where the term ACBM is used. Additionally, certain rules only apply specifically to building materials and not necessarily to ACM in general. Regarding the comment about friable ACBM, the definition of friable material is sufficient. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(4) now renumbered to §295.32(14), definition of "Asbestos-containing material," several commenters noted that EPA Section 40 CFR 763 Subpart F is "Reserved" and therefore should not be referenced, and 40 CFR 763 Subpart E, Appendix A contains the transmission electron microscopy (TEM) analysis for air samples, with no reference to bulk asbestos analysis. It was recommended that TDH reference "Method for the Determination of Asbestos in Bulk Building Materials." EPA/600/R-93/116, July 1993.

Response: The department agrees and has made the appropriate changes as recommended to new §295.32(14).

Comment: Concerning proposed §295.32(5) now renumbered to §295.32(20), definition of "Asbestos reporting unit (ARU)," several commenters suggested that we change "27 cubic feet" to "35 cubic feet" to be consistent with the Environmental Protection Agency (EPA) National Emission Standard for Hazardous Air Pollutants (NESHAP). One commenter suggested adding "for public buildings or RACM for facilities as defined under NESHAP."

Response: The department agrees with changing 27 cubic feet to 35 cubic feet, and that the ARU needed clarification as suggested, and has made the appropriate changes to new §295.32(20).

Comment: Concerning proposed §295.32(6) now renumbered to §295.32(23), several commenters noted that the term "building owner" is used in §295.34(d)(4) and §295.61(b). The commenter suggested that we remove the words "public or commercial" from the definition of "building owner" and refer to the building as a public building under each specific section as needed to distinguish when we are referring to a public building or use "public and commercial" in order to specify when we mean both public and commercial. As it is, the department has referred to a building owner in the referenced sections when they should have said "public" building owner. One commenter was con-

cerned that the definition has become more stringent for commercial buildings and suggested adding the words, "public and/or commercial" to each paragraph as applicable.

Response: The department has searched the rules for all occurrences of the term building owner and has made corrections to §§295.32(5) now renumbered to §295.32(20), 295.32(62), 295.34(d), 295.58 - 295.60, 295.61(b) and 295.64(b) to ensure that where there is a requirement for a public building owner but not for the commercial building owner, that the word "public" was added prior to the word building.

Comment: Concerning proposed §295.32(7) now renumbered to §295.32(27), definition of "Commercial building," one commenter wondered what part of the industrial buildings were included. Also the commenter stated that exterior hallways and outside mechanical systems are not inside the building and should not be in the state regulations which should stay limited to the inside of the building shell. Another commenter suggested that, since the definition of commercial building is defined differently in Webster's dictionary, it could cause confusion.

Response: The department thinks the definition of "Commercial building" is clear as to the areas intended to be covered and no change was made to new §295.32(27). New §295.32(46), definition of "Industrial building," was made by deleting the words "The interior space of any" which should clear up any misconception.

Comment: Concerning proposed §295.32(9) now renumbered to §295.32(31), two commenters suggested that "demolition" should include commercial buildings.

Response: The definition of "facility", new §295.32(39), includes commercial buildings. Since facility is part of the definition of demolition, so is a commercial building. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(10) now renumbered to §295.32(34), definition of "employee," one commenter wondered if "wage reporting and tax responsibility" included filing a Form 1099 with the IRS for an independent contractor.

Response: The department agrees that tax reporting requirements do not define who an employee is. It is important to distinguish who the individual employee is so that we can recognize who is the designated person for the company and is responsible for the actions of that company. It is also important in order to determine who is responsible to the employee. In order to clear up any confusion the department has reworded the definition of employee in new §295.32(34). An employee is a person who has a relationship with an entity that could result in the entity being liable for that person's acts or judgments.

Comment: Concerning proposed §295.32(12) now renumbered to §295.32(42), definition of "friable material," one commenter felt that this definition would require floor tile to be removed before demolition because it would become friable as compared to the NESHAP which allows a person to leave it in the building if it is in good condition.

Response: The definition is intended to be as stringent as the MAP and in no way changes what is allowable under the NESHAP. If material becomes friable, then it becomes regulated asbestos containing material (RACM) as defined in the NESHAP. The NESHAP specifically states that RACM need not be removed before a demolition if it is Category I nonfriable ACM that is not in poor condition and is not friable. The department interprets this to mean that the material is in good condition and will not be damaged in the demolition process to the point that it becomes friable and therefore regulated. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(13) now renumbered to §295.32(47), definition of "industrial building," one commenter said that since commercial building is defined to mean the interior space of an industrial or federal government owned building, then the words "The interior space of" should be deleted as they are redundant.

Response: The department agrees and has removed them in new §295.32(47).

Comment: Concerning proposed §295.32(13) now renumbered to §295.32(47), one commenter suggested we add "because of conditions that may cause serious bodily injury or death" at the end of the definition. One commenter asked if telecommunications operations are considered an "industrial process?" and are "industrial or manufacturing operations or processes" limited to those in certain SIC codes?

Response: The department disagrees. The definition of Industrial building is intended to define the subset that is not a Public or Federal government owned building but is a Commercial building. This includes manufacturing operations that are not public access and are not hazardous to public health. Telecommunications facilities that limit access to public because of the process are industrial buildings by definition. SIC codes have no relevance in determining the applicability of the definition. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(15) now renumbered to §295.32(50), definition of layer, one commenter suggested adding "suspect" before constituent because some times there are non-suspect layers of a suspect material. One commenter suggested that, since a bulk sample may or may not contain asbestos, that we make it just "bulk sample." One commenter suggested we refer to an English dictionary for a more suitable definition of layer. One commenter suggested the following definition of Layer: "Any constituent of a bulk sample that exhibits different physical properties such as color or texture and can be readily separated from the rest of the sample for analysis. Reason: The bulk sample may not contain asbestos; composition is a chemical, not a physical, property; the purpose, not the method of separating the layers is important."

Response: The department disagrees with adding "suspect" to the definition. The purpose is to define layer and not the method for analysis of discrete strata. Analysis is defined in the methods referenced in new §295.32(48). With respect to the comment about removing "asbestos" from the definition, a material sent for asbestos analysis is an asbestos bulk sample; therefore, the definition is appropriate. As for referring to an English dictionary, the department has referred to several, and has found no more suitable definitions. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(16) now renumbered to §295.32(53) and §295.32(17) now renumbered to §295.32(55), definitions of major and minor fiber release episode, two commenters suggested adding "resulting in visible emissions" to the end of each definition to be consistent with the National Emission Standard for Hazardous Air Pollutants (NESHAP).

Response: The department agrees and has added "resulting in a visible emission" to the definitions in new §295.32(53) and §295.32(55) to be consistent with the MAP.

Comment: Concerning proposed §295.32(19) now renumbered to §295.32(61), one commenter noted that this was a new definition and wanted to know what happened to the old definition.

Response: The new definition for O&M was proposed without showing that the original definition was proposed to be deleted. Proposed §295.32(19) is now §295.32(61) which is followed by the old definition of Operations and maintenance (O&M) shown as deleted.

Comment: Concerning proposed §295.32(20) now renumbered to §295.32(66), one commenter noted that the definition of owner and operator is identical and asked if this was intentional?

Response: The department took this definition from the NESHAP. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(21) now renumbered to §295.32(69), one commenter recommended that TDH set a permissible exposure limit of 0.1 f/cc for an 8 hour time weighted average.

Response: The department agrees that there should be a time-weighted average as it applies to workers affected by our rules. By referencing Occupational Safety and Health Administration (OSHA) standards, in this definition, the department intends the PEL be equal to the OSHA requirements which is based on a time weighted average . This is the PEL for workers and is not to be applied to the public. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(22) now renumbered to §295.32(70), several commenters think that the definition of "plans and specifications" should allow an alternative to architectural drawing for less complex projects (i.e., field drawings, diagrammatic drawings, etc.) that have sufficient detail to discern the location of the asbestos containing material and how to set up abatement. One commenter recommended deleting "architectural" and adding "and the methods to be used" to the end of the definition.

Response: The department agrees that the definition should allow for alternatives to architectural drawings, and insists that all plans and specifications, including the alternatives, be site-specific. The definition in new §295.32(70) has been modified. The department disagrees with deleting requirements for drawings.

Comment: Concerning proposed §295.32(23) now renumbered to §295.32(76), one commenter suggested that a response action shall also insure non-friable ACM is not made friable as a result of or during the course of the action. Another commenter suggested that the definition should read "asbestos fibers" instead of "friable ACBM."

Response: The department assumes that the first comment is referring to preventing a Response Action by preventing creation of friable material. If friable material is created, the project becomes a response action. The department does not intend to define response action in a way to be more stringent than the MAP. No changes were made as a result of these comments.

Comment: Concerning proposed §295.32(25) now renumbered to §295.32(78), definition of "small-scale, short duration activities (SSSD)," several commenters questioned where the limitation of 64 square feet came from and stated that there needs to be more uniformity between the various regulations. They could not find this figure in the federal regulations and felt that it was too large. One commenter thought that the definition should not include quantity restrictions since many projects would have to be considered abatement rather than operations and maintenance activities. Several other commenters wrote that the OSHA regulations were more stringent for Class III work, limiting the amounts to that which can be contained within a single glove bag or single waste bag. One commenter thought that SSSD was limited to emergency actions. One commenter suggested that language needs to be added to allow for small removals of material in a non-friable manner without a mini enclosure (i.e., floor tile), and it was suggested that the definition be expanded in allow installation or retrofit of fire alarm, sprinklers, air ducts, etc. One commenter suggested using the definitions in the MAP. One commenter suggested changing "... insulation on beams or above ceilings" to "fireproofing on structural steel, such as beams, columns and decks."

Response: Sixty-four square feet is a limit that the department proposed in order to define a limit not set forth in the MAP. However, the department agrees that this is more stringent than the MAP and is unnecessary. A major fiber release episode involves greater than 3 square feet or 3 linear feet but is only applies to emergency situations. A prefabricated mini-enclosure is one which is a stand alone unit and does not use the building walls as a barrier or for the support of the plastic sheeting. The comment concerning OSHA regulations being more stringent is not relevant for the purpose of this definition, because the definition applies to commercial buildings for meeting the purpose of MAP compliance. As far as allowing flooring to be removed without a mini-enclosure, this would not be an issue unless the flooring is or becomes friable. If the flooring is friable, then removal of any material is a response action, and unless it is a SSSD, it would have to be performed by an accredited person. The comment related to allowing installation or retrofit of fire alarm, sprinklers, air ducts, etc. would be considered renovation and would not be an SSSD. Regarding changing the definition to redefine insulation on beams as structural steel, such a definition is too specific, since there could be insulation on concrete beams. To accommodate these comments and to make the definition more clear, the definition of SSSD from the MAP was incorporated by modifying the format but not the content, and the changes are reflected in new §295.32(78).

Comment: Concerning proposed §295.32(28) now renumbered to §295.32(81), definition of "survey," one commenter suggested that this definition should be inspection.

Response: The department agrees. It is the same definition used for inspection. Both survey and inspection are defined exactly alike because both of these terms are used to describe the same activity. No change was made as a result of this comment.

Comment: Concerning §295.33(a)(1), one commenter suggested that the date be as amended November 20, 1990, and the department needs to add "and Appendix A, June 19, 1995."

Response: By referencing the most current edition from the Government Printing Office the public was given an opportunity to review, determine applicability, and comment on this federal regulation. Further, by saying "as amended" the rules automatically adopt any future amendments made to those federal

regulations. The appendix is part of Subpart M and does not need to be referenced specifically. No change was made as a result of this comment.

Comment: Concerning §295.33(a)(2), several commenters suggested revising this to 40 CFR 763, Subpart E and Appendices. Another commenter cited that the correct date for Subpart E is October 30, 1987 and the correct date for Appendix C to this regulation is February 3, 1994.

Response: By referencing the most current edition from the Government Printing Office the public was given an opportunity to review, determine applicability, and comment on this federal regulation. Further, by saying "as amended" the rules automatically adopt any future amendments made to those federal regulations. No change was made as a result of this comment.

Comment: Concerning §295.33(a)(9), one commenter recommended adoption of the new standard dated January 8, 1998.

Response: The definition was marked for deletion under the proposed rules. The reason for this deletion is that specific work practices are addressed in §§295.58, 295.59, and 295.60 and where a specific requirement from 29 CFR 1926.1101 is needed, it is referenced in that section of the rule. No change was made as a result of this comment.

Comment: Concerning §295.33(c), one commenter suggested replacing Texas Health Asbestos Protection Act with Texas Asbestos Health Protection Act.

Response: The department agrees and has made the appropriate changes to this section. The proper name of the act is the Texas Asbestos Health Protection Act.

Comment: Concerning §295.34(a), several commenters suggested that the requirement for building owners to notify all persons in writing who are to perform any type of maintenance, custodial, renovation, or demolition work (regardless of whether or not their activity will disturb ACBM), of the presence and location of ACBM will be a difficult and time consuming exercise which serves no purpose. They suggested using the following changed language: "Where asbestos-containing building material (ACBM) may be disturbed by maintenance, custodial, renovation or demolition work, the building owner shall notify all affected persons of the presence and location of the ACBM." One commenter suggested that we add "occupants" to the list of those persons which must be notified and that the notification not be in writing. Two commenters suggest that §295.34(a) appears to be more stringent than paragraph §295.34(b)(2) and could cause enforcement conflicts. One commenter recommended specifically adding the installation of utilities by outside contractors such as telephone lines, computer lines, and television cables, because it is an area that is often overlooked, though it is implied in the rules. This would help building managers in their duties by providing the additional guidance to the building owners.

Response: The department agrees that informing all persons in writing would be difficult to achieve and has modified this requirement. The building owner must notify and document the method and date that notification was conveyed to the person(s). The department stresses that building owners must inform building workers about the location and physical condition of the ACM that they might disturb, and stress need to avoid disturbing the material. Occupants should be notified for two reasons: (1) building occupants should be informed of any potential hazard in their vicinity; and (2) informed persons are less likely to unknowingly disturb the material and cause fibers to be released into the air. Building owners can inform occupants about the presence of ACM by distributing written notices, posting signs or labels in a central location where affected occupants can see them, and holding awareness or information sessions. To address the apparent conflict between subsections (a)and (b), the department will consider a change to paragraph (b) during later rulemaking changes. Since there was not a proposed change to this section of the rules published for public comment, the department is unable to address or change this section at this time. Therefore, no change was made as a result of this comment. However, because there is a requirement to notify in writing or document the discussion (b)(2) does not relieve the building owner of this responsibility to do it in writing. The department, nevertheless, will be mindful of this comment in any future purposed rule amendments. The last commenter makes a valid point, and the future changes will include the requirement that the building owner notify anyone who might disturb ACBM.

Comment: Concerning §295.34(a), one commenter suggested that changing the last sentence to read, "...abate all friable asbestos-containing materials or any asbestos-containing materials which are disturbed by the renovation or demolition and which may... ." One commenter suggested changing the last sentence to read, "Prior to initiating demolition or renovation processes in a work area, building owners are required by 40 CFR Part 61, Subpart M to abate all friable ACBM or asbestos containing materials which may become regulated asbestos containing materials (RACM)." One commenter felt this statement should be clarified to indicate that if disturbance of ACM occurs during renovation or demolition, then the owner shall be required to abate only the ACM that has been or will be impacted by the renovation or demolition. One commenter stated the last sentence is confusing, and asked if this statement requires the building owner to remove all friable asbestos containing material, even if it will not be disturbed during the activity. The commenter also asked if non-friable asbestos containing materials have to become friable before they are required to be abated. One commenter felt that the last sentence should say that the building owner is required to "clean up the area of disturbance" instead of "abate...."

Response: The department agrees it is somewhat unclear and has made the appropriate changes to clarify that ACBM in public buildings must be abated in accordance with the TAHPR and that RACM in a NESHAP facility must be addressed in accordance with the NESHAP.

Comment: Concerning §295.34(c), one commenter stated that the word "dismantling" is not defined in the regulation and recommended that it be added.

Response: Dismantling is a form of renovation activity, such as removing a partition wall or suspended ceiling, in which old materials are not replaced with new. This will be considered for later changes. No change was made as a result of this comment.

Comment: Concerning §295.34(c), one commenter said that the requirement to sample "all immediately surrounding areas" should be changed to "those areas that could be disturbed". Several commenters said that the requirement to sample "all immediately surrounding areas" should be changed because it is not defined well enough.

Response: The department agrees with the concept and has made appropriate changes to the section by adding the words "which would likely be disturbed by the actions necessary to perform the project" to the section to emphasize that the purpose of any project specific survey is to find all potential asbestos hazards. If a person wishes to remove a pipe but fails to see that structural fireproofing could be disturbed due to the pipe passing close by a beam, the fireproofing may very well be disturbed as the pipe is removed. A person must take into consideration what actions are required for the project and if those actions may impact a material which is not directly part of the project.

Comment: Concerning §295.34(c), several commenters stated that requiring all material to be presumed as asbestos in structurally unsound facilities would significantly increase the cost of transportation and disposal of waste which has previously been considered construction waste. EPA Region VI does not regulate demolition waste from structurally unsound facilities as Class I waste under NESHAP. The commenters recommended changing to: "... If an Inspection cannot be performed before demolition due to the building being structurally unsound and unsafe to enter, all suspect material must be presumed to contain asbestos. Demolition of structurally unsound facilities must be performed in accordance with 40 CFR 61.145(a)(3), (c)(1)(iii), (c)(9) and (c)(10). Waste material from demolition of structurally unsound facilities shall be disposed of in accordance with 40 CFR 61.150(a)(3)." One commenter suggested changing the wording to "all materials suspected of containing asbestos must be presumed to be ACM."

Response: Cost has no relationship to public safety. EPA requires that asbestos containing waste material, from demolition of an unsound facility, be disposed of in accordance with 40 CFR 61.154. The department disagrees with the second comment, since it would be impossible to view all material in the pile of demolition debris and determine if it is suspect. No change was made as a result of this comment.

Comment: Concerning §295.34(c), one commenter stated, "in the event that a fire, explosion, or natural disaster demolishes a public building or commercial building which contains asbestos or on which as asbestos survey has not been performed and as a result of the incident cannot now be performed due to structural instability, is it TDH's position that the entire material must be considered asbestos containing and disposed of accordingly? Would this presumed asbestos containing material have to also be presumed to be friable as well?"

Response: The whole building would be presumed ACBM, unless materials could be separated and sampled, prior to disposal. No change was made as a result of this comment.

Comment: Concerning §295.34(c)(1), several commenters suggested to replace "Under no circumstances will less than three samples for each homogeneous area per floor be collected" with "Perform inspection and surveys in accordance with 40 CFR 763.86". Other commenters felt that three samples per floor were too many and that the rules should allow the surveyor to determine the number necessary.

Response: The requirement to survey a building other than a school comes from NESHAP and OSHA regulations. The NESHAP does not specify the number of samples to be taken. OSHA requires a minimum of three samples per homogeneous area. It is conceivable that the public building owner may want additional samples to more fully prove the absence of asbestos in the building. The current proposed wording only suggests that the inspection be performed in accordance with AHERA. As far as requiring less than three samples per floor, it should be noted that buildings may be constructed with different material from floor to floor. The visual appearance that each floor is the same is not enough to verify that this is indeed the case. It would be prudent to perform a survey in multi-story buildings which attempts to confirm that the material used is consistent from floor to floor. One sample from each floor for each area which exhibits visual indications of being homogeneous with respect to a like material on another floor would eliminate this concern while not requiring three times as many samples. If one sample confirms that a homogeneous area contains asbestos, then no further samples would be required. The consultant should inform the building owner that assumptions are being made about the rest of the material if limited sampling is used to determine that the material contains asbestos. A change was made to the section by removing the words "per floor" to require at least three samples per homogeneous area.

Comment: Concerning §295.34(c)(1), one commenter stated that a licensed Inspector is no more qualified to examine material safety data sheets (MSDS) for building materials than an architect or engineer, and it was suggested that the department add architect and engineer to the list of persons being able to compile the information and make a statement that no ACBM was used in construction. One commenter stated that they have seen mistakes on MSDS sheets and feel samples are needed and analysis is needed to be sure they do not contain asbestos.

Response: The department agrees to include an architect or engineer as reflected in §295.34(c)(1). An architect or engineer certainly can make the determination.

Comment: Concerning §295.34(c)(1), one commenter said to add that composite sampling should not be allowed since OSHA does not allow composite sampling.

Response: The department has addressed this issue in the definition of Asbestos-containing material by including "any layer of a material sample". This means that an analyst who is analyzing a sample for asbestos content, who can recognize and separate a distinct layer from the rest of the sample and finds it to contain asbestos in excess of one percent must declare that layer to be ACM. To insure that this is the intent, the department added that composite sampling is not allowed in the definition.

Comment: Concerning §295.34(c)(1), one commenter said that the requirement for 3 samples will invalidate every survey.

Response: The department disagrees. It is not the intent of the rules to invalidate any previous surveys. The EPA accepts surveys performed without accreditation prior to the requirement, but when a survey is performed under these new rules, it must be performed by an accredited person. OSHA requires a minimum of three samples per homogeneous area collected in a randomly distributed manner to disprove the presence of asbestos. The testing, evaluation and sample collection must be conducted by an accredited inspector. If inspections performed previous to this OSHA requirement show no asbestos present, but there were less than three samples collected to make that determination, then a new inspection must be performed by a licensed or accredited person (as applicable) who must collect a minimum of three samples from

each homogeneous area under these new rules. No change was made as a result of this comment.

Comment: Concerning §295.34(d), one commenter recommended the addition of designated person by the building owner to the subsection.

Response: The department disagrees. This would not help to make this section more clear. No change was made as a result of this comment.

Comment: Concerning §295.34,(d), several commenters suggested that the word "public" be added to avoid confusion with what a commercial building owner is required to do.

Response: The department agrees. This change has been incorporated into §295.34(d) as it applies only to public building owners.

Comment: Concerning §295.34(d)(1)-(4), several commenters said "public" needs to be added before the appropriate sections so commercial building owners are not required to hire licensed personnel.

Response: The department agrees and has made the appropriate modifications to subsection (d) which indicates that it applies to public building owners.

Comment: Concerning §295.34(d)(4), two commenters said that the last sentence should be deleted since it was not consistent with the MAP which requires accreditation for much smaller projects. One commenter said that the last sentence should say "non-friable ACBM" after 260 linear feet. One commenter suggested the following language, "Any project larger than 3 linear feet or square feet involving removal of friable ACBM must be designed by a licensed asbestos consultant." One commenter suggested adding "interior" to describe projects requiring design plan. One commenter suggested "Texas should adopt the most stringent requirements as instructed in the MAP. OSHA's 29 CFR 1925.1101 requires 25 linear feet and 10 square feet is more stringent that the MAP's 260 linear feet or 160 square."

Response: The department agrees. The requirements of the MAP do require accreditation for projects smaller than 160 square feet and 260 linear feet. Since the design of both the SSSD activities and non-friable ACBM activities are addressed in §295.34(g), the last two sentences of §295.34(d)(4) were both deleted to remove the confusion.

Comment: Concerning §295.34(d)(4), one commenter felt there was a conflict between this section and (f)(2).

Response: The amounts that trigger NESHAP notification, 160 square feet / 260 linear feet, used to be the same as the amounts requiring a licensed consultant for design and that may be the source of confusion. The department deleted the last two sentences in §295.34(d)(4) to avoid any confusion.

Comment: Concerning §295.34(e), two commenters felt that this section was too open ended and there was no indication of what the maximum penalty was.

Response: The department agrees. The Texas Asbestos Health Protection Act (TAHPA) sets the maximum penalty for civil and administrative penalties at $10,000 per offense. The Act sets the maximum penalty for a criminal offense committed under the Act at $25,000 and two years in jail for performing work without a license when a license is required. To ensure that this is known, the department has made the appropriate changes.

Comment: Concerning §295.34(f), one commenter noted that a notification is not required for a disturbance.

Response: The department disagrees. Section 295.61(c) requires a notification for a disturbance which is consistent with 40 CFR 61.145(b)(3)(i) which requires notification at least 10 days before activity such as site preparation that would disturb asbestos material. No change was made as a result of this comment.

Comment: Concerning §295.34(f)(2), one commenter asked if annual notifications which combine the SSSD projects that are estimated for the year could be submitted annually and not for every project. He suggested that this section would be more clear if we added wording to show that an annual notification could be submitted for operations and maintenance projects.

Response: The department agrees that the building owner or operator has that option. In reviewing the section, it appeared that the best way to explain what is required would be to cross reference to §295.61, which describes in detail the options available to the building owner or operator and the procedures to notify. This section should merely let the person know that a notification is required for all demolitions and for renovations, and, when certain conditions are true, where to go to find out when and how to notify. The words "in accordance with §295.61" were added to §295.34 (f) to make this reference.

Comment: Concerning §295.34(g), one commenter objected that a design by a consultant is required on all activities which are not an SSSD activity or Resilient Floor Covering Institute activity. One commenter suggested that there is no provision for clean-up operations due to an unintended disturbance, such as a minor or major fiber release. They went on to state that the public health would be jeopardized by delaying immediate clean-up in order to obtain written designs by a licensed consultant.

Response: The department disagrees. The MAP requires that a design be completed by an accredited project designer. The MAP requires accreditation for any activity involving a response action other than SSSD activity or minor fiber release episode. Concerning the second comment, it is the department's intent to promote and protect public health, and, in attempting to carry out this goal, appropriately qualified persons must design responses as required in the MAP. One solution might be to have a prepared site/material specific specification in an operations and maintenance plan to address these contingency situations or an implemented management plan. No change was made as a result of this comment.

Comment: Concerning §295.34(g), one commenter felt that non-friable material in a commercial building should be no different than in a public building and should require a design.

Response: The department disagrees. The intent of the proposed changes with respect to commercial buildings is for the purpose of gaining compliance with the MAP. The Texas Asbestos Health Protection Act allows the Board of Health (board) to establish requirements to its adopted asbestos training plan so long as the plan is at least as comprehensive and as stringent as the MAP. Because these buildings are covered by OSHA, which sets requirements for the workers, and the public is not exposed to the same risks in those buildings, it is not necessary to be more restrictive than the MAP. The

asbestos industry has made it clear that they do not want the department to be more restrictive in commercial buildings. The department agrees that the requirement for licensing does not extend to commercial buildings. No change was made as a result of this comment.

Comment: Concerning §295.36(b), one commenter said that this section should be for public buildings only.

Response: This section was not open for public comment. The section is already limited to public buildings through the use of the words "public buildings." No change was made as a result of this comment.

Comment: Concerning §295.37(a) and (b), several commenters said to delete the words "or facility" from the second sentence in (a) and the first sentence in (b) since there should be no restrictions of this type outside of public buildings where the licenses are required.

Response: The department agrees and has removed the references to facilities.

Comment: Concerning §295.37(b), one commenter suggested that deleting "under a contract or other hire agreement" would hinder the current way they do business and suggested that the existing exemption for municipalities be modified to include entities such as Universities and school districts that perform asbestos related activities in-house.

Response: The department disagrees. The department cannot be any less stringent than the Statute. Please refer to Article 4477-3a, Section 4A, of the Texas Civil Statutes, the Texas Asbestos Health Protection Act. No change was made as a result of this comment.

Comment: Concerning §295.38(a), one commenter said that the cost of a cashier's check is more than $20. He suggested that hot check writers be punished by invalidating their license.

Response: The department agrees. The department was attempting to provide faster service by requiring this. To remedy the cost, a cashier's check will not be required by removing the word "cashier's." However, an applicant should be aware that if a personal or company check is remitted, the application will not be issued until the department account has been credited by the bank. This delays the process by one to two weeks.

Comment: Concerning §295.38(a), several commenters said that they did not want to make the list of owners, partners, executive officers and stockholders public information. One commenter recommended a statement on the licensing form complying with §295.35(j) relating to Responsible person.

Response: The department agrees and has removed the sentence referencing the list. The department will review its license applications forms at a later date. :

Comment: Concerning §295.39(d), one commenter pointed out that the requirement for a person who has received all of their training from out of state to take the Texas law course does not indicate if it is required every year. Another commenter asked if the Texas Law Course was required for a person who took all of their course work in Texas, except the most recent refresher, which was taken in another state.

Response: The requirement for Texas law is an annual one, unless a refresher (for which licensure is required) is taken in Texas from a department-licensed training provider. However, since there was not a proposed change to this section of the rules published for public comment, the department is unable to address or change this section of the rule. Therefore, no change was made as a result of this comment. The department, nevertheless, will be mindful of this comment in any future rulemakings. Regarding the last comment, the answer is yes. The last refresher submitted for licensure must include Texas law. In §295.64(h), "Persons seeking an asbestos license or worker registration with the department who submit out-of-state training as a means of qualification must successfully complete an approved three-hour course on Texas Asbestos Health Protection law which shall be conducted by a training sponsor licensed by the department." A licensee who is required to obtain multiple refreshers, may use any current course, taken from a Texas licensed training provider, as evidence of meeting this requirement.

Comment: Concerning §295.39(e)(4), One commenter stated, "In the event an out-of-state contractor claims to be self-insured, what kind of evidence of self-insurance will be acceptable to TDH?"

Response: Evidence of self-insurance would have to be verifiable and meet the requirements of the State in which the status was granted. Each State issues a Certificate of Self Insurance to those companies that meet the State's requirements for self insurance. These include adequate escrow to pay claims, an independent claims adjusting service and an approved management plan for handling the claims that occur. No change was made as a result of this comment.

Comment: Concerning §295.40, one commenter said that the insurance should just be professional liability because the pollution liability is too expensive. Another commenter said that the cost of pollution liability insurance at their agency was included with the professional liability at no extra cost. Another commenter said that they did not want to be liable unless it was a direct action on their part. Another commenter stated that it should read liability insurance shall include pollution liability for asbestos abatement activity. One commenter asked, "why should a consultant, inspector, management planner or laboratory be required to have this insurance?" And stated, "as a consultant I do not transport or dispose of asbestos containing materials or waste materials. The additional insurance is expensive and unnecessary and ultimately will increase the cost of doing business. Of course this cost will be passed along to the building owner who in turn will cause a trickle down effect and cost each of us more money for goods and services while not serving the health and safety of the general public."

Response: The department disagrees. Asbestos regulations exist because asbestos is a health hazard and a pollutant. Because pollution is excluded from all standard liability coverage, any claim including a pollution loss would be denied under a standard policy. The cost of asbestos liability insurance, including pollution insurance, is less expensive today than it has been in the past. Insurance companies writing professional liability insurance without pollution coverage will not knowingly insure a consultant with a potential asbestos exposure. No change was made as a result of this comment.

Comment: Concerning §295.40, one commenter said that the word "activity" should be substituted for the word "exposure" under liability insurance.

Response: The department disagrees. The insurance industry representative on the advisory committee has advised that exposure is the correct wording for TDH purposes. This

is intended to be broad enough to address requirements of consultants, contractors, and transporters. No change was made as a result of this comment.

Comment: Concerning §295.40(2), One commenter stated, rather than name the Texas Department of Health as a certificate holder for insurance purposes, it will be better to name the Department of Health as the additional insured which will insure that the Health Department will be notified if the insurance lapses or is canceled.

Response: The department disagrees because it is a requirement under Section 4A of the Texas Asbestos Health Protection Act (Texas Civil Statutes Article 4477-3a) for the Texas Department of Health to be the certificate holder. No change was made as a result of this comment.

Comment: Concerning §295.40(5), One commenter stated that "a contracting firm who leases employees has no control or knowledge of whether or not the leasing firm is paying the proper taxes."

Response: The department agrees that this situation cannot be completely controlled. It is a violation to attempt to avoid proper payment of required workers' compensation insurance by hiring temporary or leased employees or by paying employees in such a way as to obscure the intent of an individual's employment. No change was made as a result of this comment.

Comment: Concerning §295.41(b), one commenter suggested that the department consider providing the exams on a daily or weekly basis for license applicants.

Response: The department disagrees and is currently offering exams based upon the demand in the most cost effective manner. No change was made as a result of this comment.

Comment: Concerning §295.42(e)(2), several commenters said that 29 CFR 1910.134 does not require a licensed physician and suggested this section be reworded in accordance with this regulation as printed in the 8 Jan 98 Federal Register. One commenter suggested the following: Environmental Protection Agency (EPA) regulations in 40 CFR, Section 763.121(m), relating to medical surveillance in lieu of 29 CFR 1926.1101.

Response: The department disagrees. The referenced regulation applies to the general industry and is less stringent than OSHA. The rules reference the OSHA standard 29 CFR 1926.1101 which applies directly to the construction industry and requires examination by a licensed physician. No change was made as a result of this comment.

Comment: Concerning §295.42(e)(2), several commenters stated that under 29 CFR 1926.1101(m), OSHA only requires a medical examination when employees are exposed at or above the PEL for 30 days/year or are performing Class I, II, III activities for 30 or more days/year. The commenter recommended deleting "in accordance with Occupational Safety and Health Administration."

Response: The department disagrees. The issue is not the conditions under which a physicians' written opinion is required, rather, how the written opinion's criteria is evaluated, who performs the evaluation, and what the appropriate components are. OSHA is used for guidance for the form and content, not to describe under what conditions the medical is required. No change was made as a result of this comment.

Comment: Concerning §295.43(e)(18) second sentence, one commenter suggested the sentence read: "Persons submitting out-of-state training certificates with their applications shall submit the necessary photo-identification they obtained while attending the mandatory course on Texas asbestos rules, as required in accordance with §295.64(h) of this title."

Response: The department agrees and has replaced "may obtain" with "shall submit."

Comment: Concerning §295.43(f)(2)(A), one commenter felt that state agencies (including universities) should not be subject to an OSHA regulation.

Response: The department disagrees. It is not the intent of the department to invoke OSHA jurisdiction against entities not subject to OSHA, but instead to adopt an OSHA technical standard that is well-suited to meeting a TDH goal. TDH has adopted such appropriate standards from industry groups such as the NIOSH 7400 protocol in §295.58(i)(3)(C) and believes it is appropriate to adopt a suitable standard from a governmental entity as well. The requirements under the OSHA regulation are specific and useful in how to construct a mini-enclosure and is protective of public health. The EPA regulation requires a contiguous decontamination room which is also required in the interest of public health under this section. The department has amended §295.59(b)(4) to reference this subsection for the pertinent work practices.

Comment: Concerning §295.44(f)(3), one commenter suggested referring to the definition of "small scale short duration" and create a definition for "mini-enclosure."

Response: The department disagrees in creating a definition, since a definition would possibly limit the ability of the designer to accommodate the unique circumstances for the project. In both of the referenced regulations under §295.43(f)(2), there are descriptions of how to set up a mini-enclosure. No change was made as a result of this comment.

Comment: Concerning §295.47(a), several commenters suggest clarifying that an accredited project designer can perform work in their own public buildings without an agency license and by adding the following: "Offices that do not advertise or conduct asbestos consulting activities outside their own facilities are exempt from obtaining an asbestos consultant agency license."

Response: The department disagrees. This is already addressed in section §295.48(b)(1). In addition to accreditation requirements, to design a project in a public building, an Individual Asbestos Consultant license must be obtained. No change was made as a result of this comment.

Comment: Concerning §295.47(a)(1), one commenter asked if an architect could sign off on non-standard abatement plans.

Response: The department disagrees. It is not the intent of the department to invoke OSHA jurisdiction against entities not subject to OSHA, but instead to adopt an OSHA technical standard that is well-suited to meeting a TDH goal. TDH has adopted such appropriate standards from industry groups such as the NIOSH 7400 protocol in §295.58(i)(3)(C) and believes it is appropriate to adopt a suitable standard from a governmental entity as well. The OSHA regulations require that a Certified Industrial Hygienist (CIH) or Professional Engineer (P.E.) review and certify the plans when alternative control methods are used. Because the OSHA requirement is a prudent step to ensure

safety to the workers as well as the tenants in the building, it should apply equally to both private and public persons. It would not be appropriate to allow an architect to certify the plans as the safety aspects of the procedure are more appropriately addressed by a CIH or P.E. No change was made as a result of this comment.

Comment: Concerning §295.47(a)(1), several commenters wanted to know what "reasonably ensure proper procedures are used" means.

Response: The intent of this language is to place the responsibility on the consultant to determine if the specifications are being followed in a manner consistent with the regulations. The consultant should attempt to secure voluntary compliance from the asbestos abatement contractor by documented oral communication first. If that fails, written communication to the contractor with a copy to the building owner should be used to remedy the situation as quickly as possible. If it is not corrected at that point, it is the consultant's responsibility under §295.35(f) to report the violation to the department. The department agrees that the word "reasonably" could cause some confusion and has therefore removed the word to ensure there is no confusion about the consultant's responsibility. Once the consultant has informed the building owner, it is the owner's responsibility to get the abatement contractor to comply with the law.

Comment: Concerning §295.47(a)(2), several commenters were unsure what type of "alteration" would require the services of a professional engineer (PE) and felt that this needed better clarification. One commenter recommended deletion of the Texas Engineering Practice Act which is not referenced in the rules and is not a regulatory entity of asbestos related activities.

Response: The designer must be aware that certain operations must be designed by a PE and this reference is a reminder of this requirement. No change was made as a result of this comment.

Comment: Concerning §295.47(a)(2), several commenters said that the PE and the consultant should not have to be the same person. A licensed consultant can design the asbestos portion and the PE could design the portion for which and engineer is needed.

Response: The department agrees and has made appropriate changes to separate these two tasks.

Comment: Concerning §295.47(e), one commenter asked if there was any way to substitute experience for the required degree under the eligibility for licensing.

Response: If a person became licensed before the degree was required, they were "grandfathered." If they did not let that license expire they are still licenced today without the degree. The Asbestos Advisory Committee recommended continuation of this educational requirement in the interest of providing greater public health protection. This section was not open for public comment. No change was made as a result of this comment.

Comment: Concerning §295.47(f)(3), one commenter said that the MAP does not require the Air Monitor Technician training for a consultant and that it should be dropped.

Response: The department disagrees. The Texas Asbestos Health Protection Rules (TAHPR) are more stringent than the MAP for the purposes of licensing required for asbestos work in public buildings. The requirement in the MAP is for training necessary to perform designs. In the rules, there is no such person for public buildings except the consultant which requires designer, inspector, management planner, and air monitor technician training. The Asbestos Advisory Committee indicated that it is necessary for this person to understand all aspects of the work for those persons which he will be supervising. This section was not open for public comment. No change was made as a result of this comment.

Comment: Concerning §295.47(h)(4), one commenter suggested designating more than one project manager on long or complex abatement projects, instead of limiting it to one project manager.

Response: The department's intent is to require the consultant to designate at least one project manager and to specify the project manager's responsibilities in writing. The consultant can designate more than one licensed project manager for long or complex projects as long as it is documented in writing and submitted to the building owner. No change was made as a result of this comment.

Comment: Concerning §295.47(i), several commenters did not like the concept of signing every page. One suggested that the consultant sign every page of the work plan or other unique identification for the company. Another suggested that just the scope of work be signed.

Response: The department disagrees. The scope of work and the plan drawings must be signed on every page to help insure that the plan is specific to that particular project and only necessary changes have been made. No changes were made as a result of these comments.

Comment: Concerning §295.48(b)(4), two commenters wanted an explanation of what "creating a conflict of interest" meant. One commenter suggested adding the words "as described in §295.37(b)".

Response: The reason for this proposed change was to remove a discrepancy in the original wording. The way it was originally written, an individual could not have both a contractor license and a consultant license. However, a person could in fact do just that, as long as they did not perform as both a consultant and an abatement contractor on the same job. The new wording is just a reminder not to create a conflict. Since the new wording is confusing and since §295.37 already addresses the conflict of interest issue in sufficient detail, paragraph (4) has been deleted.

Comment: Concerning §295.48(b)(4), two commenters feel that a consultant performing OSHA personnel air monitoring for the contractor is a conflict. Another commenter disagreed and said that sometimes the building owner wants the consultant to perform OSHA monitoring for the contractor. Another said it was not a conflict and the OSHA monitoring could be done cheaper if the consultant can perform both the compliance monitoring and the OSHA monitoring.

Response: The department allows OSHA sampling under §295.37(a) because the consultant has independent incentive to perform accurate monitoring under other sections. No changes were made as a result of these comments.

Comment: Concerning §295.49(d)(6), one commenter felt that designer training would be better than the contractor/supervisor training for the project manager.

Response: The department disagrees. There is sufficient difference in the two courses as defined in the MAP. For example, the 14 hour hands-on training is not addressed in the project designer course. It is the responsibility of the project manager to verify that the contractor follows the design (plans and specifications), but it is not necessary for the project manager to know how to develop the design. No change was made as a result of the comment.

Comment: Concerning §295.49(e), one commenter suggested placing a comma after the word "with" on the first sentence.

Response: The department agrees and has made the necessary change.

Comment: Concerning §295.49(e), one commenter said that the project manager should be at the project during preparation as well as the rest of the job to ensure that this critical phase is done correctly. Another commenter said that it is not a federal requirement to have a project manager on site. Another thought that this addition was a good idea and it should stay.

Response: The department agrees with the first commenter. The word "work" is replaced with "activities" since abatement activities is defined to include preparation of the containment and work is not defined.

Comment: Concerning §295.49(e), two commenters asked that the activities of the project manager should be defined to include bag out, prep, etc. Another commenter said that it would be too expensive to have the project manager out there all the time, that it would be better to have the air monitor out there. Another commenter wanted authority to allow the project manager to delegate the responsibility to an air monitoring technician.

Response: The project manager is the consultant's eyes and ears on the project. The project manager must verify that the asbestos abatement contractor is performing according to plans and specifications, and the project is in compliance with all applicable regulations. The air monitoring technician license limits air monitoring technicians to taking air samples. No changes were made as a result of this comment.

Comment: Concerning §295.49(e), several commenters said that the word "monitor" should be "project manager".

Response: The department agrees and has made the change.

Comment: Concerning §295.49(e), one commenter suggested deleting the word "ensure," since the Project Manager cannot contractually "ensure these sections are complied with" according to industry standards and AIA and Engineering Contract Documents.

Response: The department agrees. The intent is for continual monitoring of the abatement project on the owner's behalf to verify that the project is being performed in substantial compliance with the applicable sections of our rules. The appropriate changes have been made.

Comment: Concerning §295.50(a), one commenter wanted a definition of "bulk samples."

Response: The department disagrees. The use of the term "bulk sample" is commonly accepted to be a representative sample large enough for analysis. No change was made as a result to this comment.

Comment: Concerning §295.50(a), several commenters suggested allowing an accredited asbestos inspector to perform work in their own buildings without obtaining an agency license.

Response: The department disagrees. The rule states that an accredited inspector must be employed by a licensed asbestos consultant agency or a licensed asbestos management planner agency, to perform asbestos inspections in public buildings. No change was made as a result of this comment.

Comment: Concerning §295.50(d)(3), one commenter suggested deleting the added language "indicating that the applicant has no limitations in wearing the respirator." Many licensees have some limitations, however, few limitations exclude all respirator use and it is unnecessarily restrictive. Another commenter says that the new language imposes a greater degree of medical fitness than for any other class of licensure.

Response: The department agrees and has removed the language as suggested.

Comment: Concerning §295.50(d)(4), One commenter stated that, if the department deleted the requirement for insurance for inspectors, it should also be done for other consulting disciplines. The commenter also said that, the deletion of this requirement would give an unfair financial advantage to individual inspectors causing consulting agencies to reduce the quality of inspection work in an effort to compete.

Response: The department disagrees. The insurance requirement was deleted in the proposed rule since the inspector has to be employed by an asbestos consultant agency or asbestos management planner agency and would be covered through the employer's insurance. Since an inspector cannot perform an inspection in a public building without working for either an asbestos consultant agency or asbestos management planner agency, there is no unfair advantage for the inspector not having insurance. Anyone performing inspections without working for a consultant agency or management planner agency or without insurance through that agency would be in violation of the rules. No change was made as a result of this comment.

Comment: Concerning §295.50(d)(4), one commenter said that experience gained under the supervision of a licensed inspector should count.

Response: The department agrees and has added "licensed asbestos inspector."

Comment: Concerning §295.51(a), two commenters felt that by adding the new language requiring a license for a "federal government owned school building" would mislead people to believe that other school buildings were not covered.

Response: Other school buildings are indeed covered since they allow for public access. However, the fact that the federal government owns the school excludes it from the public building definition. The intent of adding federal government owned schools here was to be as stringent as the MAP. To better accomplish this intent, this language was deleted in §295.51(a) and moved to §295.57(a).

Comment: Concerning §295.51(a), one commenter felt that there was no need to say that a company cannot employ more than one management planner without becoming an agency.

Response: The department disagrees. A company is responsible for ensuring its licensed management planners and inspectors comply with the provisions of all of the applicable regula-

tions and that proper storage is maintained for all of the company's records and plans related to asbestos activities. If more than one management planner works for a company, that company must be licensed or an agency. No change was made as a result of this comment.

Comment: Concerning §295.51(f)(3), One commenter suggests clarifying that a Management Plan is not specifications and cannot substitute for specifications.

Response: The department disagrees with the need for clarification, though it agrees that a management plan cannot substitute for specs. Even though a management plan may contain include a procedure on how to address a response action (ie in case of a major fiber release episode, contact a licensed asbestos consultant), it is not a substitute for bid documents. The list of Management Planner responsibilities does not include preparation of plans and specifications for abatement (see §295.51(f)). No change was made as a result of this comment.

Comment: Concerning §295.52, one commenter said that there was no requirement for an air monitoring technician to be on site and would prefer this person versus the project manager. Another commenter said that we needed to clarify that an air monitoring technician is not required to be on site.

Response: The air monitoring technician must ensure that the samples are not tampered with. A project manager who must be at the site could watch the samples to ensure their integrity. This project manager could also be licensed as an air monitoring technician. In response to the second comment, although there is no specific requirement in §295.52 that an air monitoring technician must be on site monitoring the air sampling pumps, the consultant must ensure that sampling integrity is preserved. No change was made as a result of this comment.

Comment: Concerning §295.52(a), one commenter needed to know if an air monitoring technician would be able to perform area, clearance, and personal samples for the contractor. The same commenter also recommended that the department allow an air monitoring technician to perform both types of air monitoring on a project. Another commenter was unclear as to whether an AMT can take personal samples for a contractor as an independent contractor and not as an employee of the contractor.

Response: The asbestos contractor can hire the same air monitoring technician to perform area and clearance samples for the building owner to perform OSHA compliance sampling. The person performing the area and clearance sampling must be employed by the building owner. See 295.37.Licensing and Registration: Conflict of Interests. In response to the last comment, the proposed language allows an AMT to act as an independent contractor in order to collect the Occupational Safety and Health Administration (OSHA) personnel samples for an abatement contractor. The AMT may not analyze those samples unless he works for a licensed laboratory. No change was made as a result of this comment.

Comment: Concerning §295.52(e)(7), several commenters felt that 30 days experience was too long. Some suggested two weeks. Another suggested five days over a 60 day period. Another commenter felt that no experience was necessary since air monitoring is entry level. Two commenters said to remove the requirement for "direct" supervision or reduce the number of days of supervision required. One commenter said that apprenticeship without a license needed to be addressed.

Response: The department agrees that an acceptable minimum time frame for experience is required. Ten days experience under the direct supervision of a licensed air monitor technician or consultant over the past year is sufficient to meet this requirement. Even though this is an entry level position, it does require some degree of technical ability, that for some persons, requires hands-on experience in order to fully learn it. A short apprenticeship will help assure that the air samples, a critical part of monitoring an abatement job for compliance, are of a high quality and reliable indicators of the abatement performance. As far as apprenticeship without a license, this issue is automatically addressed by requiring direct supervision. Since an applicant cannot perform air monitoring without a license, in order to get the apprenticeship completed before obtaining a license, the applicant must work under the direct supervision of a licensed air monitor technician. No change was made as a result of this comment.

Comment: Concerning §295.52(e)(7), one commenter suggested a temporary license for the apprenticeship.

Response: The department feels that a temporary license is redundant. If a person can work without supervision with this temporary license, then it is not an apprenticeship. A person such as an apprentice, who is required to be under direct supervision does not need a license and may enter containment at the discretion of the consultant in accordance with §295.60(a)(4). No change was made as a result of this comment.

Comment: Concerning §295.52(e)(7), One commenter suggests adding "working for a contractor" to agree with paragraph (a) and to eliminate the license requirement for an air monitoring technician to perform personal air samples for a contractor.

Response: The department has incorporated the requirement for an air monitor to be an employee of an asbestos contractor. The department disagrees with eliminating the license requirement for an air monitoring technician performing personal air samples. The purpose of having an air monitoring technician licensed by the department is to ensure that the person has received proper training and experience needed to perform his duties. No change was made as a result of this comment.

Comment: Concerning §295.52(e)(7), One commenter wanted to know what is required as proof of performing air monitoring since it is not defined in this paragraph.

Response: The department recommends submitting written documentation to reflect the projects where air sampling was performed and provide a name and phone number of a person that can verify the experience. Refer to sample format of supervisor's license application when submitting job experience. The department will be updating the licensing form when the rules become effective. No change was made as a result of this comment.

Comment: Concerning §295.52(e)(7), One commenter suggested deleting "as an apprentice," since this implies a type of employment relationship that may exist in the construction industry but is not common for AMTs.

Response: The department uses the term "apprentice" to describe a person who is learning by practical experience under the supervision of a knowledgeable and skilled worker (journeyman). No change was made as a result of this comment.

Comment: Concerning §295.53(c)(1), one commenter said that this section is redundant.

Response: The department disagrees. A client needs to know that every office conducting management planning work must have a management planner in residence who is responsible for that work. No change was made as a result of this comment.

Comment: Concerning §295.53(f)(2), One commenter suggested deleting the term "if workers compensation is required by the specification or the owner" because Texas law requires you to either have insurance or be self-insured.

Response: The department disagrees because it is a requirement under Section 4A of the Texas Asbestos Health Protection Act (Texas Civil Statutes Article 4477-3a). No change was made as a result of this comment.

Comment: Concerning §295.54, one commenter asked if the Asbestos Analyst Registry still exists.

Response: Yes. The Asbestos Analyst Registry program is administered by the American Industrial Hygiene Association (AIHA) and is designed for individual asbestos analysts performing fiber-counting procedures on the job site.

Comment: Concerning §295.54, one commenter said that there was no need to eliminate the NIOSH Proficiency Analytical Testing (PAT) Program for lab qualification. Reliance on the single AIHA Program is not justified.

Response: The department has eliminated references to the NIOSH PAT program because NIOSH no longer sponsors a PAT program. Those duties have been taken over and coordinated by AIHA. Those references where deleted from §§295.54(d)(1) and (3). No change was made as a result of this comment.

Comment: Concerning §295.54(a), one commenter suggested changing "phased-contrast microscopy" to "phase contrast microscopy" and also adding "AIHA" before "Asbestos Analyst Registry." The same commenter recommended adding a section (6): AIHA Bulk Asbestos Proficiency Analytical Testing Program.

Response: The department agrees and has changed "phased" to "phase." The department has added AIHA as requested. Regarding adding paragraph (6) to §295.54(d). The department understands, from our advisory committee, that the AIHA Bulk asbestos PAT program is not currently equivalent to the NVLAP program, but that they are in the process of developing a program which may be equivalent in the future. The advisory committee will continue to monitor their progress and may, in the future, recommend inclusion of AIHA's program as an option.

Comment: Concerning §295.54(a), one commenter suggests waiving the license requirement for an out-of-state laboratory since it is an unnecessary business expense. The commenter suggests that the laboratory notify the department in writing and submit their laboratory accreditation only.

Response: The department disagrees. According to The Texas Asbestos Health Protection Act, Texas Civil Statutes, Article 4477-3a, Section 3(a)(7) unless a person is licensed by the department, the person may not engage in providing the analysis of bulk material samples for asbestos content or asbestos concentration, or the analysis of airborne samples by transmission electron microscopy, phase contrast microscopy, polarized light microscopy, scanning electron microscopy, or another analytical method approved by the department. No change was made as a result of this comment.

Comment: Concerning §295.54(a), one commenter said that he did not want to be required to list the persons with controlling financial interest.

Response: The department agrees and has removed the sentence from §295.54(a).

Comment: Concerning §295.54(d)(3), one commenter suggests replacing the words "airborne asbestos" to "airborne fibers" in the last line.

Response: The department agrees and has made the appropriate change.

Comment: Concerning §295.54(d)(4), one commenter said that the correct reference to NIOSH 7400 method is issue number 2, August 1994 and is not a revision.

Response: The department agrees and has made the appropriate changes to §295.54(d)(4) and (5).

Comment: Concerning §295.54(d)(4), one commenter suggests not to grant licenses to laboratories that are found to be non-proficient until proof of proficiency can be re-established, and the commenter suggested that participation in the PAT Program should not be substituted for proficiency in the program.

Response: The department agrees. The department checks for current proof of proficiency when the license application is submitted. AIHA provides a mechanism to re-test for proficiency prior to the quarterly testing for those who do not pass a particular round. No change was made as a result of this comment.

Comment: Concerning §295.54(d)(5), one commenter questioned how this section related to the Air Monitoring Technician.

Response: An air monitoring technician must be working for a properly accredited laboratory as specified in §295.54(e)(3) in order to perform analysis in the field. No change was made as a result of this comment.

Comment: Concerning §295.54(d)(5), one commenter suggested deleting all reference to the Asbestos Analyst Registry since it is believed that this is an individual requirement and should be deleted from the qualification list for laboratories.

Response: The department disagrees. The laboratory must maintain individual records for each analyst as required by NIOSH 7400 to document the individual analyst's coefficient of variation. No change was made as a result of this comment.

Comment: Concerning §295.54(e)(3), one commenter suggested to reword the last sentence to say that records must indicate which samples were used for the 10% quality-control analysis.

Response: The department agrees that this statement is confusing. The commenter may have been misled and didn't understand the type of sample. The samples referenced are the Quality Control/Quality Assurance (QA/QC) samples, not the field blanks. The language has been appropriately modified. It is appropriate to maintain the integrity of the samples by keeping the records related to QA/QC in the laboratory.

Comment: Concerning §295.55(d)(6), one commenter suggests to clarify that a hands-on training group should have a ratio of not more than 15 trainees per instructor.

Response: The language is self explanatory. No change was made as a result of this comment.

Comment: Concerning §295.55(d)(9), one commenter recommends adding the requirement that coincides with the MAP as follows: "Courses shall be taught in English except that the worker course may be in another language provided the instructor speaks the language and books and training materials are in that language."

Response: The department agrees and has changed §295.55(d)(9)(B) accordingly.

Comment: Concerning §295.55(d)(11), two commenters suggested allowing the training providers to extend the 8 hours of instruction per calender day to 10 hours per day, since comprehension and information retention is better for courses on consecutive days than for intermittent courses. Also, if the department limits the number of hours per day of training, this will limit the services that training organizations can provide to their clients.

Response: The department disagrees. The department has defined the number of instruction hours to meet the requirements under the MAP. According to the MAP and EPA policy, attendees shall not be required to sit through more than eight hours of training in any single 24 hour period. No change was made as a result of this comment.

Comment: Concerning §295.55(e)(2), one commenter suggested clarifying the department's requirement of training providers to provide written notice within 2 hours of a course being canceled. The commenter said that it is not clear if the department wants this cancellation notice 2 hours prior to the cancellation or up to 2 hours after the cancellation.

Response: The department agrees that the statement is unclear and has made modifications to this section to clarify the intent.

Comment: Concerning §295.55(e)(3), one commenter suggested the department add the "dates of the training course," to be in compliance with the MAP.

Response: The department agrees and has added the language.

Comment: Concerning §295.55(e)(3), one commenter suggested the department add the "and a statement that the person receiving the certificate has completed the requisite training for asbestos accreditation under TSCA Title II," to be in compliance with the MAP.

Response: The department agrees and has added the language.

Comment: Concerning §295.55(f), one commenter suggested that we clarify the section to include instructors which have received approval from another State. This would also make the rule in compliance with the MAP.

Response: The department agrees that an instructor may receive approval either through an EPA approved State program or directly from EPA. The department has added clarifying language in accordance with the MAP. In those instances where approval is received from another State program, the department may require additional information to verify the courses that an instructor has been approved to teach.

Comment: Concerning §295.55(f)(6), one commenter asked who would be the person making the decision to revoke or suspend an instructor's approval. He felt that it should be someone who is qualified to make this determination.

Response: The department agrees that a person who fully understands the requirements conveyed by both the TAHPR and the MAP will make these decisions together with the approval of others in the enforcement program.

Comment: Concerning §295.55(f)(6), one commenter suggested deleting this section since the person conducting the field inspection or audit is not qualified to perform them anyway. Also the system does not appear to have any professional trainer, adult educator or other qualified person making those audits. One commenter said that the auditors of the course should have taken the course prior to assessing it and the instructors.

Response: The department disagrees. The department makes every effort to ensure that the inspectors or auditors have appropriate direction and training to make reasonable and fair judgments about the work practices they observe on either a job site or at a training facility. No change was made as a result of this comment.

Comment: Concerning §295.56, several commenters said that the transporters should have the same training as the workers. One pointed to the requirement in §295.42 for a worker registration in order to transport, load or unload asbestos.

Response: The training required of transporters under other federal law is more specific to potential transportation hazards. Such training is different than the worker accreditation training requirements under the MAP (not required for transportation). Therefore, registration as an abatement worker cannot be obtained with transporter training. No change was made as a result of this comment.

Comment: Concerning §295.56(e)(6), one commenter recommends referencing appropriate DOT regulations in 49 CFR and HM 126 and/or 181 since OSHA regulation 29 CFR §1910.120 does not apply to transporters unless they are employees of a covered industry.

Response: The department recognizes that OSHA may not be the only regulation applicable to transporters. The department has added 49 CFR 172 Subpart H which covers any and all persons labeling, manifesting, transporting and disposing of asbestos to the rule under §295.56(e)(6).

Comment: Concerning §295.57(a), two commenters suggest requiring the same training requirements for persons doing SSSD work in commercial buildings, in an effort to protect human health.

Response: The department disagrees. The intent of these rule changes is not to be more stringent than the MAP requirements in commercial buildings. No change was made as a result of this comment.

Comment: Concerning §295.57(c), one commenter suggests adding the following: "A person may not perform work that requires accreditation during the grace period." This commenter also wanted to know if a person has to carry the accreditation certificates (I.D. cards) as well as a valid TDH license.

Response: According to the MAP, the 12-month grace period is to enable "formerly" accredited persons with expired certificates

to complete refresher training and have their accreditation status reinstated. This means that they are NOT accredited during this time and should not be performing work with an expired accreditation. Regarding the second part of the comment, §295.58(k)(1), states that all current licenses, registrations and accreditation certificates are required to be on-site. For commercial buildings, our inspectors verify accreditation by reviewing the accreditation certificates. No change was made as a result of this comment.

Comment: Concerning §295.57(d), several commenters suggested that this should say "no more stringent than" instead of "at least as stringent as."

Response: The department disagrees. By choosing the words "at least as," a minimum standard, not a maximum, is set for compliance. No change was made as a result of this comment.

Comment: Concerning §295.57(d), one commenter suggested deleting "and accreditation requirements" and "the MAP or," accreditation requirements are provided by the MAP (not the NESHAP's). Also that there are no work practices mentioned in the MAP.

Response: The department's intent is to reference those federal regulations which provide the requirements of accreditation and work practices. No change was made as a result of this comment.

Comment: Concerning §295.57(d), one commenter said that §295.41(a) conflicts with this section which requires a state "accreditation" examination for licensing.

Response: The department does not see a conflict. No change was made as a result of this comment.

Comment: Concerning §295.58, two commenters recommended changing the section title to "Operations: General Requirement for Public Buildings."

Response: The department agrees and will incorporate the change in the final rule. In the interest of being clear concerning this section and §§295.59 and 295.60 which also deal with asbestos practices and procedures in public buildings, the department has changed the titles of these two sections by adding the words "for Public Buildings" and has deleted the words "accredited"from §295.58(i) and "project designer" from §295.60(a)(2) since a person who is only accredited may not perform duties related to that accreditation in a public building without holding a license.

Comment: Concerning §295.58, one commenter suggested referencing "work practices" in the General Requirement section.

Response: The department disagrees, based on the fact that "operations" pertains to some activities that are not considered work practices, for example, records. No change was made as a result of this comment.

Comment: Concerning §295.58(a), one commenter said that because §295.58 is not included in the scope of §295.31(c)(3), as a section relevant for enforcing the MAP, the last sentence of this paragraph should be removed since it pertains to owners of commercial buildings who are not subject to the MAP.

Response: The department agrees and has removed this sentence in §295.58(a).

Comment: Concerning §295.58(h), several commenters suggest that wording on bulk sampling of "not beyond question" conflicts with the AHERA standard for bulk sampling.

Response: The AHERA rule provides for the inspector to use discretion in determining if materials are suspect ACM and gives guidance as to which types of materials the inspector's discretion may be applied to. The department considers the phrase "not beyond question" to similarly provide this level of discretion to the inspector without limiting the discretion to specific types of material. In general, if the inspector makes a determination that a material is "beyond question" and therefore contains no ACM, and the department determines otherwise through sampling, the inspector would be in violation of the rule. No change was made as a result of this comment.

Comment: Concerning §295.58(h), one commenter said that this section conflicts with §295.34(c)(1) which requires no less than three samples. Also, he questioned if this requirement would void previous inspections.

Response: The department agrees that this is in conflict and has made appropriate changes to remove this conflict. The requirement to perform an inspection as specified does not require a reinspection of those areas where one has been performed in the past as long as that inspection was performed in compliance with the regulations at that time.

Comment: Concerning §295.58(i), one commenter said that the reference to 29 CFR §1926.1101(k)(4)(ii)(B) is incorrect.

Response: The department agrees. The reference to §1926.1101(k)(4)(ii)(B) was removed from this section.

Comment: Concerning §295.58(i), one commenter suggested that the paragraph be modified to provide for the use of air pumps that collect more than one sample at a time.

Response: The department disagrees. The complications in calibrating and maintaining accurate calibrated airflow as filters begin to load is such that the quality of the results would be unreliable. No change was made as a result of this comment.

Comment: Concerning §295.58(i)(1), several commenters said that the need to take baseline samples should be left to the discretion of the consultant. The suggestion was made to have the consultant justify why baseline samples were not taken. One commenter was in favor of baselines.

Response: The department disagrees that baseline samples should be discretionary. Baselines are an important benchmark that can be used at a later time to evaluate any pre-existing conditions. Analysis does not have to be done but may be performed later if needed. No change was made as a result of this comment.

Comment: Concerning §295.58(i)(3), one commenter said that aggressive sampling should only be required for buildings that will be reoccupied.

Response: The department disagrees. By allowing different clearance procedures for a building that is being demolished, the workers which perform the demolition may be exposed to high levels of asbestos during the demolition. No change was made as a result of this comment.

Comment: Concerning §295.58(i)(3)(A), one commenter asked why aggressive clearance sampling would be required if they never exceeded clearance throughout the project.

Response: The reason for aggressive sampling is to evaluate the public health threat due to fibers that may have accumulated on surfaces during the project. Factors such as static electric charges could hold the dust on surfaces which would become airborne while tearing down the containment. No change was made as a result of this comment.

Comment: Concerning §295.58(i)(3)(A), one commenter asked if aggressive sampling would be required after floor tile removal.

Response: Yes. In order to return the area to the public, the same requirements apply to floor tile removal sampling with no less concern for public health. In the case of a floor tile removal project, it is incumbent upon the building owner to ensure the abated area does not pose a public health threat. The only way to determine how clean the area is with respect to free asbestos fibers is to perform wipe samples or aggressive air samples. Since wipe samples would only indicate the presence of asbestos fibers, this alone would not provide the information necessary to assess the public health threat. The aggressive air sample would be analyzed for compliance with an accepted level of .01f/cc by PCM or 70 structures/mm by TEM. These are both recognized standards which provide an acceptable level of public health protection. No change was made as a result of this comment.

Comment: Concerning §295.58(i)(3)(A), one commenter asked if aggressive sampling were required in areas such as a crawl space because it would not pass clearance.

Response: No. The consultant has the authority to design an appropriate clearance procedure in accordance with §295.58(i)(3)(C). No change was made as a result of this comment.

Comment: Concerning §295.58(i)(3)(B), two commenters said that this section conflicts with §295.58(i)(3)(D) because §295.58(i)(3)(B) requires a consultant to perform the work where §295.58(i)(3)(D) says that the consultant may delegate the responsibility.

Response: The department does not see a conflict. Either the consultant must perform the visual inspection as per subparagraph (B) or he may delegate this responsibility in writing to a licensed inspector per subparagraph (D).

Comment: Concerning §295.58(i)(3)(B): One commenter suggested that the licensed consultant be provided the option to delegate, in writing, the responsibility of performing visual clearances to the project manager.

Response: The department agrees. See above.

Comment: Concerning §295.58(i)(3)(B), two commenters said that the ASTM standard has changed to P1368-96A and they did not think that they should be required to purchase a copyrighted protocol. Another commenter said that the department should add instructions directly to the rules on how a visual inspection should be performed.

Response: The department agrees that a copyrighted protocol should not be required and has removed this reference.

Comment: Concerning §295.58(i)(3)(B), one commenter suggested that a visual be performed before and after the containment is torn down.

Response: The department agrees that inspecting the area after the containment is down is necessary to ensure that contamination has not occurred through leaks or spills through or over the containment. This language was in the proposed rule. No change was made as a result of this comment.

Comment: Concerning §295.58(i)(3)(C), one commenter suggested that the provision be changed to allow air sample collection at a rate of at least one-half up to 16 liters per minute.

Response: The department agrees and has made the appropriate changes.

Comment: Concerning §295.58(k)(2), two commenters said that the reference to the "Green Book" is outdated since this book is no longer published and conflicts with the TDH regulations.

Response: The department disagrees and has found that the book may be obtained by calling the TSCA Hotline at (202) 554-1404. No change was made as a result of this comment.

Comment: Concerning §295.58(l)(1), one commenter suggested that the prohibition of the use of solvents should be expanded to include the statement "If solvents are used, TEM air analysis is required. The results may not exceed the permissible exposure limit (PEL) while solvents are being used. If the PEL is exceeded, the use of solvents shall be suspended."

Response: The department disagrees. Since solvent use according to this section is inside containment and personal protective equipment is worn, the necessity for TEM air analysis for personal exposure is unwarranted. Additionally, there is no accepted standards for personal exposure analysis using TEM. No change was made as a result of this comment.

Comment: Concerning §295.59, one commenter suggests adding a paragraph in either the Responsibilities or General Provisions section outlining the applicability of the section to public buildings.

Response: The department agrees and has incorporated these changes in the final rule. In the interest of being clear concerning this section and §§295.58 and 295.60 which also deal with asbestos practices and procedures in public buildings, the department has changed the titles of these two sections by adding the words "for Public Buildings" and has deleted the words "accredited" and "project designer" from these sections for the same purpose.

Comment: Concerning §295.59, one commenter asked if polyethylene is asbestos containing waste material.

Response: Yes. The NESHAP defines asbestos containing waste material to include materials contaminated with asbestos.

Comment: Concerning §295.59(a), two commenters said that since §295.34(a)(5) and (9) have been deleted, the references to those sections need to be changed.

Response: The department agrees and has revised the references.

Comment: Concerning §295.59(b)(9): One commenter suggested that the requirement to perform air-clearance testing for O&M projects be dropped, due to unnecessary costs.

Response: The department disagrees. The clearance testing is important to ensure the regulated area is safe to the public prior to reentry. No change was made as a result of this comment.

Comment: Concerning §295.60(a): One commenter recommends referencing "work practices" from section 295.57(d) for

other than public buildings in Operations (295.60), since it applies to work practices.

Response: The department has limited §§295.58, 295.59, and 295.60 to public buildings, in response to comments that they should not apply to commercial buildings. The work practices referenced in §295.57(d) are the work practices that are minimums for commercial buildings and are not to be considered minimums for public buildings and are therefore not referenced in §295.60. The minimum standards for work practices in a commercial building are dependent upon the workers. The EPA Worker Protection Rule applies for government employees, and the OSHA Construction Industry Standard applies for other workers. No change was made as a result of this comment.

Comment: Concerning §295.60(a), one commenter suggested deletion of the requirement for the consultant to be a PE or CIH to specify work practices that differ from the rules. He suggested that the consultant work with the PE or CIH.

Response: The department agreed with a similar comment regarding §295.60. The difference in this section over the earlier comment is that here the PE or CIH is not concerned with alterations to the building structure or systems, but with the abatement procedures themselves. 29 CFR §1926.1101(g)(6) requires a certified industrial hygienist or licensed professional engineer who is also qualified as a project designer to evaluate and certify that the method will provide adequate protection to the employees and prevent asbestos contamination outside the regulated area when "alternative control methods" are used. Although such non-exempt individuals in the private sector must be in compliance with OSHA, it is not a requirement of OSHA to be a licensed consultant, rather that the person be "qualified" as a project designer in accordance with AHERA and the MAP. Because any such evaluation would be considered an action that a designer is required to perform, as specified in the MAP, the department is compelled to require that this person also be a licensed consultant since this section applies to public buildings and any person who is required to be accredited under the MAP must also be licensed to work in a public building under TAHPA.

Comment: Concerning §295.60(a)(2): One commenter suggested deleting "(project designer)" on the grounds that the licensed consultant is an accredited project designer.

Response: The department agrees and has removed this.

Comment: Concerning §295.60(a)(2): Two commenters suggested that a mechanism be in place for timely response from TDH regarding approval of project designs that vary from the provisions set forth in the section.

Response: The TDH will seek to provide timely response to the those who submit alternative project designs. If proper review has been performed and has been certified in writing by a CIH or PE in accordance with 29 CFR 1926.1101(g)(6) the time will be kept to a minimum. No change was made as a result of this comment.

Comment: Concerning §295.60(a)(2), two commenters asked for a definition of "non-standard".

Response: 29 CFR §1926.1101 provides great detail concerning the requirements for critical barriers, additional barriers of plastic sheeting, negative pressure enclosure, glovebags, HEPA vacuums, wet methods, and respiratory protection. Subsection (g)(6) requires that a certified industrial hygienist or licensed professional engineer who is also qualified as a project designer evaluate and certify the method that will provide adequate protection to the employees and prevent asbestos contamination outside the regulated area when "alternative control methods" are used. Because of this requirement, the department requires this certification. The department agrees that this might not be clear to the reader and has added a reference to 29 CFR §1926.1101(g)(6) concerning alternative control methods.

Comment: Concerning §295.60(d): One commenter suggested that documentation of tear specifications should be kept on site when using asbestos waste bags that are less than 6 mil thick.

Response: The department agrees that the documentation should be readily available so that the contractor is able to produce evidence that the material is in compliance. No change was made as a result of this comment.

Comment: Concerning §295.60(d), two commenters said that it is redundant to require sheeting to be placed over flooring if it is to be removed.

Response: The department agrees that if flooring is removed this would result in be covering the very material to be removed. This section is patterned around the typical containment used to remove fireproofing or decorative ceiling. For floor tile, the consultant must consider whether there is a need to construct an inverted containment. If the job is expected to produce a large fiber release, an inverted containment would be required to prevent fibers from contaminating the ceiling. No change was made as a result of this comment.

Comment: Concerning §295.60(d), one commenter said that the rules should be consistent, that the department needs to make a decision concerning inverted containment when removing floor covering. He indicated that the requirement for an inverted containment differed from one region to the next.

Response: The judgments of TDH inspectors is based upon their experience and may take into consideration the unique characteristics of the specific project such as condition of the floor tile or the ceiling material in the rooms. While there must be critical barriers and negative pressure established to prevent the migration of fibers from the regulated area, the need for an inverted containment when removing floor tile is left to the discretion of the licensed consultant. However, the department recognizes that sheet flooring with a friable backing needs an inverted containment due to the high probability of the material to release fibers. No change was made as a result of this comment.

Comment: Concerning §295.60(d), several commenters said that fire retardant polyethylene sheeting is three times the cost of regular plastic sheeting. It was suggested that the rules require fire retardant plastic sheeting only where a fire hazard exists.

Response: The department agrees and has changed the requirement accordingly.

Comment: Concerning §295.60(d), several commenters said that the department should add "as is feasible" concerning adding viewing windows to the containment.

Response: The department agrees and has added this qualifier.

Comment: Concerning §295.60(d),one commenter stated that a second layer of plastic sheet on the walls is a waste of money

in light removal jobs and should be subject to the consultant's discretion.

Response: The department disagrees. Two layers of plastic sheeting on the walls are minimum standard practice and should not be compromised solely for the purposes of cost savings. In many cases two layers are necessary and appropriate to contain fibers and facilitate clean up. In §295.60(a)(2) the consultant may vary from the provisions of the rules in the project plans and specification if conditions warrant. No change was made as a result of this comment.

Comment: Concerning §295.60(e), one commenter asked what is considered an air lock.

Response: The air locks are two layers of plastic sheeting that are not taped together but form a double flap or barrier between the clean room, shower room, equipment room and work area. A true air lock would be an air tight room where a person would transfer from a particular pressure environment to a different pressure and would be brought to the pressure of the new environment before opening the air tight door. This type of system would be cost prohibitive and is why the typical containment has this much simpler system. However the use of the term airlock has been applied even though it is not a true airlock but rather flaps of plastic that help to form a barrier to the passage of asbestos fibers in the event power is lost and the negative air machines no longer are able to provide the negative pressure differential needed to ensure the fibers remain inside the containment. This section was not open for comment. No change was made as a result of this comment.

Comment: Concerning §295.60(g), one commenter suggested deleting references to OSHA if both English and Spanish signs are required, because OSHA does not require the signs posted in both languages.

Response: The department references OSHA for the purposes of setting forth the specific information on the sign to be used and its placement. OSHA specifies a sign that bears specific information, but does not specify that it must be in English. In the interest of serving the public in Texas, which includes individuals who may speak Spanish or English, the department requires signs be posted in both languages. No change was made as a result of this comment.

Comment: Concerning §295.60(h), one commenter suggests that TDH may accept some liability and limit enforcement action on "approved" projects.

Response: The department has considered the comment and made no change.

Comment: Concerning §295.60(h), several commenters suggested deleting the reference to 40 CFR 763.90(i)(1).

Response: The department agrees and the reference was deleted in the proposed §295.60(h). No further change was made as a result of this comment.

Comment: Concerning §295.60(i), one commenter suggested that the phrase "acceptable for final clean air monitoring results" be changed to "acceptable for final clearance air monitoring results".

Response: The department agrees and has made appropriate changes.

Comment: Concerning §295.60(j), one commenter suggested that some discussion should be added that addresses how long asbestos may be stored onsite.

Response: The department agrees. This subject had been addressed in §§295.43 and 295.45 and needs to be addressed in this section. The new subsection (j)(4) has been added to address the subject of storage of the asbestos containing waste material.

Comment: Concerning §295.60(j), one commenter said that the rules should explain the process of bagging so that the reader knows what is meant by the use of "double bagging".

Response: The department has added a description of the procedures for double bagging in §295.60(j)(1).

Comment: Concerning §295.60(j), one commenter wanted to know what the tear resistance data meant. Several commenters oppose the new language regarding rips and tears in asbestos waste bags on the grounds that persons who handle the standard six mil bags and tear them should immediately repair them and clean the surrounding area using a HEPA vacuum, or be subject to enforcement action. Additionally the commenters state that the tear specifications for bags less than six mil thickness are impractical to obtain.

Response: Some polyethylene manufacturers produce plastic sheeting which is thinner than six mil but has a tear and puncture resistance that is equal to or greater than the six mil thick plastic that has been the common thickness material used in abatements for years. The department has added this material as an alternative to the six mil plastic to provide an alternative that will still provide the same level of protection. In the event of a tear and leakage of ACM, the requirement to cleanup is intrinsic in the work practice standard, where no ACM is allowed to accumulate on the floor and become dry. The tear specifications were given to the department by the poly manufacturers and the distributers that wish to sell this product. Therefore, it should not be difficult to obtain polyethylene that meets these specifications. No change was made as a result of this comment.

Comment: Concerning §295.60(j)(2): One commenter suggested deleting the reference to O&M Supervisor, as the section pertains to abatement, not O&M.

Response: The department agrees and has removed the reference to O&M Supervisor.

Comment: Concerning §295.60(j)(2): One commenter suggested that wetting the asbestos on the entire component may damage the matrix and cause the ACM to become friable. The commenter suggests that standard industrial practice is to encapsulate the ACM, then wrap the components in plastic.

Response: The department maintains that the standard is to adequately wet the ACM; however, alternate work practices may be specified by the consultant if equally protective of public health and may be used after obtaining written permission from the Chief of the Asbestos Programs Branch per §295.60(a)(2). No change was made as a result of this comment.

Comment: Concerning §295.60(j)(3): One commenter suggested that dry removal be allowed per the OSHA exemption when the temperature in containment is below freezing.

Response: The department maintains that the consultant may specify alternate work practices which are equally protective of

public health, when appropriate to the unique circumstances of the job. No change was made as a result of this comment.

Comment: Concerning §295.60(m): One commenter suggested that ASTM 1368-90 Section 12, which deals with health considerations, be incorporated into §295.60(m).

Response: The purpose of this section is to set forth the requirements for operations. Although the department agrees that asbestos health-effect considerations are important, these issues are most efficiently conveyed as part of the required accreditation training, where the information can be continually updated. No change was made as a result of this comment.

Comment: Concerning §295.60(m)(3): One commenter suggests that the following provisions be added to the section: If a facility or building is to be demolished (not re-occupied), floor tile and mastic may be removed by: (1) installing critical barriers over all fixed objects, doors, windows, pipe penetrations, and HVAC penetrations. (2) a minimum of one layer of 6-mil polyethylene plastic to a minimum height for 4 feet. (3) negative pressure of 0.02 inches of water column shall be maintained with a minimum of 4 air changes per hour until final clearance samples have been achieved. (4) fully operational worker decontamination facility. (5) application of an EPA-approved bridging encapsulate to the removal area prior to final air clearance sampling and, (6) clearance sampling in accordance with established protocol.

Response: The department maintains that these specifications would be most appropriately addressed in the consultants specifications which address the unique circumstances of each job. No change was made as a result of this comment.

Comment: Concerning §295.60(m)(3), one commenter said the reference should be just "Appendix A" and nothing else. Several commenters suggested changing the revised language to clarify that the referenced section 40 CFR 763 SUBPART A refers to TEM and that the NIOSH 7400 refers to phase contrast microscopy (PCM), which should be referenced as a minimum standard. One commenter suggested deleting the entire paragraph on the grounds that the material is covered elsewhere. If retained, the commenter suggests changing the section to read: "Air monitoring shall be conducted in accordance with §295.58(i)."

Response: The department has changed this section, citing applicable federal regulations for personal air samples and referring to §295.58(i) in the TAHPR for other samples which cite the NIOSH 7400 method.

Comment: Concerning §295.60(m)(3), one commenter suggested that mandatory aggressive sampling will not work except in a full enclosure.

Response: The department agrees. Section 295.59(b)(9) and §295.58(i)(3)(A) provide for non-aggressive clearance on O&M Projects using glove bags or mini-enclosures. Projects not done in full containment must be specified as such by the consultant under §295.60(a)(2). No change was made as a result of this comment.

Comment: Concerning §295.61(f), several commenters suggested adding language to the first sentence that would exclude the annual Oand M notifications from the start-date/stop-date requirement.

Response: The department agrees and has made the corrections.

Comment: Concerning §295.61(f), several commenters felt that it was burdensome to require 24 hours notice prior to changes in the completion date. Two of the commenters requested that industrial/commercial facilities be exempted from the requirement.

Response: The department believes that sufficient flexibility already exists in the provision. An amendment must only be submitted when the completion date is varied by one work day for each week for the time period for which the project has been notified. NESHAP requires that the notification be updated when a 20% change to the project is made. The one work day per week completion date change is approximately 20% and easier to calculate. The accuracy of the completion date is important to prevent a department inspector from attempting to inspect a project that has been completed. No change was made as a result of this comment.

Comment: Concerning §295.61(g), several commenters stated that it was confusing and more stringent than NESHAP to change 35 cubic feet to 27 cubic feet.

Response: The department agrees and has changed all provisions, to reflect 35 cubic feet instead of 27 cubic feet. Changes were made in §295.61(g), (j)(3) and new §295.32(20).

Comment: Concerning §295.61(j), several commenters said that the notification fees should not be raised for floor tile. One of these commenters felt that this increase would not add protection for public health. One commenter said that the school districts cannot afford to perform the big projects if the cost is raised. One commenter believes that the changes in the notification fees could increase the notification cost by 200%.

Response: The department must enforce the asbestos law for all projects involving the disturbance of asbestos. Since non-friable material poses a significant risk to public health if not performed correctly, it is necessary to perform compliance inspections during the removal of this material in the same manner as friable material. When the NESHAP program was transferred to the department from TNRCC in 1994, the notification responsibility and fee collection came with it. Previously, when TNRCC had the program, they only enforced the provisions of the NESHAP. The NESHAP does not regulate non-friable material that remains non-friable. However, the TAHPA does regulate non-friable materials in public buildings. Because of the requirement to regulate all types of asbestos in a public building, both friable and non-friable, it is necessary to provide the funding necessary to carry out the task of providing compliance inspections for those projects to ensure that they are being performed properly in accordance with all applicable guidelines and therefore ensure protection of the public health. The changes in the notification fees will make it more equitable for all building/facility owners to notify. The increase in the notification fees for the abatement of Category I and Category II ACM will be, in part, balanced by the decrease in the maximum notification fee from $10,000 to $3,000. Building owners such as school districts which have a group of buildings on one site can reduce the cost of notification by submitting a combined "phased" project notification. By combining all of their abatement projects at one campus on one notification a district could effectively reduce the total cost of all the projects. The department encourages building owners to take advantage of the cost savings associated with the long term planning and notification based upon this type of project scheduling. No change was made as a result of this comment.

Comment: Concerning §295.61(j), one commenter did not want to be charged for demolition of pipeline that was non-regulated (under NESHAP).

Response: The demolition of a pipeline with non-regulated material, in ground, without supports, is not considered a demolition and therefore no notification is needed. Also, any renovation projects on a NESHAP facility, that involve the abatement of non-regulated material do not have to be notified according to NESHAP. Courtesy notifications will be charged a notification fee based on the total ARUs. Therefore, if you don't wish to pay for notifying when there is no requirement to notify, don't notify. If you are unsure about the requirement to notify, call the Asbestos Programs Branch at 800-572-5548. No change was made as a result of this comment.

Comment: Concerning §295.61(j)(3), one commenter said that "asbestos-containing material" should say "asbestos-containing building material".

Response: The department agrees and has made this change.

Comment: Concerning §295.62, one commenter suggests reviewing and incorporating section 10 of ASTM's standard guidelines into §295.62 which deals with record keeping.

Response: Existing record keeping requirements are considered adequate. Adding an external record keeping requirement would pose an unnecessary financial burden on the regulated community. No change was made as a result of this comment.

Comment: Concerning §295.62, one commenter asked if building owners are required to keep records related to asbestos if that building is sold.

Response: The records of any maintenance performed in the building should pass on to the new owner for its records. If the seller wants to keep a copy of the records they may, but there is no requirement to do so. No change was made as a result of this comment.

Comment: Concerning §295.62(a), two commenters said that this section conflicts with OSHA 29 CFR 1926.1101(n)(8) which requires records to be sent to the Director at OSHA.

Response: The department's intent is to have the information available for future review. The OSHA requirement to maintain and send records to the Director is similar but is not in conflict with the requirement in §295.62(a).

Comment: Concerning §295.62(a), one commenter suggested to put "in federal or state regulations" at the end of the first sentence.

Response: The department agrees that the sentence should be more specific about what regulations should overrule this 30 year record keeping requirement. Since all record keeping requirements are mentioned in this section, the department is adding "in this section" to the sentence.

Comment: Concerning §295.62(b)(4), one commenter suggested deleting this requirement from the proposed rules. The department has not identified the persons who will have access to such information and at what times and days of the week nor the purpose of such inquiries by the un-named persons.

Response: Any employee of the Toxic Substance Control Division, including regional inspectors, has the authority to request information from a TDH licensed person. The purpose of such inquiries is to verify training certification for licensing purposes and/or to gather support documentation as part of an investigation or inspection. The department expects this information to be provided in a timely manner; however, the department does not intend this to hinder or impede the ability to conduct business. No change was made as a result of this comment.

Comment: Concerning §295.62(b)(5), several commenters asked how a training provider is supposed to confirm that the prospective student possesses a valid training certificate. Another commenter felt that only a "reasonable" effort need be made.

Response: The department researched the comments made during the development of the MAP and found that the EPA had similar comments and agreed that to require the training provider to verify the accreditation status of students would be a significant burden. The department therefore agrees to remove this requirement but encourages the training providers to verify the accreditation status of students enrolling in their courses by asking to see a current accreditation certificate or card. Students are ultimately responsible for verifying their accreditation status. Again, training providers are encouraged to help the student understand their responsibilities and that any training will be invalid if proper prerequisite training has not been taken or is not within the 12 month grace period.

Comment: Concerning §295.62(b)(6)(A) and (B), one commenter suggests deleting this requirement from the proposed rules. Neither of these suggestions belong in the TAHPA Rules.

Response: The last sentence of each paragraph were provided for guidance and the department agrees that they are not a requirement. These two sentences where removed.

Comment: Concerning §295.62(c)(2)(A), one commenter said that it would be a more reasonable requirement to have documentation on-site for all of the contractor's on-site employees.

Response: The department agrees and the current language reflects this intent. No change was made as a result of this comment.

Comment: Concerning §295.62(c)(2)(K), one commenter suggested that personal safety practices are very ambiguous and that TDH should specify the type and manner of personal safety practices required for electrical, hazard communication, fire safety training, lock-out, tag-out, hot work, and others. This commenter also asked if TDH will enforce those personal safety requirements strictly related to asbestos or will TDH enforce those personal safety requirements specified for construction work.

Response: These are OSHA requirements. TDH inspectors are trained in general recognition of obvious workplace hazards. If a hazard identified, TDH inspectors may document and notify the appropriate Agency. No change was made as a result of this comment.

Comment: Concerning §295.62(c)(2)(N), one commenter said that it would be a burden for a contractor to maintain a roster of asbestos workers employed on a daily basis and could not assure the accuracy of such information.

Response: The contractor should not have a problem in complying with this requirement. This procedure should already be inplace. These records already exist for payroll records, tax, and insurance purposes. Every contractor needs to know who

is working on any given day. An additional burden is not being imposed. No change was made as a result of this comment.

Comment: Concerning §295.64(a), two commenters suggested that this paragraph applies to commercial buildings requiring accreditation under MAP.

Response: The department agrees. Proposed language reflects those changes. No change was made as a result of this comment.

Comment: Concerning §295.64(a), one commenter said that the MAP includes lunch and breaks in the eight hour training day and therefore the state rule is more restrictive than the MAP.

Response: The department recognizes the concern of the commenter regarding this section. However, since there was not a proposed change to this section of the rules published for public comment, the department is unable to address or change the rule at this time. Therefore, no change was made as a result of this comment. The department, nevertheless, will be mindful of this comment in any future proposed rule amendments.

Comment: Concerning §295.64(a)(3), several commenters suggest that §295.57(c) which allows for "accreditation" is in conflict with this section. Commenters say that it is more restrictive and the department should delete the reference to "accreditation." One commenter suggested deleting "accreditation" from section §295.64(a)(3).

Response: The department agrees with the commenter who suggested deleting the word "accreditation" and has made the change. We do not intend to penalize the person receiving the accreditation, even though the training provider is not TDH licensed, unless the training provider has no accreditation approval from EPA or another State that has an approved accreditation program inplace. The persons trained by an unlicensed training provider will not be approved for issuance of a license until all of the required training has been completed (e.g, the Texas Law course).

Comment: Concerning §295.64(b), several commenters suggest that the last sentence of this section creates confusion as to the training requirements for a licensed consultant.

Response: The department agrees and has made the appropriate changes to §295.64(b) by adding the words "For work in public buildings, see" in front of "also the other training required for consultants in §295.47(f)(3)" in order to direct a person to the requirement for a designer in a public building to have a consultant's license and the required training, of air monitor technician, inspector and management planner in addition to the designer course, as a prerequisite for that license.

Comment: Concerning §295.64(b), one commenter suggests inserting "at least" before "three-days." Some training providers offer four-day project designer courses.

Response: The department agrees and has made the change.

Comment: Concerning §295.64(c), two commenters said that accreditation does not apply for operations and maintenance which is a TAHPA requirement only.

Response: The department agrees and has made appropriate changes in §295.64(c).

Comment: Concerning §295.64(c), one commenter suggests deleting "asbestos competent person...requirements." There is no accreditation or licensing requirement for a competent person.

Response: The department agrees and has removed that specific language.

Comment: Concerning §295.64(c), (c)(11), (d), (d)(11), (e), and (g) several commenters said that the OSHA respirator standard requires medical evaluation be performed prior to fit-testing.

Response: The department agrees; however, the MAP requires this training as part of the instructional curriculum. To be in compliance with the OSHA requirements, a person should have the medical evaluation performed prior to attending the class to insure that they can wear a respirator. The instructor should insure that the person has had a medical evaluation before performing the respirator fit test. No change was made as a result of this comment.

Comment: Concerning §295.64(f), two commenters suggest deleting this requirement from §295.31(c)(3), since management planners are not required in commercial buildings under the MAP.

Response: The department agrees and has made the appropriate changes to §295.31(c)(3). No change was made to §295.64(f) as a result of this comment.

Comment: Concerning §295.64(g), one commenter suggested deleting this requirement from §295.31(c) since air monitoring technicians are not required in commercial buildings under the MAP.

Response: The department agrees and has made the appropriate changes to §295.31(c)(3).

Comment: Concerning §295.64(j), one commenter recommended adding this section to §295.31(c)(3). Commenter says that examination for accreditation should apply to disciplines providing asbestos abatement activities in commercial buildings.

Response: The department disagrees. This requirement would make the rules more stringent than the MAP for commercial buildings. It is the intent of the department to make the rules consistent with the MAP. No change was made as a result of this comment.

Comment: Concerning §295.64(j)(1), one commenter suggests deleting this requirement from the proposed rules, as it restricts the training provider to only one source to evaluate the student. Commenter also suggests that the department define the term "demonstration testing" and to define how this will fit into the testing scheme.

Response: The department disagrees with the deletion of the §295.64(j)(1). This language reflects the requirements under the MAP. An example of demonstration testing might be: having four types of respirator cartridges labeled a, b, c, and d. The exam question could be "Which of the cartridges would be used in asbestos abatement?" The student would then pick the appropriate letter corresponding to the correct cartridge. The exams must still have the required number of test questions. No change was made as a result of this comment.

Comment: Concerning: Concerning §295.65(c), one commenter suggested that the department not approve any additional training providers. The argument was that the department cannot keep up with the current approved licensed training providers and that it would create more competition as it is.

Response: The department cannot deny the opportunity to any otherwise qualified person/persons wanting to become licensed as an asbestos training provider. The department is currently developing an asbestos training provider database to more accurately keep track of providers, instructors, etc. No change was made as a result of this comment.

Comment: Concerning §295.65(d)(1), one commenter stated that this section did not include all the necessary elements of the MAP.

Response: The department agrees and has made the appropriate modifications.

Comment: Concerning §295.65(d)(1)(H), one commenter suggested deleting this requirement, and stated that it does not assist in the issuance of a license and serves no useful function to the department.

Response: The department disagrees. This information is useful to the department because it allows the department to keep track of asbestos courses its registered training providers are conducting in other states. This information is needed if the course approval is based on the approval of another state. When these rules are approved and Texas has the authority to approve training courses, there will be three ways to gain approval: directly from EPA, from another state, or TDH. If the applicant is using approval from another state, then the department needs the list in order to contact the other states of verify accreditation status. No change was made as a result of this comment.

Comment: Concerning §295.65(d)(1)(I), one commenter suggested deleting this requirement and that the department should be more definitive than the term "other course related materials." Another commenter had similar concerns related to §295.65(d)(2)(C).

Response: The department's intent is to have the training provider submit all materials that will be used for instructional purposes. Any materials, other than those specifically listed, such as videos or slides, must be evaluated to determine whether all required course topics are being addressed. No change was made as a result of this comment.

Comment: Concerning §295.65(d)(1)(J), one commenter said that the term "a detailed statement" is far too vague and for the department to be more definitive, or delete this requirement.

Response: This addition was needed to be in compliance with the MAP and is therefore must remain as stated. The intent is to have a written description of how the examination was developed and by whom. The department needs to know if the examination was developed by the training provider, copied from someone else's exam, or is a standardized examination purchased from a commercial entity. Information may include expected passing rates and statistical validity of the questions used. No change was made as a result of this comment.

Comment: Concerning §295.65(d)(3)(F), one commenter suggested deleting this requirement because it is clearly a case of double jeopardy.

Response: The department agrees to a certain extent with the comment and has amended the language to add criteria specifying that the violation of asbestos regulations must indicate a lack of ability, capacity or fitness to perform training duties or responsibilities. Training instructors and providers should be familiar with state rules because they are teaching those rules.

Comment: Concerning §295.65(e), one commenter suggested that the department drop the separate Air Monitoring Technician (AMT) refresher requirement, because it was not a MAP requirement, and add the required AMT topics to the project designer refresher curriculum. This would make the time spent in the separate refreshers equal to the two-day annual refresher course allowed elsewhere in the rules.

Response: The department disagrees. Because the department will be providing EPA approval, it is important to maintain the Project Designer course in accordance with the MAP. It is at the discretion of the training provider to offer the two-day course in lieu of providing four separate refresher courses. The intent of the two-day course is to allow combining duplicated material such as health effects and rules. The topics specific to each discipline are included in the two-day course. No change was made as a result of this comment.

Comment: Concerning §295.65(e), one commenter stated that we did not include the following requirement for contractor/supervisor and workers: "for each discipline, the refresher course shall review and include: federal, state and local regulations; state-of-the-art developments; and a review of the key aspects of the initial training course."

Response: The department agrees and has made the appropriate modifications.

Comment: Concerning §295.65(f)(3), one commenter asked if the photos could be digital.

Response: The department is not allowing digital photos in order to help prevent tampering with the evidence provided in the conventional photograph. The requirement to have a class photograph stems from a concern that training providers issue certificates to individuals that did not receive the proper training. By requiring a class photo the department hopes to curtail this practice. As a result of this comment, the department has added that digital or scanned images will not be accepted.

Comment: Concerning §295.65(f)(3), one commenter says that requiring a group photo is a needless burden, but may have merit to assure that all participants are truly present. This commenter suggested deleting this section from the rules but suggested that a group photograph could be taken anytime during the course, rather than at the end of the course. Another commenter suggested that the department should allow training providers to take the individual photos, at a time left to the training provider's discretion.

Response: The department's intent is to ensure that all participants are present and non-participants are not added at a later date. The department agrees that specifying a time may present an undue burden for individual photos and will change this section. However, the group photo must be taken at the end of the class to ensure that all students were in attendance for the full class.

Comment: Concerning §295.65(f)(3), one commenter asked how large the group photograph should be.

Response: The group photographs should be no smaller than a standard 3 1/2 in X 5 in print. This language has been added to the rule.

Comment: Concerning §295.65(h), one commenter indicates EPA has stated that the number 5 is artificial and arbitrary. The commenter further states that the minimum number of instructors is best determined by the professional trainer and not by an

arbitrary rule making policy. The commenter recommends that this section be deleted from the proposed rules. Additionally, the commenter states that two hours of relief from the second instructor is hardly any relief and this requirement should also be deleted.

Response: The department disagrees with deleting this section. EPA policy letters dated February and April of 1990 address the issue of one instructor. The training provider certainly may use more than two approved instructors, but, according to EPA policy, "under no circumstances shall a contractor, inspector/ management planner, or project designer course be taught by a single instructor." During our August 1997 Training Provider Seminar, Neil Pflum, the EPA Region 6 Asbestos Coordinator addressed the number of instructors for five or fewer students. The number five was discussed and agreed to by the training providers present at the meeting. Mr. Pflum, on behalf of EPA, has agreed to allow the use of only one instructor for classes with five or fewer students. TDH will abide by that decision and not take enforcement action if one teacher is used for five or fewer students. If TDH or EPA changes this policy, it will notify the licensed trainers by letter informing them of the change. Regarding the last portion of the comment, a second instructor may teach more than two hours (and less than 50%) and the rule states, "the second instructor shall teach a minimum of two hours." No rule change was made as a result of this comment.

Comment: Concerning §295.67, two commenters suggested adding the words "and commercial" to the end of the first sentence to show the policy extends beyond the public buildings to include the commercial buildings since the NESHAP and the MAP are part of the rules. Two commenters stated that there should be consistency in the use of industrial or commercial facilities in section 295.67 and Section 295.32(c)(2).

Response: The department agrees that this would be an appropriate change. However, since there was not a proposed change to this section of the rules published for public comment, the department is unable to address or change the rule at this time. Therefore, no change was made as a result of this comment. The department, nevertheless, will be mindful of this comment in any future purposed rule amendments.

Comment: Concerning §295.70(f)(1)(C), two commenters suggested adding "or accreditation" to this sentence.

Response: During the hearings when this was brought up, the department responded that this change would be more stringent than the MAP. The department has since learned that the MAP does extend greater penalties beyond those minimums addressed in §295.66 under deaccreditation. In fact since the MAP is promulgated under Title II of TSCA, persons violating the MAP may also be subject to assessment of civil administrative penalties. Therefore, the original suggestion to include "or accreditation" in this section holds merit and is consistent with the MAP. However, since there was not a proposed change to this section of the rules published for public comment, the department is unable to address or change the rule at this time. Therefore, no change was made as a result of this comment. The department, nevertheless, will be mindful of this comment in any future purposed rule amendments.

Comment: Concerning Section 295.70(f)(1)(E), one commenter requested clarification in regard to use the "adequately wet."

Response: The department addressed this in a previous response to §295.32(2) now renumbered to §295.32(3) and has provided added language in the new §295.32(3) definition to address "adequately wet."

The department is making the following minor changes due to staff comments.

Change: The department found several places where the term ACM needed to be replaced with the more descriptive term ACBM. The addition of the term ACBM was needed to be in compliance with the MAP and is therefore appropriate in the changes referred to here. Changes where made to §§295.32(5) now renumbered to §295.32(20), 295.34(g), 295.44(a), 295.44(f)(3), 295.47(a)(1), 295.50(a), 295.51(f)(2), 295.56(d)(3), 295.58(h), 295.58(i)(1)(A), 295.58(i)(3)(B), 295.59(a), 295.59(b)(4), 295.60(j), 295.60(j)(1), 295.60(j)(2), 295.60(j)(3), 295.61(j)(3), 295.64(c)(1), 295.64(d)(1), 295.64(e)(8), 295.64(e)(9).

Change: Concerning §295.32(73), the definition for Public building, staff suggested clarifying that the interior space of the subject buildings are the areas where a license is needed. This is consistent with past enforcement and the MAP. This change was made to §295.32(73) by adding the words ("The interior space of a" and "Interior space includes exterior hallways connecting buildings, porticos, and mechanical systems used to condition interior space.").

Change: Concerning §295.60, staff added the definition for adequately wet using the NESHAP as a basis for the definition in new §295.32(3). In doing so the term thoroughly wet was replaced with adequately wet in §295.60(j)(1), §295.60(j)(2), §295.60(j)(3), §295.70(f)(1)(E).

Change: Concerning §295.60(i), staff suggested adding that a working manometer shall be hooked up to the containment to indicate the negative pressure differential relative to the pressure outside containment. The department maintains that the use of the manometer is required in accordance with 29 CFR 1926.1101(g)(5) and should be required for a containment in a public building accordingly, for the ability to ensure containment integrity. For the purposes of compliance inspections, the department will check the relative negative pressure using the department's manometer, independent of any devices used by the contractor or consultant. The words "as measured by manonetric measurements" were added to §295.60(i).

Change: Concerning §295.64(a), staff suggested clarifying that disabilities covered by the Americans with Disabilities Act will be appropriately accommodated.

Change: Concerning §295.64(c), staff suggested that since there is no requirement under the MAP for accreditation for project manager or operations and maintenance contractor, that this section be reworded. The licensing requirements for project manager and Oand M contractor require accreditation training as a prerequisite, but it is not required under the MAP.

Public hearings were held in San Antonio, Texas on June 16, 1998, Houston, Texas on June 19, 1998, Richardson, Texas on June 23, 1998, and Midland, Texas on June 26, 1998. There were 200 people who attended those meetings of which 50 made comments. A total of 35 persons made written comments. The following organizations provided comments: U.S. Environmental Protection Agency, Texas Chemical Council, Texas Utilities, Asbestos Contractors Association of Texas, and the Texas Department of Health. The commenters were generally supportive of the rules. However, they had questions,

comments, suggestions, and concerns about specific sections. A total of 730 comments were received.

The amendments and new sections are adopted 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.

§295.31. General Provisions

(a) (No change.)

(b) Purpose. The purpose of these sections is to establish the means of control and minimization of public exposure to airborne asbestos fibers, a known carcinogen and dangerous health hazard, by regulating asbestos disturbance activities in buildings that afford public access or occupancy and in commercial buildings.

(c) Scope.

(1) For the purposes of licensure and procedures in public buildings:

(A) Rules application. These sections apply to all buildings which are subject to public occupancy, or to which the general public has access, and to all persons disturbing, removing, encapsulating, or enclosing asbestos within public buildings for any purpose, including repair, renovation, dismantling, demolition, installations, or maintenance operations, or any other activity that may involve the disturbance or removal of asbestos-containing material (ACM) whether intentional or unintentional. Also included are the qualifications for licensure of persons, and requirements for compliance with these sections and all applicable standards of the United States Environmental Protection Agency and the United States Occupational Safety and Health Administration as adopted.

(B) Exclusions. Private residences and apartment buildings with no more than four dwelling units are excluded from coverage by these rules. Except as provided in subsection (c)(2) and (c)(3) of this section, industrial or manufacturing facilities, in which access is controlled and limited principally to employees therein because of processes or functions dangerous to human health and safety, federal buildings and military installations are excluded from coverage by these rules.

(2) For the purposes of Federal National Emission Standards for Hazardous Air Pollutants (NESHAP) enforcement only: §§295.32; 295.34(a), (b)(1)-(3), (c), and (f); 295.61; 295.67-68; 295.70; and 295.71 of this title (relating to Texas Asbestos Health Protection) apply to all facilities. These sections shall apply to the extent necessary to allow the department to adopt and enforce the federal NESHAP. For facilities which are not otherwise subject to this title as public buildings, the department will apply and enforce these sections in a manner consistent with the NESHAP.

(3) For purposes of enforcing the Environmental Protection Agency (EPA) Asbestos Model Accreditation Plan (MAP) in commercial buildings, §§295.31, 295.32, 295.33, 295.34 (c),(e) and (g), 295.57, 295.64 (except (f)-(h)), 295.66, 295.67, 295.68 and 295.70 apply. For buildings which are not otherwise subject to this title as public buildings, the department will apply and enforce these sections in a manner consistent with the MAP.

(d) - (e) (No change.)

§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) Accredited person - A person who has attended and passed, within the last year, the appropriate asbestos course, as described in §295.64 of this title (relating to Training: Required Asbestos Training Courses) offered by an asbestos training provider licensed by the department or one that has been approved by another state, that has the authority from EPA to approve courses, or that has been approved directly by EPA.

(2) Act - The Texas Asbestos Health Protection Act, Texas Civil Statutes, Article 4477-3a, as amended.

(3) Adequately wet - Sufficiently mixed or penetrated with liquid clear through with no dry material to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet.

(4) AHERA - Asbestos Hazard Emergency Response Act of 1986, Public Law 99-519. The act amends the Federal Toxic Substances Control Act, 15 United States Code, §2641, et seq., by requiring an inspection of all school buildings (Grades K-12), all school administrations to develop plans for controlling asbestos in or removing asbestos from school buildings, and providing penalties for non-compliance.

(5) AIHA - The American Industrial Hygiene Association.

(6) Air monitoring - The collection of airborne samples for analysis of asbestos fibers.

(7) Asbestos - The asbestiform varieties of chrysotile, amosite, crocidolite, tremolite, anthophyllite, and actinolite and all materials containing one percent or more of any of those substances.

(8) Asbestos abatement - The removal, the encapsulation or the enclosure of asbestos for the purpose of, that has the effect of, reducing or eliminating airborne concentrations of asbestos fibers or amounts of ACM.

(9) Asbestos abatement activity - Asbestos abatement, any on-site preparations or clean-up related to the abatement.

(10) Asbestos abatement contractor - A person who undertakes to perform asbestos removal, enclosure, or encapsulation for others under contract or other agreement, or who bids to undertake asbestos activities.

(11) Asbestos abatement supervisor - An individual who is in the direct and responsible charge of the personnel, practices, and procedures of an asbestos abatement operation or project.

(12) Asbestos consulting activities- consulting activities in public buildings include: the designing of asbestos abatement projects; the inspection for asbestos-containing materials (ACM); the evaluation and selection of appropriate asbestos abatement methods and project layout; the preparation of plans, specifications and contract documents; the review of environmental controls, abatement procedures for personal protection employed during the project; the design of area and clearance air monitoring of the project; any inspection, management planning, air monitoring, or project management performed by or for the consultant or consulting agency; consultation regarding compliance with various regulations and standards; recommending abatement options; and representing the consultant agency or consultant in obtaining consulting work.

(13) Asbestos-containing building material (ACBM) - Surfacing ACM, thermal system insulation ACM, or miscellaneous ACM that is found in or on interior structural members or other parts of a public or commercial building.

(14) Asbestos-containing material (ACM) - Materials or products that contain more than 1.0% of any kind or combination of asbestos, as determined by the Environmental Protection Agency (EPA) recommended methods as listed in EPA/600/R-93/116, July 1993 "Method for the Determination of Asbestos in Bulk Building Materials". This means any one material component of a structure or any layer of a material sample. Composite sample analysis is not allowed.

(15) Asbestos-containing waste material - Includes mill tailings or any waste that contains commercial asbestos and is generated by a source subject to the provisions of 40 CFR Part 61, Subpart M. This term includes filters from control devices, friable asbestos waste material, and bags or other similar packaging contaminated with asbestos. As applied to demolition and renovation operations, this term also includes regulated asbestos-containing materials, and materials contaminated with asbestos including disposable equipment and clothing.

(16) Asbestos exposure - Airborne asbestos fiber concentrations resulting from disturbance or deterioration of asbestos or asbestos containing material (ACM).

(17) Asbestos project design - Asbestos abatement project design includes the inspection of public buildings for asbestos containing material (ACM), the evaluation and selection of appropriate asbestos abatement methods, project layout, the preparation of plans, specifications and contract documents, and the review of environmental controls, abatement procedures and personal protection equipment employed during the project.

(18) Asbestos-related activity - The disturbance (whether intentional or unintentional), removal, encapsulation, or enclosure of asbestos, including preparations or final clearance, the performance of asbestos surveys, the development of management plans and response actions, asbestos project design, the collection or analysis of asbestos samples, monitoring for airborne asbestos, bidding for a contract for any of these activities, or any other activity required to be licensed under the Texas Asbestos Health Protection Act.

(19) Asbestos removal - Any action that dislodges, strips, or otherwise takes away asbestos containing material (ACM).

(20) Asbestos reporting unit (ARU) - An asbestos reporting unit is 160 square feet or 260 linear feet or 35 cubic feet of ACBM in public buildings or RACM in facilities, as defined under NESHAP.

(21) Asbestos survey - An inspection of a building or facility to determine the location, quantity, and condition of asbestos-containing material (ACM) therein by taking samples for analysis or by visual inspection.

(22) Board - The Texas Board of Health.

(23) Building owner - The owner of record of any building or any person, such as a property manager, who exercises control over such building to the extent that said person contracts for or permits renovation to or demolition of said building. A general contractor hired by the building owner for the purpose of performing a renovation or demolition cannot act as the building owner.

(24) CFR - The Code of Federal Regulations.

(25) Commissioner - The Texas Commissioner of Health.

(26) Commercial asbestos - Any material containing asbestos that is extracted from ore and has value because of its asbestos content (NESHAP definition, 1990).

(27) Commercial Building - The interior space of any industrial or federal government owned building. Interior space includes exterior hallways connecting buildings, porticos, and mechanical systems used to condition interior space.

(28) Competent person - The individual designated as the competent person as required by the United States Occupational and Health Administration regulations in 29 CFR, §1926.58.

(29) Containment - A portion of the regulated area that has been sealed and placed under negative air pressure with high efficiency particulate air-filter (HEPA) filtered negative air machines.

(30) Contractor - A person under contract to perform a service with wage or income reporting and tax responsibility.

(31) Demolition - The wrecking or removal of any load-supporting structural member of a public building or facility or any related asbestos removal, stripping, or handling operations together with any related operations or the intentional burning of any public building or facility.

(32) Department - The Texas Department of Health.

(33) Designated person - The individual designated under Asbestos Hazard Emergency Response Act (AHERA) to oversee all asbestos activities to include compliance with all laws, regulations, and rules.

(34) Employee - A person who is paid a salary, wage, or remuneration by an entity for services performed and has a relationship with the entity that would result in the entity being liable for that person's acts or judgements.

(35) Encapsulation - A method of control of asbestos fibers in which the surface of asbestos containing material (ACM) is penetrated by or covered with a liquid coating prepared for that purpose.

(36) Enclosure - The construction of an airtight, impermeable, semi-permanent barrier surrounding asbestos to prevent the release of asbestos fibers into the air.

(37) Environmental Protection Agency (EPA) regulations - Regulations found in 40 Code of Federal Regulations (CFR).

(38) EPA - The United States Environmental Protection Agency.

(39) Facility - Any institutional, commercial, public, industrial or residential structure, installation or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units); any ship; and any active or inactive disposal site. Any structure, installation or building that was previously subject to 40 CFR §61.141, Subpart M is not excluded, regardless of its current use or function.

(40) Facility owner - The owner of record of any facility or public building or any person who exercises control over a facility or public building to the extent that said person contracts for or permits renovation to or demolition of said facility or public building.

(41) Federal government owned building - Any building, which is not a school building as defined by 40 CFR 763.83, owned

by the United States Federal Government or any other type of US military building.

(42) Friable material - Materials that when dry can be crumbled, pulverized, or reduced to powder by hand pressure, and includes previously nonfriable material after such previously nonfriable material becomes damaged to the extent that, when dry, it may be crumbled, pulverized, or reduced to powder by hand pressure.

(43) HEPA - A high-efficiency particulate air filter, capable of trapping and retaining 99.97% of mono-dispersed airborne particles 0.3 micron or larger in diameter.

(44) HVAC - Heating, ventilation, and air conditioning systems.

(45) Independent third-party air monitor - A person retained to collect area air samples to be analyzed by and for the owner of the building or facility being abated. The person must not be employed by the abatement contractor to analyze any area samples collected during the abatement projects being monitored or the clearance samples.

(46) Individual - A single person acting of and for his or herself.

(47) Industrial building - Any building where industrial or manufacturing operations or processes are conducted and to which access is limited principally to employees and contractors of the facility operator or to invited guests under controlled conditions.

(48) Inspection - An activity undertaken in a school building, public building, or commercial building to determine the presence or location, or to assess the condition of, friable or nonfriable asbestos-containing building material (ACBM) or suspected ACBM, whether by visual or physical examination, or by collecting samples of such material. This term includes reinspections 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.

(49) Installation - A building or structure, or group of buildings or structures, at a single demolition or renovation site controlled by the same owner or operator (NESHAP definition, 1990).

(50) Layer - Any constituent of an asbestos bulk sample that exhibits different physical properties such as color or composition and can by readily separated from the rest of the sample with an instrument such as a modeler's knife.

(51) License - Any license or registration issued under this chapter.

(52) Licensee - A person who meets all qualifications and has been issued a license or registration by the Texas Department of Health in accordance with these sections.

(53) Major Fiber Release Episode - Any uncontrolled or unintentional disturbance of ACBM, resulting in a visible emission, which involves the falling or dislodging of more than 3 square or linear feet of friable ACBM.

(54) Management plan - A written plan describing appropriate actions for surveillance and management of asbestos containing material (ACM).

(55) Minor Fiber Release Episode - Any uncontrolled or unintentional disturbance of ACBM, resulting in a visible emission, which involves the falling or dislodging of 3 square or linear feet or less of friable ACBM.

(56) Model accreditation plan - A United States Environmental Protection Agency plan which provides standards for initial training, examinations, refresher training courses, applicant qualifications, decertification, and reciprocity, as described in Title 40, CFR, Part 763, Subpart E, Appendix C.

(57) NESHAP - The United States Environmental Protection Agency National Emissions Standards for Hazardous Air Pollutants, as described in Title 40, CFR, Part 61.

(58) NIOSH - The National Institute of Occupational Safety and Health.

(59) Nonfriable material - Material which, when dry, may not be crumbled, pulverized, or reduced to powder by hand pressure.

(60) NVLAP - The National Voluntary Laboratory Accreditation Program.

(61) Operations and maintenance (O&M) - Operations and maintenance activities are repairs, maintenance, renovation, installation, replacement, or cleanup of building materials or equipment.

(62) Operations and maintenance (O&M) contractor- A person who holds an Asbestos Operations & Maintenance Contractor (Restricted) license for general asbestos O&M work in a public building for himself or herself, as a building owner or agent, or as a contractor, if working for others, and follows the guidance contained in the EPA "Green Book". A contractor working for others must have the specified insurance for an abatement contractor.

(63) Operations and maintenance (O&M) manual - A record of O&M activities in a public building. The public building owner shall record each individual O&M activity in the manual, including the date of activity, the persons performing the activity, complete description of the activity, including methods used to prevent the emission of asbestos fibers, and the amount of asbestos removed. An updated total of the amount of asbestos abated shall be kept as a comparison to the amount estimated in the annual O&M notification. The manual will be made available to the department upon request.

(64) OSHA - The Occupational Safety and Health Administration of the United States Department of Labor.

(65) OSHA Regulations - Regulations found in 29 Code of Federal Regulations.

(66) Owner or operator of a demolition or renovation activity - Any person who owns, leases, operates, controls, or supervises the facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation or both.

(67) PAT - Proficiency Analytical Testing.

(68) PCM - Phase-contrast microscopy, a method of analysis for overall airborne fiber counts using an optical microscope.

(69) PEL - Permissible Exposure Limit as defined by OSHA regulations (29 CFR §1926.1101).

(70) Plans and specifications - Site-specific asbestos abatement description which includes drawings, floor plans or equivalent of sufficient size and detail, that display the location of asbestos abatement activities, the location of regulated area(s), and a clear and understandable written description of the work to be performed.

(71) PLM - Polarized-light microscopy, a method of analysis for detection of the presence and type of asbestos.

(72) Person - A person is:

(A) an individual;

(B) an organization such as a corporation, partnership, sole proprietorship, governmental subdivision, or agency; or

(C) any other legal entity recognized by law as the subject of rights and duties.

(73) Public building - The interior space of a building used or to be used for purposes that provide for public access or occupancy, including prisons and similar buildings. Interior space includes exterior hallways connecting buildings, porticos, and mechanical systems used to condition interior space. The term includes any building during a period of vacancy, including the period during preparations prior to actual demolition. The term does not include:

(A) an industrial facility to which access is limited principally to employees of the facility because of processes or functions that are hazardous to human safety or health;

(B) a federal building or installation (civilian or military);

(C) a private residence;

(D) an apartment building with no more than four dwelling units; or

(E) a manufacturing facility or building that is limited to workers and invited guests under controlled conditions.

(F) a building, facility, or any portion of which has been determined to be structurally unsound and in danger of imminent collapse by a professional engineer, registered architect, or a city, county, or state government official.

(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.

(75) Renovation - Additions to or alterations of the building for purposes of restoration by removal, repairing, and rebuilding.

(76) Response action - A method, including removal, encapsulation, enclosure, repair, and operation and maintenance, that protects human health and the environment from friable ACBM.

(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.

(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.

(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.

(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.

(81) Survey - An activity undertaken in a school building, or a public and commercial 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 reinspections 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.

(82) TEM - Transmission Electron Microscopy.

(83) Transportation of asbestos containing material (ACM) - Moving asbestos materials from one site to another.

(84) Working days- Monday through Friday including holidays which fall on those days.

§295.33. Adoption by Reference of Federal And Other Standards.

(a) Adoption by reference. The Texas Department of Health (department) adopts by reference the following federal laws and regulations, as amended, in the Code of Federal Regulations (CFR). To the extent that the Department has delegated authority, these laws and regulations are part of the state regulations and are enforced by the department:

(1) 40 CFR Part 61, Subpart M, titled, "National Emission Standard for Asbestos" (NESHAP), July 1, 1997, as amended; and

(2) 40 CFR Part 763, Subpart E, and Appendices A, B, C, and D, titled, "Asbestos" July 1, 1997, as amended.

(b) Availability. Copies of the documents in subsection (a) of this section are available for review at any department licensed training provider or the Texas Department of Health, Toxic Substances Control Division, Austin, Texas, department regional office, or local health program under contract to the asbestos branch, and may be reviewed during normal business hours.

(c) State versus federal standards. In certain instances the state requirements in the Texas Asbestos Health Protection Act and/or these sections are more stringent than the federal standards listed in subsection (a) of this section. In such cases the state requirements shall prevail.

§295.34. Asbestos Management in Facilities and Public Buildings.

(a) General. Those whose jobs relate to the physical aspects of a building including carpenters, electricians, plumbers, telephone and maintenance personnel, and those who occupy such buildings, are at great risk of asbestos-related disease unless proper training, personal protection, and/or engineering controls are rigorously employed. Prudent management of asbestos in buildings is vitally necessary for their protection. Building owners are required to inform all persons in writing, or document personal communication between the owner, or their authorized representative, and the persons, who are to perform any type of maintenance, custodial, renovation, or demolition work of the presence and location of asbestos-containing building materials (ACBM). Before performing any demolition or renovation activity facility owners are required to abate all friable ACBM or asbestos containing materials which may become RACM in accordance with 40 CFR Part 61, Subpart M. Before performing any demolition or renovation activity public building owners are required to abate friable and non-friable ACBM in accordance with 40 CFR Part 61, Subpart M and these sections.

(b) (No change.)

(c) Conditions requiring a mandatory asbestos inspection for ACBM. Prior to any renovation or dismantling within a public building, commercial building, or facility including preparations for partial or complete demolition, as required by 40 CFR, §61.145, owners must have a thorough inspection performed. The work area and all immediately surrounding areas which could foreseeably be disturbed by the actions necessary to perform the project must be inspected and sampled as applicable prior to renovations or demolition. A copy of the inspection report must be produced upon request by the Texas Department of Health (department). Once an inspection is complete, care must be taken to ascertain the contents of any new products installed in the building that would void the accuracy and validity of the survey. If an inspection cannot be performed before demolition or renovation is started due to the building being structurally unsound and unsafe to enter, all material must be presumed to contain asbestos and must be treated as ACBM.

(1) In a public building the inspection must be performed by a licensed asbestos inspector. Criteria to rebut the presence of ACBM in a public building shall be based upon inspections which conform to accepted standards such as the sampling protocol specified in 40 CFR Part 763 Subpart E, commonly referred to as the "AHERA" rules which are the required method for schools. Other factors should be taken into consideration when deciding on the best method to determine the location, extent and condition of the ACBM in a non-school building. Multi-story buildings may require investigation of the systems in the building in order to identify all possibilities of ACBM occurrence. Under no circumstances will less than three samples for each homogeneous area be collected. During the construction of a new public building, a licensed inspector, or project architect or engineer, may compile the information from material safety data sheets (MSDS) of all products used in the construction of the building and, finding no asbestos in any of those products, make a statement that no ACBM was used during the construction. This statement, together with copies of the MSDSs, can be used as an asbestos inspection.

(2) In a commercial building the inspection must be performed by an accredited inspector.

(3) In a facility the inspection must conform with 40 CFR §61.145.

(d) Asbestos control and abatement. A public building owner has the following options for managing the asbestos found in his/her buildings.

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

(4) Building owners may conduct asbestos abatement projects, including asbestos O&M activities, if they obtain an asbestos abatement contractor's license, as set forth in §295.45 of this title (relating to Licensure: Asbestos Abatement Contractor).

(e) Prohibition. The owner of a public building and any other person who contracts with or otherwise permits any person without appropriate valid license, registration, accreditation, or approved exemption to perform any asbestos-related activity is subject to administrative or civil penalty under the Texas Health Protection Act (Act), not to exceed $10,000 a day for each violation, or criminal penalty not to exceed $25,000, confinement in jail for not more than two years, or both.

(f) Mandatory notification. Notification is required in accordance with §295.61 under the following conditions.

(1) (No change.)

(2) In a public building, a notification to abate any amount of asbestos must be submitted to the Texas Department of Health (department) by the public building owner and/or operator. In a facility, a notification to abate amounts described in NESHAP must be submitted to the department by the facility owner and/or operator.

(g) Mandatory abatement project design. A project design, with respect to friable ACBM, must be prepared by either a licensed consultant (for a school or public building) or an accredited project designer (for a commercial building) for all projects which involve any of the following activities: (1) A response action other than a SSSD activity, (2) a maintenance activity that disturbs friable ACBM other than a SSSD activity, or (3) a response action for a major fiber release episode. Abatement projects which have a combined

amount of non-friable asbestos exceeding 160 square feet of surface area, or 260 linear feet of pipe length, or 35 cubic feet of material to be removed from a public building shall require that the project be designed by a licensed asbestos consultant. The exception to this requirement is for floor tile removed in accordance with §295.36 of this title (relating to Licensing and Registration: Exemptions; Emergency). In a commercial building, non-friable material does not require a design but must be treated in accordance with 40 CFR Part 61, Subpart M.

(h) (No change.)

§295.37. Licensing and Registration: Conflict of Interests.

(a) Independent third-party air monitoring. Third-party area monitoring and project clearance monitoring for airborne concentrations of asbestos fibers during an abatement project shall be performed by a person under contract to the public building owner to collect samples by and for the owner of the public building being abated. Such persons must not be employed or subcontracted by the asbestos abatement contractor hired to conduct the asbestos abatement project, except that:

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

(b) Licensee conflict of interest. Any person licensed according to these sections to perform asbestos inspections or surveys, write management plans, or design asbestos abatement projects shall not also engage in the removal of asbestos from those buildings, except for subsection (c) of this section. It is a conflict of interest for an individual instructor to train himself/herself in order to qualify for a license, or for an individual to give himself/herself a physical in order to qualify for a license.

(c) Municipalities exemption. Municipalities are exempt from the conflict of interest requirement only for the purpose of retaining a licensed person who may perform asbestos inspections and surveys, write management plans, design abatement projects and abate asbestos from the same building or facility. This exemption does not include air monitoring or abatement project clearance procedures which includes performing visual inspection and air samples for clearance in accordance with §295.58(i)(3) of this title (relating to Operation: General Requirements) which shall be performed by an independent third party who is not an employee of the municipality.

§295.38. Licensing and Registration: Applications and Renewals.

(a) General requirements. Applications for a license or worker registration under these sections must be made on forms provided by the Texas Department of Health (department), shall be signed by the applicant, and must be accompanied by a check or money order for the amount of the license or renewal fee. Only applications which are complete shall be considered by the department; the burden of proof for all requirements for licensure rests with the applicant.

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

(e) Processing applications and renewals.

(1) (No change.)

(2) Reimbursement of fees. Initial application or renewal fees will be refunded only when the department does not process a completed application in the time period specified in paragraph (e)(1) of this section, or when fee amounts are in excess of the correct fee amount or there is a double payment. Otherwise, fees for applications and renewals are not eligible for refund. A $30 administrative fee may be deducted from refunds for double payments or excess fees.

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

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

(f)-(j) (No change.)

§295.40. Licensing And Registration: Insurance Requirements.

Persons required to have insurance must obtain policies for required coverage and in the amounts specified in these sections. Self-insurance is allowed for governmental agencies and for persons who meet the self-insurance requirements under the insurance laws of Texas and receive approval from the Texas Department of Insurance or Texas Workers' Compensation Commission. Proof of approval by the appropriate authority as required for non-governmental persons must be submitted with the application. Liability insurance shall include pollution liability for asbestos exposure. Additional requirements are as follows:

(1) (No change.)

(2) The certificate of insurance must be complete, including all applicable coverages and endorsements, and must name the Texas Department of Health, Toxic Substances Control Division, as a certificate holder. Each required policy shall be endorsed to provide the department with at least a ten day notice of cancellation.

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

(5) Attempts to avoid proper payment of required workers' compensation insurance by hiring temporary or leased employees who are not properly covered or by paying employees in such a way as to obscure the intent of an individual's employment will be considered a violation of these sections and the requirement to obtain proper insurance.

§295.41. Licensure: State Licensing Examination.

(a) General. The Texas Department of Health (department) shall administer an examination to individuals seeking a license and who have successfully completed the required training from a training provider licensed or approved by the department. A copy of the training certificate shall be submitted with the application. All individuals, except workers, seeking a license in a specific category shall pass the examination for that category. For example, an individual seeking a license as an asbestos inspector must pass the department's inspector accreditation examination. Individuals receiving their training from training providers outside of Texas must complete the approved three-hour Texas law course prior to applying for the accreditation exam.

(b) Testing requirements. Beginning January 1, 1999, an applicant for a license will be required to pass a state examination to qualify for the original license. The application for the examination and the required fee may be included with the initial license application form or the applicant may register for the exam before applying for the license. Examinations shall be based upon the requirements for the license category for which an individual is applying The examination will cover the topics included in the training course for that license category. Out-of-state applicants must take the test for their respective category following completion of the required three-hour course in Texas law. Misconduct or dishonesty during the examination, or an individual taking the examination other than the individual scheduled, will constitute grounds for the issuance of a failing grade and revocation or denial of a license.

(c)-(f) (No change.)

§295.42. Registration: Asbestos Abatement Workers.

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

(e) Qualifications. Applicants for registration as asbestos abatement workers shall provide:

(1) (No change.)

(2) an acceptable written opinion of a physical examination of the applicant within the past 12 months that was performed by a physician in accordance with Occupational Safety and Health Administration of the United States Department of Labor (OSHA) regulations in 29 Code of Federal Regulations (CFR), §1926.1101(m), or Environmental Protection Agency (EPA) regulations in 40 CFR, §763.121(m), relating to medical surveillance. This opinion must be submitted on the Texas Department of Health (department) "Physicians Written Statement" form only, must be signed by the doctor and include certification of the following elements:

(A) completion and review of the applicants standardized medical questionnaire and work history with special emphasis directed to the pulmonary, cardiovascular, and gastrointestinal systems per 40 CFR §1926.1101 Appendix D;

(B)-(D) (No change.)

(E) a chest roentgenogram, posterior-anterior, 14x17 inches, or current film on file with interpretation in accordance with 29 CFR §1926.1101 Appendix E. (Note: According to 29 CFR §1926.1101 (m)(2)(ii)(C), it is up to the discretion of the physician whether or not a chest X-ray is required); and

(F) (No change.)

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

(f) (No change.)

§295.43. Licensure: Asbestos Operations and Maintenance Contractor (Restricted).

(a) (No change.)

(b) Restrictions.

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

(5) EPA regulatory requirements for small-scale, short duration activities affecting asbestos are explained in detail in 40 CFR, Part 763, Appendix B to Subpart E, as amended. The same regulatory requirements of OSHA for these activities are explained in 29 CFR 1926.1101.The restricted asbestos activities of licensed O&M contractors, O&M supervisors, and asbestos workers shall be confined to the work practices and procedures therein.

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

(e) Qualifications. Applicants for licensing as asbestos operations and maintenance contractors shall provide:

(1) a certificate of training from a training provider approved by or acceptable to the Texas Department of Health (department), indicating successful completion within the past 12 months of the approved training course for asbestos abatement contractors and supervisors or the annual refresher training, as described in §295.64 of this title (relating to Training: Required Asbestos Training Courses). An applicant organization shall designate at least one individual as their responsible person who will comply with this training requirement. This person must be responsible for asbestos operations and compliance with all asbestos rules and regulations;

(2)-(16) (No change.)

(17) proof of successfully passing the department examination for asbestos abatement contractors and supervisors:

(18) a copy of the wallet-size photo-identification card of the responsible person from the training course, as required from all trainers in Texas in accordance with §295.65(f)(2) of this title (relating to Training: Approval of Training Courses). Persons submitting out-of-state training certificates with their applications shall submit the necessary photo-identification they obtain when attending the mandatory course on Texas asbestos rules, as required in accordance with §295.64(h) of this title; and

(19) a one-inch by one-inch photograph of the face of the responsible person.

(f) Responsibilities. O&M contractors who obtain restricted licenses shall be responsible for:

(1) (No change.)

(2) complying with federal standards of operation, including EPA and OSHA regulations, which are adopted by reference, as follows:

(A) OSHA regulations in 29 CFR, §1926.1101(g)(9), titled "Work Practices and Engineering Controls for Class III Asbestos Work"; or

(B) (No change.)

(3)-(9) (No change.)

(g) (No change.)

§295.45. Licensure: Asbestos Abatement Contractor.

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

(e) Qualifications. Applicants for licensing as asbestos abatement contractors shall provide:

(1)-(17) (No change.)

(18) copies of all citations issued;

(19) proof of successfully passing the department examination for asbestos contractors, if required:

(20) a copy of the wallet-size photo-identification card of the responsible person from the training course, as required from all trainers in Texas in accordance with §295.65(f)(2) of this title (relating to Training: Approval of Training Courses). Persons submitting out-of-state training certificates with their applications shall submit the necessary photo-identification they obtained when attending the mandatory course on Texas asbestos rules, as required in accordance with §295.64(h) of this title; and

(21) a one-inch by one-inch photograph of the face of the responsible person.

(f) Responsibilities. The asbestos abatement contractor shall be responsible for:

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

(7) standards and practices for O&M activities, as conducted by a contractor, as described in §295.59 of this title (relating to Operations: Operations and Maintenance (O&M) Activities);

(8)-(11) (No change.)

§295.47. Licensure: Individual Asbestos Consultant.

(a) Licensing requirements. An individual must be licensed as an asbestos consultant to design asbestos abatement projects. A company employing an individual asbestos consultant may not hire an inspector, project manager, air monitor technician, or another individual asbestos consultant without obtaining an asbestos consultant agency license.

(1) Asbestos abatement project design includes the inspection of public buildings for asbestos-containing building material (ACBM), the evaluation and selection of appropriate asbestos abatement methods, project layout, the preparation of plans, specifications and contract documents, and the review of environmental controls, abatement procedures and personal protection equipment employed during the project. If hired to perform the asbestos project management by the building owner, the consultant is responsible to ensure proper procedures are used from the time of arrival of the abatement contractor on site through the completion of the removal of the containment and the departure of the contractor from the project site. Alternative control methods as referred to in 29 CFR §1926.1101(g)(6), such as dry removal or no negative air, shall be reviewed and certified in writing by a Certified Industrial Hygienist (CIH) or a Professional Engineer (PE) and shall be approved in writing by the Chief of the Asbestos Programs Branch, Toxic Substances Control Division, prior to the start of abatement.

(2) If an asbestos abatement project includes alterations to a building's structure, its electrical, mechanical, safety systems, or their components, a licensed individual consultant in conjunction with or who is a licensed Professional Engineer (PE) in Texas must prepare the appropriate plans and specifications as required by the Texas Engineering Practice Act, Article 3271a and the rules of the Texas State Board for Registration for Professional Engineers in addition to the requirement of paragraph (1) of this subsection.

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

(f) Qualification for licensing. To qualify as an individual asbestos consultant, individuals shall provide:

(1) verifiable documentation of their asbestos-related activity in conjunction with at least six asbestos abatement projects covering a period of at least a year within the past seven years. All asbestos work must be documented as having been performed under the applicable licensed or accredited rules or regulations;

(2)-(6) (No change.)

(g) (No change.)

(h) Responsibilities. The responsibilities of licensed asbestos consultants shall include the following:

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

(4) represent the interests of the building owner during the conduct of an asbestos abatement project, including consultation with the abatement contractor personnel, requiring compliance with regulations and specifications, requiring remedy of infractions, providing monitoring services, maintaining progress records and photographs as necessary, waste disposal, designating in writing a project manager and specifying the manager's responsibilities and authority, and providing written assurance to the building owner or operator of the final clearance of the project; and

(5) (No change.)

(i) Signature authority. All asbestos abatement plans and specifications must be signed on every page that addresses the scope of work and all drawings related to the abatement work. The cover page shall also include the consultant's signature, license number and license expiration date. The plans and specifications bearing the consultant's original signature shall be provided to the building owner prior to the start of the asbestos abatement. Plans and specifications that are used by another consultant, or consultant agency, to monitor a project, shall be reviewed, deletions and/or additions made, and signed in the same manner, indicating acknowledgment of their adequacy and the assumption for the responsibility related to the content contained therein.

§295.48. Licensure: Asbestos Consultant Agency.

(a) Scope: Asbestos consultant agency licenses. A company, employing an individual asbestos consultant and one or more additional asbestos consultants, inspectors, project managers, or air monitor technicians must be licensed as an asbestos consultant agency. Consultant organizations desiring to be licensed as asbestos consultant agencies shall designate one or more individuals licensed as asbestos consultants as their responsible persons, who shall be either principals or employees, and who shall have responsibility for the organization's asbestos activity.

(b) Authorization and conditions. A licensed asbestos consultant agency is specifically authorized to employ asbestos consultants, asbestos project managers, asbestos inspectors and management planners, and air monitoring technicians who are currently licensed under these sections to assist in the conduct and fulfillment of the agency's asbestos consultation activity, as necessary. As a condition of licensure, an asbestos consultant agency must comply with the following:

(1) (No change.)

(2) notify the department in writing of any additions or deletions of responsible individual asbestos consultants within 10 days of such occurrences;

(3) (No change.)

(c)-(f) (No change.)

§295.49. Licensure: Asbestos Project Manager.

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

(d) Qualifications. To qualify for a license, an applicant must provide:

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

(6) proof of successfully passing the department examination for asbestos abatement contractors and project supervisors.

(e) Responsibilities. To verify these sections are complied with, it is required that the project manager be on the project site when abatement activities are being performed. Those responsibilities and duties that shall be assumed by the asbestos project manager include observance and monitoring of compliance with:

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

§295.50. Licensure: Asbestos Inspector.

(a) Licensing. An individual must be licensed as an asbestos inspector to conduct asbestos inspections in public buildings. To perform inspections, an asbestos inspector must be employed by a licensed asbestos consultant agency or licensed asbestos management planner agency. The scope of duties include the collection of bulk samples of suspected asbestos-containing building material (ACBM); determining the location and condition of ACBM and suspect ACBM in a public building; and documenting inspection results. This license is not required for a licensed management planner, however, the management planner must provide documentation of completion of the inspectors course or refresher when renewing a management planner license.

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

(d) Qualification. To qualify for a license, an applicant must provide:

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

(3) a physician's statement of the required physical examination done within the past year as described in §295.42(e)(2) of this title (relating to Registration: Asbestos Abatement Workers) and submitted on the department's "Physician's Written Statement" form only;

(4) work experience: applicants for licensing as asbestos inspectors are required to submit verifiable written documentation of prior work experience, including professional references with their application forms which includes participation in at least five asbestos inspections performed under the direct supervision of a licensed management planner, licensed asbestos inspector, or licensed asbestos consultant.

(5) a copy of the wallet-size photo-identification card from the training course as required from all trainers in Texas in accordance with §295.65(f)(2) of this title (relating to Training: Approval of Training Courses). Persons submitting out-of-state training certificates with their applications may obtain the necessary photo-identification when attending the mandatory course on Texas asbestos rules, as required in accordance with §295.64(h) of this title;

(6) a one-inch by one-inch photograph of the face; and

(7) proof of successfully passing the department examination for asbestos inspector, if required.

(e) (No change.)

(f) Signature. All asbestos building surveys or inspections must be signed by the licensed inspectors performing the inspections and the consultant or management planner.

§295.51. Licensure: Individual Asbestos Management Planner.

(a) Licensing. A person must be licensed under these sections to develop an asbestos management plan, which shall include a written schedule and procedures to protect occupants from asbestos health hazards in a public building. A company, employing an individual management planner, cannot hire an inspector nor another management planner without becoming an asbestos management planner agency. A licensed management planner is also a licensed inspector and shall fulfill all requirements for the inspector license as listed in §295.50 of this title (relating to Licensure: Asbestos Inspector) in addition to the requirements for a management planner license. Only the fee for the management planner license will be charged to the applicant.

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

(e) Qualification. To qualify for a license as an asbestos management planner, an applicant must demonstrate in a manner acceptable to the Texas Department of Health (department) that they meet the following applicable qualifications. The applicant must:

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

(3) have participated in the preparation of at least five management plans, under the direction of a licensed management planner or licensed asbestos consultant;

(4)-(7) (No change.)

(f) Responsibilities. The asbestos management planner shall be responsible for:

(1) (No change.)

(2) the production of drawings which show the locations of asbestos materials, together with notes as to the extent and the condition of this ACBM;

(3) writing an asbestos report which includes information from paragraph (2) of this subsection together with a proposed schedule of actions to be taken to manage and control asbestos in the subject building; and

(4) (No change.)

(g) (No change.)

§295.54. Licensure: Asbestos Laboratory.

(a) Licensing requirement. A person must be licensed in compliance with the provisions of this section to provide polarized-light microscopy (PLM), phase contrast microscopy (PCM), or transmission electron microscopy (TEM) analysis of bulk or air samples collected in public buildings. Branch offices, which perform laboratory analysis, must fulfill the same equipment and operational standards as the main office which has been licensed, and must be separately licensed and accredited in accordance with subsection (d) of this section for the type of analysis they will be performing. The license may not be transferred to another company which has bought the licensed laboratory. A new license must be applied for within 60 days of change of ownership. Laboratories which change their name must notify the department within 60 days of the change, send a processing fee of $20 and a name change application. An applicant desiring to be an asbestos laboratory shall designate one or more individuals as their responsible persons, who shall have responsibility for the asbestos activity.

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

(d) Laboratory accreditation and proficiency. To be eligible for licensure, applicants must submit evidences of accreditation or proficiency of at least one of the following:

(1) accreditation by the National Voluntary Laboratory Accreditation Program (NVLAP) for bulk analysis by polarized-light microscopy

(2) accreditation by the NVLAP for analysis of airborne asbestos by transmission electron microscopy;

(3) accreditation as an industrial hygiene laboratory by the American Industrial Hygiene Association (AIHA) and participation in the Proficiency Analytical Testing (PAT) program for analysis of airborne fibers by phase-contrast microscopy (PCM);

(4) proficiency according to the standards of the AIHA PAT Program, which includes quarterly proficiency testing for airborne fibers by PCM and a quality assurance/quality control program as required by the NIOSH method 7400, issue 2, August 1994; or

(5) accreditation of the individual laboratory analysts through the AIHA Asbestos Analyst Registry (AAR) and a quality assurance/quality control program as required by the NIOSH method 7400, issue 2, August 1994.

(e) Limitations. Limits which are placed on the type of services that an asbestos laboratory can perform are as follows.

(1) (No change.)

(2) A laboratory may analyze samples by transmission electron microscopy (TEM) only if accredited by NVLAP.

(3) A laboratory enrolled in the AIHA PAT program may perform phase-contrast microscopy analysis under controlled laboratory conditions or under field conditions, if quality-control analysis is performed on at least 10% of the samples analyzed. Records must be kept in the laboratory indicating which samples were used to meet this 10% quality-control analysis. All phase-contrast

analysis shall be performed by an analyst who has received National Institute for Occupational Safety and Health (NIOSH) 582 or NIOSH 582 equivalent training. The laboratory must maintain individual records for each analyst as required by NIOSH 7400 to document the individual analyst's coefficient of variation. These records must be available on site for review by the department.

(f) Qualifications. Applicants for licensing as an asbestos laboratory shall submit as applicable:

(1) evidence of laboratory accreditation and most recently available results of PAT rounds for PCM and/or most recently available results of NVLAP sponsored proficiency tests for TEM and/or PLM in accordance with subsection (d) of this section;

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

§295.55. Licensure: Asbestos Training Provider.

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

(d) Qualification. To qualify for a license, an applicant must demonstrate to the department that they meet the applicable requirements. Documentation required of applicants for licensing as asbestos training providers is as follows.

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

(3) Advertising. Printed bulletins, brochures, or other promotional literature must specify course prerequisites for admission, the content of the course, and requirements for successful completion.

(4) Refund and cancellation policy. Each training provider must have a written policy concerning refunds and cancellations in both Spanish and English that is made available to applicants prior to acceptance of fees for enrollment, and shall include the procedure for notification by the trainee desiring to cancel.

(5) Information requirements. The training provider shall discuss and inform each prospective trainee of the requirements for the category of license being sought, and of necessary qualifications he/she must have. The training provider shall refund any course-related fees a prospective trainee may have incurred due to a failure to provide this information to the student. Necessary qualifications include the following.

(A) Individuals not eligible for employment in the United States will not be licensed.

(B) Eligibility for refresher training courses is dependent on the effective date of the initial training.

(C) Certain asbestos training courses require the successful completion of other training courses as a condition for admission.

(6) Maximum trainee-instructor ratio. The maximum number of trainees in a lecture session shall be 40. Hands-on training groups shall have no more than 15 trainees and must be so arranged that each trainee is given individual attention.

(7) Attendance and course completion standards. Attendance and course completion standards are as follows.

(A) Attendance records in asbestos training courses shall be taken at the beginning of each four-hour segment of course instruction. Control of exits and entrances shall be maintained. A master attendance record shall be maintained for each session.

(B) A trainee is not eligible to complete a given course if more than 10% of the session has been missed, and the qualifying exam shall not be offered in such instances. The records of that session shall be marked to this effect.

(C) A training provider must certify each examination taken by a trainee as to whether a minimum score of 70% correctly answered questions was achieved. The training provider shall have a written policy concerning re-examinations which shall apply to all such cases of failure of the initial examination. Failure of the re-examination means that the course will have to be repeated.

(8) Training facilities. Training facilities used will be those commonly used and accepted as classrooms or conference rooms. Classrooms must have restrooms available for the students. Unacceptable classrooms are rooms which by their arrangement or contents would readily distract students, or rooms open to the general public.

(9) Training requirements. A training provider must provide each course as a separate entity, as follows.

(A) Initial training courses shall not be combined with refresher courses.

(B) Courses shall be conducted in only one language and not combined with courses taught in another language, i.e. English or Spanish. All courses shall be taught in English, except the worker course. The worker course may be taught in another language, provided the instructor is fluent in the language, and books, training materials, and examinations are in the same language.

(C) Basic or refresher courses shall be conducted in only one discipline and not be combined with courses of other disciplines, i.e. an abatement worker course and a contractor/supervisor course cannot be taught as a combined course.

(10) Methods of instruction. Standard methods of instruction are as follows.

(A) At least 50% of the classroom instruction and 100% of the hands-on instruction will be conducted with instructors presenting the material.

(B) Training films and video tapes may be used to enhance understanding, but they may not be used as a substitute for the formal class conducted by a certified instructor or the Model Accreditation Program required hands-on training. Any of these materials must support and convey the understanding of the subject to the student.

(11) Hours of operation. Classes will be conducted during scheduled hours as noted in subsection (e)(2) of this section. More than eight hours of training in a calendar day shall not be authorized.

(12) The applicant must submit the following with the application:

(A) publications listed in §295.65(d)(3) of this title (relating to Training: Approval of Training Courses);

(B) if the applicant is a Texas corporation, a certificate of good standing issued by the Texas State Comptroller's Office must be submitted with the application for licensure; and

(C) if the applicant is a resident outside the State of Texas, a certificate of authority issued by the Texas Secretary of State authorizing the corporation to do business in the state, must be submitted with the application for licensure.

(e) Conditions of issuance. The following conditions and agreements shall apply to issuance of licenses under this section.

(1) (No change.)

(2) The department shall be furnished a copy of all scheduled courses and shall be notified in writing, at least 24 hours

in advance of any scheduled course cancellations. Facsimiles will be accepted, but it is the responsibility of the training provider to follow-up with a hard copy bearing the responsible party's signature. In the event the instructor can not provide notice of cancellation at least 24 hours in advance, an exception to this requirement may be granted. The instructor shall notify the department within two hours after the scheduled class start time and provide complete written justification as to why this cancellation could not be foreseen. Course schedules shall be provided to the department 14 days prior to the conduct of any course on the schedule. Exceptions may be made only with a complete justification being provided to the department and approval received. The department may consider variances with this rule. Requests for variances shall be submitted in writing to the Asbestos Programs Branch, Toxic Substances Control Division. Approval will be granted, if appropriate, in writing.

(3) There shall be a description and an example of numbered certificates issued to students who attend the course and pass the examination. The uniquely numbered certificate must be in conformance with 40 CFR, Part 763, Subpart E, Appendix C, and must show the school's name, address, telephone number, name of accredited person, discipline of the training course completed, name of instructor, dates of the training course, expiration date of one year after the date upon which the person successfully completed the course or examination, as applicable, and a statement that the student passed the examination and the date it was taken. The certificate must include the signature of the instructor and the signature of the course director, principal officer, owner, or CEO, and a statement that the person receiving the certificate has completed the requisite training for asbestos accreditation under TSCA Title II. Refresher certificates require all of the above except the examination date.

(4) (No change.)

(f) Approval of course instructors and guest speakers. Course instruction must be provided by EPA or State-approved instructors. The training provider shall submit a resume of each instructor and guest speaker who will participate in the conduct of any asbestos training course to be approved by the department. Prior approval of instructors and guest speakers is required. The training provider will notify the department of additions and deletions to their instructor roster within 15 days of actual occurrence.

(1) Instructor qualifications. Training instructors shall be qualified in any one of the categories in subparagraphs (A)-(D) of this paragraph. Training qualifications must be fully documented, and verifiable by the department. Instructors shall have current accreditation training from an Environmental Protection Agency (EPA) approved course for the discipline in which the instructor desires to teach. Instructors shall have current training from a Texas Department of Health (department) approved course for Air Monitor Technician (AMT) to teach the AMT course. The categories include:

(A) at least two years of actual hands-on experience in asbestos-related activities (abatement or consulting) with current training accreditation from Environmental Protection Agency (EPA) asbestos courses for the subject which the instructor will teach, and a high school diploma and completion of at least one teacher education course in vocational or industrial teaching;

(B) graduation from an accredited college or university with a bachelor's degree in natural or physical sciences or a related field, with one year's hands-on experience in asbestos-related activities (abatement or consulting), and current accreditation in at least one EPA asbestos course;

(C) at least three years teaching experience in Hazmat or HazWoper or EPA approved asbestos courses, and completion of one or more teacher education courses in vocational or industrial teaching from an accredited junior college or university; or

(D) a vocational teacher with certification from the Texas Education Agency with one year's hands-on experience in asbestos related activities (abatement or consulting) and current accreditation in at least one EPA asbestos course.

(2) Professional references. Each instructor application shall include three professional references attesting to teaching experience and asbestos-related qualifications. No more than one reference will be accepted from an employee of the same company as the applicant. References will be submitted on a form provided by the department which will be completed by the person providing the reference and mailed directly to the department for inclusion with the instructor application.

(3) Guest speaker qualifications. Guest speakers must be qualified on an individual basis of professional expertise for the purpose of teaching their specialty, such as law, medicine, insurance, etc.

(4) Complete applications. The department shall not accept any instructor or guest speaker application until it is complete. The department shall reject any such application that does not contain sufficient references to be fully verifiable.

(5) Responsibilities. The asbestos training provider shall be responsible for:

(A) complying with standards of operation, as described in §295.58 of this title (relating to Operations: General Requirements);

(B) presenting to students all course material as outlined in syllabus and as represented to the department for approval;

(C) providing the environment, training, and testing of sufficient quality that the student retains the required elements of the course;

(D) cooperating with department personnel in the discharge of their official duties to conduct inspections and investigations as described in §295.68 of this title (relating to Compliance: Inspections and Investigations); and

(E) taking an aggressive approach in meeting the needs of the student to include providing course review in preparation for the examination and specialized attention to enhance comprehension.

(6) Revocation or suspension of approval. The department may revoke or suspend instructor approval if field site inspections or classroom audits indicate an instructor is not providing training that meets the requirements of the Model Accreditation Plan or these sections. Training course sponsors shall permit department representatives to attend, evaluate, and monitor any training course instructor without charge. The inspection staff is not required to give advance notice of their inspections.

(g) Record keeping Requirements for Training Providers. All records shall be kept in accordance with §295.62(b) of this title (relating to Operations: Record keeping).

§295.56. Licensure: Asbestos Transporters.

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

(d) Qualifications. To qualify for a transporter license, an applicant must submit the following:

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

(3) pollution liability insurance in the amount of $1 million as required by §295.40 (relating to Licensing and Registration: Insurance Requirements), when transporting asbestos-containing building material (ACBM) for hire;

(4)-(5) (No change.)

(e) Responsibilities. An asbestos transporter shall:

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

(6) train employees in compliance with OSHA regulations in 29 CFR, §1910.120(a)(1)(v) or 49 CFR 172 Subpart H, as applicable, in anticipation of possible spills of asbestos;

(7) insure asbestos containing waste material is properly labeled: and

(8) in Texas, deliver all asbestos-containing waste material for disposal to a facility from the approved list provided by the Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087. If transporting out-of-state, follow the regulations of the receiving state.

§295.57. Accreditation: Asbestos Abatement in Commercial Buildings.

(a) In a federal government owned school building, (as defined in 40 CFR §763.83), or a commercial building, unless a person is appropriately accredited as a worker, contractor/supervisor, project designer, or inspector, the person may not engage in:

(1) work, supervision, or design to carry out any of the following activities:

(A) a response action other than a SSSD activity;

(B) a maintenance activity that disturbs friable ACBM other than a SSSD activity; or

(C) a response action for a major fiber release episode.

(2) conducting inspections for asbestos;

(3) project management to observe abatement activities performed by accredited contractors, serving as the commercial building owner's representative to ensure that abatement work is completed according to specification and in compliance with all relevant statutes and regulations.

(b) A person must be accredited in order to perform asbestos related activities in commercial buildings in Texas. Licensed persons meet this requirement since accreditation is a prerequisite to obtaining a license under these regulations.

(c) Accreditation is received by attending and passing the appropriate asbestos course, as described in §295.64 of this title (relating to Training: Required Asbestos Training Courses) offered by an asbestos training provider licensed by the department or one that has been approved by another state, that has the authority from EPA to approve courses, or that has been approved directly by EPA. Evidence of accreditation is shown by possession of an accreditation certificate or accreditation ID card of successful completion of the appropriate asbestos course. This documentation must be at the jobsite where the accredited person is working. All disciplines shall receive refresher training annually for reaccreditation. A person has a 12-month grace period in which to take refresher training once their accreditation certificate has expired. After that grace period, initial training must be completed again to become accredited again.

(d) Work practices and accreditation requirements for asbestos related activities under this section shall be at least as stringent as applicable federal laws and regulations relating to the MAP and 40 CFR Part 61, Subpart M.

§295.58. Operations: General Requirements for Public Buildings.

(a) Responsibility. It is the responsibility of owners of public buildings or their designated agents to engage persons licensed under the provisions of these sections to perform any asbestos-related activity.

(b)-(g) (No change.)

(h) Sampling for asbestos. A survey by a licensed asbestos inspector using accepted standards such as the Asbestos Hazard Emergency Response Act (AHERA) protocol or, as a minimum, three samples for each homogeneous area is required to rebut or confirm the presence of ACBM for abatement or operations and maintenance (O&M). Only laboratories licensed by the State of Texas may be used to evaluate samples taken from within public buildings in Texas. Building material that has not been sampled, and is not beyond question as to asbestos content, must be treated as ACBM.

(i) Project monitoring. The asbestos consultant shall specify the protocol for monitoring the project. This will include the duties and responsibilities of the project manager and the air monitoring requirements. Only one cassette may be placed on a pump at a time.

(1) Baseline.

(A) The asbestos consultant shall insure that baseline samples are collected. This requirement shall be made a part of the specifications for an asbestos project. Air samples for analysis by Phase-contrast Microscopy will be collected under normal building conditions for any abatement activity prior to the disturbances of asbestos-containing building material (ACBM) as a part of the activity. A minimum of three samples shall be collected on 0.8 micron mixed cellulose ester (MCE) filters loaded in conducting cassettes with extension cowls. Sampling and analysis will be in accordance with the latest edition of NIOSH 7400 protocol, counting rules A. The minimum sample volume will be 1,250 liters.

(B) (No change.)

(2) (No change.)

(3) Clearance.

(A) All project activities, except O&M, shall be cleared by using aggressive air sampling. Aggressive air sampling is the use of an air blower, such as a leaf blower with the force of air unaltered and operating as it comes from the factory, directed at all surfaces in order to cause loose asbestos fibers to become airborne. The maximum levels of residual fibers shall be as cited in subparagraph (C) of this paragraph.

(B) A visual inspection of the abatement area shall be made upon completion of ACBM removal but before the containment is removed to determine if the project has been properly conducted in accordance with the specifications and with applicable state and federal regulations and confirm that all ACBM has been properly removed, encapsulated, or maintained. A final visual will be performed by the asbestos consultant, or project manager delegated by the asbestos consultant, once the abatement contractor has removed all containment and other materials from the project site.

(C) For all projects, samples may be collected and analyzed by NIOSH 7400 protocol, counting rules A, Phase-contrast Microscopy (PCM) as amended. Clearance samples shall be collected at a rate of at least 0.5 less than 16 liters per minute on 0.8 micron

MCE filters in conducting cassettes with extension cowls. Minimum sample volume will be 1,250 liters. Clearance will be achieved if no sample is reported greater than 0.01 f/cc by the analysis report from the licensed laboratory. Asbestos Hazard Emergency Response Act (AHERA) protocol will be used in schools. A licensed asbestos consultant shall design the air monitoring scheme and may deviate from this subsection only if public health is maintained in accordance with all regulations. The asbestos consultant shall, upon request by the department, provide documentation and justification to support deviations and must be able to demonstrate that the design meets the requirements and intent of the applicable regulations.

(D) The visual inspection must be conducted by a properly licensed asbestos consultant. The asbestos consultant may delegate the visual inspection responsibility in writing to a licensed asbestos project manager considered experienced enough to properly perform this duty.

(E) (No change.)

(j) Posting of documents. The following documents are required to be posted conspicuously by licensees involved in the project to be visible at the entrance to the regulated area and must not be covered by any other documents:

(1) (No change.)

(2) copies of any violations issued as evidenced by an order from the federal or state asbestos-regulating authorities within the preceding 12 months from any asbestos project.

(k) Documents required to be on-site are as follows:

(1) all current licenses, registrations and accreditation certificates;

(2) EPA "Green Book" for O&M work;

(3) appropriate publications as listed in §295.33 of this title (relating to Adoption by Reference of Federal Standards) for the asbestos activity which is being performed;

(4) a copy of the "Recommended Work Practices for the Removal of Resilient Floor Coverings," published by the Resilient Floor Covering Institute, if removing floor coverings using this method.

(l) Prohibitions:

(1) Solvents with a flash point of 140 degrees Fahrenheit or below shall not be used.

(2) Disposal of improperly labeled or classified asbestos containing waste material as defined in 40 CFR Part 61, Subpart M is prohibited.

§295.59. Operations: Operations and Maintenance (O&M) Requirements for Public Buildings.

(a) Restrictions. O&M activities involving asbestos-containing building materials (ACBM) are restricted to small-scale, short-duration activities, according to 40 CFR Part 763, Subpart E, Appendix B, titled, "Work Practices and Engineering Controls for Small-Scale, Short-Durations Operations Maintenance and Repair (O&M) Activities Involving ACM", July 1, 1997, as amended. Asbestos O&M licensees shall not engage in any activity for which the primary purpose is asbestos abatement unless otherwise licensed to perform such activity.

(b) Work practices. Work practices shall include the following requirements.

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

(4) A mini-enclosure shall be constructed for containment of asbestos fibers, or a glove bag technique may be used for removal or repair of ACBM on pipes or ducts as described the references in §295.43(f)(2)of this title.

(5)-(7) (No change.)

(8) Asbestos shall be bagged and placed in containers, and disposed of in accordance with §295.60 of this title (relating to Operations: Abatement Practices and Procedures) and 40 CFR Part 61, Subpart M.

(9) Air clearance and visual inspections shall be performed before removing any mini-enclosure.

(10) (No change.)

§295.60. Operations: Abatement Practices and Procedures for Public Buildings.

(a) General provisions. The following general work practices are minimum requirements for protection of public health, and do not constitute complete or sufficient specifications for an asbestos abatement project. More detailed requirements in plans and specifications for a particular abatement project, or requirements that address the unusual or unique circumstances of a project, may take precedence over the provisions of this section. The specifications written for the abatement project shall also include the required air clearance procedures.

(1) (No change.)

(2) An asbestos project consultant who is licensed under §295.47 of this title (relating to Licensure: Individual Asbestos Consultant) and is a Professional Engineer (PE) or Certified Industrial Hygienist (CIH), may specify work practices that vary from the provisions of this section as long as the work practices specified are at least as protective of public health, and are clearly described in the project notification submitted to the Texas Department of Health (department). The burden of proof rests with the asbestos consultant. Alternative control methods as referred to in 29 CFR §1926.1101(g)(6), such as dry removal or no negative air, shall be reviewed and certified in writing by a Certified Industrial Hygienist (CIH) or a Professional Engineer (PE) and shall be approved in writing by the Chief of the Asbestos Programs Branch, Toxic Substances Control Division, prior to the start of abatement.

(3)-(4) No change.

(b)-(c) No change.

(d) Floor and wall preparation. Floor sheeting shall completely cover all floor surfaces and consist of a minimum of two layers of sheeting with at least a dart impact of 270 grams and tear resistance of machine direction (M.D.) 512 grams and transverse direction (T.D.) of 2067 grams or at least six-mil true thickness. Floor sheeting shall extend up sidewalls at least 12 inches and be sized to minimize the number of seams. No seams shall be located at wall-to-floor joints. Sealing of all floor penetrations against water leakage is mandatory. Wall sheeting shall completely cover all wall surfaces and consist of a minimum of two layers of four-mil sheeting. Wall sheeting shall be installed so as to minimize joints and shall extend beyond wall/floor joints at least 12 inches. No seams shall be located at wall-to-wall joints. Where a fire hazard exists, all plastic sheeting will be certified by the Underwriters Laboratory (UL) as being fire retardant. Where feasible, when containment walls which exceed 260 linear feet must be constructed, a viewing window will be included in the wall for each 260 linear feet or fraction of that distance which will permit the viewing of at least 51% of the abatement work area. The window shall be constructed of plexiglass which measures ap-

proximately 18 inches by 18 inches. The bottom of the window will be at a reasonable viewing height from the outside floor.

(e)-(f) (No change.)

(g) Warning signs. Danger signs in accordance with 29 CFR §1926.1101, shall be displayed, in both the Spanish and English languages, at all entrances to regulated areas, and on the outside of critical barriers.

(h) High-efficiency particulate air (HEPA) cleaning. Except with prior written approval from the department, cleaning procedures shall use wet methods and HEPA vacuuming.

(i) Containment-area ventilation. Units with HEPA filtration, and in sufficient number to provide a negative pressure of at least 0.02 inches of water column differential between the containment and outside, as measured by manometric measurements, and a minimum of four containment air changes per hour, shall be operated continuously for the duration of the project. The duration of the asbestos abatement project for the purpose of this requirement shall be considered from the time a regulated area is established through the time acceptable final clearance air-monitoring results are obtained in accordance with §295.58(i)(3) of this title relating to Operations: General Requirements for Public Buildings. These units shall exhaust filtered air to the outside of the building wherever technically feasible.

(j) Requirements for removal. The requirements for removing ACBM are that:

(1) all ACBM shall be adequately wetted prior to removal or other handling; material to be bagged will be marked per the applicable Occupational Safety and Health Administration (OSHA) and the National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations and doubled bagged with true 6 mil thickness or may be placed in a bag that meets the following criteria: tear resistance of M.D. 300 grams , T.D. 2,068 grams, and dart impact of 216 grams. Documentation from the manufacturer shall be on site. In order to double bag the asbestos waste the inner bag must be no more than half full, excess air must be squeezed out, the top twisted closed, folded over, sealed with duct tape, rinsed off or HEPA vacuummed to remove asbestos contamination, and placed inside another bag (or in a fiberboard drum). If an outer bag is used excess air must be squeezed out and the outer bag twisted closed, the top folded over and sealed with duct tape. If a fiberboard drum is used, the top must be sealed. Any bagging shall not allow leakage nor breakage due to overfilling;

(2) asbestos covered components that are going to be removed from the building may either be stripped in place and cleaned (and pass a visual inspection by the consultant), or the ACBM may be adequately wetted and the entire component wrapped in two layers of six-mil plastic or a single layer of plastic with a tear resistance of no less than M.D. 512 grams, T.D. of 2,068 grams, and a dart impact of no less than 297 grams as measured using ASTM methods D1709, D1922, and D882, labeled and sealed, providing that:

(A)-(C) (No change.)

(3) ACBM shall be removed in small sections and containerized while wet. At no time shall material be allowed to accumulate on the floor or become dry. Structural components and piping shall be adequately wetted prior to wrapping in plastic sheeting for disposal;

(4) proper temporary storage of asbestos containing waste material shall be provided (e.g. a roll-off box, dumpster or storage room lined with plastic sheeting). Final disposal of asbestos containing waste material shall be within 30 days of project completion or when receiving container is full, whichever is sooner.

(k)-(l) (No change.)

(m) Safety requirements. The following safety requirements shall be in effect for an abatement project:

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

(3) Air monitoring. Air monitoring shall include personal samples according to 40 CFR Part 763, Subpart G or 29 CFR §1926.1101, base line sampling, area sampling, and clearance sampling according to §295.58(i) of this title.

§295.61. Operations: Notifications.

(a) (No change.)

(b) Responsibility. It is the responsibility of the facility owner and/or operator to notify the department under this section. In a public building, this task may be delegated to a licensed asbestos abatement contractor or consultant in writing. The facility owner is responsible for the payment of the required notification fee. In a demolition where a licensed abatement contractor or consultant are not required, the task may be delegated to the demolition contractor. The notification must be filed on the form specified by the department. The notification shall have all information completed with no blocks left blank. The facility owner, and the person to whom the task of notification has been delegated, are jointly and severally responsible for the accuracy and timeliness of the notification.

(c) Timeliness of notification. Written notifications of asbestos abatement activity or demolition must be hand delivered, express mailed, or postmarked at least 10 working days (not calendar days) before asbestos abatement or any other activity begins that will disturb asbestos. Notifications must be delivered by United States Postal Service, commercial delivery service, or by hand delivery. Telephone facsimile (FAX) is not permitted.

(d)-(e) (No change.)

(f) Start-date/stop-date (completion date) requirement. In no event shall asbestos abatement activity, demolition, Operations and Maintenance (O&M), or renovation, as covered by this section, begin or be completed on a date other than the date contained in the written notice except for operation covered under subsection (g) of this section. Amendments to start date changes are to be submitted as required in subsections (d) and (e) of this section. An amendment is required for any stop dates which change by more than one work day for each week (seven calendar day period) for which the project has been scheduled and notification submitted. The building owner, or his/her delegated agent, shall provide schedule changes to the department no less than 24 hours prior to the change or completion of the project. Changes less than ten days in advance shall be confirmed with the regional office telephonically and followed up in writing to the central office.

(g) Consolidated notifications of small operations. Notifications involving a series fsmall, separate asbestos O&M or abatement operations (each less than 160 square feet or 260 linear feet or 35 cubic feet in size) may be combined by listing the information on a single notification form. Predict the combined additive amount of asbestos to be removed or stripped during a calendar year of January 1 through December 31. If the total amount is less than one asbestos reporting unit per subsection (j) of this section, and the facility is not a public building, a notification is not required. If the facility is a public building, a notification is required for any amount. The department shall be notified at least ten working days (not calendar

days) before the end of the calendar year preceding the year for which notice is being given.

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

(h)-(i) (No change.)

(j) Asbestos notification fees.

(1) (No change.)

(2) Payment. An invoice for the required fee will be sent to the building owner after the notification has been received by the department. Fee amounts, address, and fund numbers are included on the form. Payment must be remitted in the manner instructed on the invoice.

(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 fee shall be $3,000 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.)

§295.62. Operations: Record keeping.

(a) Record retention. Records and documents required by this section shall be retained for a period of 30 years from the date of project completion unless otherwise stated in this section. Such records and documents shall be made available to the department upon request. Persons ceasing to do business, shall notify the Texas Department of Health (department) in writing within 30 days of such event. The department, on receipt of such notification may instruct that the records be surrendered and may specify a repository for such records. The persons shall comply with the department's instructions within 60 days.

(b) Training providers. Licensed training providers shall comply with the following minimum record-keeping requirements.

(1) Training course materials. A training provider must retain copies of all instructional materials used in the delivery of the classroom training such as student manuals, instructor notebooks and handouts.

(2) Instructor qualifications. A training provider must retain copies of all instructors' resumes, and the documents approving each instructor issued by the department or EPA. Instructors must be approved by the department before teaching courses for accreditation purposes. A training provider must notify the department in advance whenever it changes course instructors. Records must accurately identify the instructors that taught each particular course for each date that a course is offered together with the course student roster.

(3) Examinations. A training provider must document that each person who receives an accreditation certificate for an initial training course has achieved a passing score on the examination in accordance with §295.64(j) of this title (relating to Training: Required Asbestos Training Courses). These records must include a copy of the exam and clearly indicate the date upon which the exam was administered, the training course and discipline for which the exam was given, the name of the person who proctored the exam, and the name and test score of each person taking the exam. The topic and dates of the training course must correspond to those listed on that person's accreditation certificate.

(4) Accreditation certificates. The training providers shall maintain records that document the names of all persons who have been awarded certificates, their certificate numbers, the disciplines for which accreditation was conferred, training and expiration dates, and the training location. The training provider shall maintain the records in a manner that allows verification of the required information by telephone.

(5) Verification of certificate information. Training providers of refresher training courses for accreditation must reasonably confirm that their students possess valid accreditation before granting course admission. Training providers offering the initial management planner training course must reasonably confirm that students have met the prerequisite of possessing valid inspector accreditation at the time of course admission. A valid accreditation certificate to receive refresher training would be one in the same course and not expired over 12 months.

(6) Records retention and access.

(A) The training provider shall maintain all required records for a minimum of three years.

(B) The training provider must allow the department reasonable access to all of the records required by the MAP, and to any other records which may be required by the department for the approval of asbestos training providers or the accreditation of asbestos training courses.

(C) If a training provider ceases to conduct training, the training provider shall notify the department and provide reasonable opportunity for the department to take possession of that providers asbestos training records.

(c) Asbestos contractors.

(1) Central location. The following records and documents shall be maintained by asbestos contractors at a central location at the principal place of business for a period of 30 years and shall be made available to the department upon request:

(A) records and documents required by 29 CFR §1910, and 29 CFR §1926.1101, as amended;

(B) (No change.)

(C) copies of all regulatory agency correspondence including letters, notices, citations received and notifications made by the building owner or operator;

(D)-(G) (No change.)

(2) On site. Records and documents shall be maintained on-site at the asbestos project location for the duration of the project. Records and documents with personal references shall be made available to all persons employed at the site upon request. All on-site records and documents shall be made available to the department upon request. The records and documents covered by this paragraph include:

(A) all current licenses, registrations and accreditation certificates;

(B) a current copy of the work practice requirements;

(C) a copy of the contract or technical specifications governing the project or if no contract, location and description of operations and description of abatement procedures;

(D) a listing of all employees, by name, social security number and certificate number working on the project;

(E) a listing of each of the contractors, sub-contractors and consultants on the project;

(F) a daily sign-in/out log which identified persons by name and the length of time each spent at the site;

(G) records of all on-site air monitoring;

(H) a written respirator program which conforms to requirements of 29 CFR §1910.134(b), as amended;

(I) name and address of the contractor or building owner-operator;

(J) name and address of project supervisor(s);

(K) description of personal safety practices;

(L) name and address of waste disposal site;

(M) dates of participation in the operation; and

(N) a roster of registered asbestos workers employed.

(d)-(e) (No change.)

§295.64. Training: Required Asbestos Training Courses.

(a) General provisions. Persons working with asbestos must be appropriately accredited to perform as a worker, contractor/supervisor, inspector, management planner, or project designer. In a commercial building, only accreditation is required as specified in this section. In a public building, licensing is also required. Applicants for licensing or renewal must submit evidence of fulfillment of specific training requirements acceptable to the Texas Department of Health (department) under these sections. Course content, hours of instruction, refresher training, etc., are subject to change or modification. At the conclusion of each training course, the instructor shall provide the student a copy of the registration form for the state licensing examination and a copy of the examination schedule. The training provider shall also assist the applicant if needed to complete the application to include listing any special requirements of the student, such as an accommodation for a disability covered by the Americans With Disabilities Act.

(1) The provisions of the Environmental Protection Agency (EPA) Model Accreditation Plan (MAP) reaffirm the principle that each of the accredited training disciplines is distinct from the others, because each reflects a different functional job role. Training courses for all disciplines shall be in accordance with the MAP.

(2) (No change.).

(3) Training courses shall be conducted by training providers licensed by the department. Persons trained within the confines of this State by unlicensed providers shall not be licensed by the department.

(4)-(7) (No change.)

(b) Asbestos project designer training. The project designer training course shall be at least three days in length. Persons seeking to be licensed as an asbestos consultant or accredited as a project designer under these sections shall complete the approved project design training course as described in this subsection. (For work in public buildings, see also the other training required for asbestos consultants in §295.47(f)(3) of this title (relating to Licensure: Individual Consultant)). Successful completion of the course shall be demonstrated by achieving a score of at least 70% correct on the course examination. The course shall adequately address:

(1)-(20) (No change.)

(c) Contractor/supervisor training. The contractor/supervisor course shall consist of at least five days of training. Persons seeking to be licensed as an asbestos abatement contractor, asbestos abatement supervisor, project manager, or operations and maintenance (O&M) (restricted) contractor/supervisor or accredited as an asbestos abatement contractor or supervisor, shall successfully complete an approved contractor/supervisor training course as described in this subsection. The course may be substituted for the asbestos abatement worker course; this substitution also applies to annual refresher training. This training shall include lectures, demonstrations, audio-visuals and hands-on training, including individual respirator fit testing, course review, and a written examination of 100 multiple-choice questions. Each trainee must score at least 70% correct or better on this exam to successfully complete the course. The course shall adequately address:

(1) physical characteristics of asbestos and asbestos-containing building material (ACBM);

(2)-(16) (No change.)

(d) Asbestos abatement worker training. The worker training course shall consist of at least four days of training. Persons seeking registration or accreditation as asbestos abatement workers shall successfully complete the approved training course, as described in this subsection. Successful completion of the contractor/supervisor training course shall also be acceptable as qualification for asbestos worker applicants. Worker training courses are required to have a classroom student-instructor ratio of not more than 25 to 1 (25:1). The worker training course shall include lectures, demonstrations, hands-on training including individual respirator fit testing, course review, and a written examination consisting of 50 multiple-choice questions. Successful completion of the course shall be demonstrated by achieving a score of at least 70% correct on the examination. The course shall adequately address:

(1) physical characteristics of asbestos and ACBM;

(2)-(12) (No change.)

(e) Asbestos inspectors. The inspector course shall consist of at least three days of training. Persons seeking to be licensed or accredited as asbestos inspectors shall successfully complete the approved training course as described in this subsection. The inspector training course shall include lectures, demonstrations, hands-on individual respirator fit testing, course review and a written examination consisting of 50 multiple choice questions. Successful

completion of the course shall be demonstrated by achieving a score of at least 70% correct on the examination. The course shall adequately address:

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

(8) inspecting for friable and non-friable ACBM;

(9) assessing of the condition of friable ACBM;

(10)-(16) (No change.)

(f) Management planners. The management planner course shall consist of at least two days of training, and has as a prerequisite, the three-day asbestos inspector course. Persons seeking to be licensed as management planners shall successfully complete the training program for inspectors, as described in subsection (d) of this section, plus the approved asbestos management planner training course, as described in this subsection. The management planner course shall include lectures, demonstration, course review and a written examination consisting of 50 multiple choice questions. Successful completion of the course shall be demonstrated by achieving a score of at least 70% correct on the examination. The course shall adequately address:

(1)-(12) (No change.)

(g) Air monitoring technician. Persons seeking to be licensed as air monitoring technicians shall successfully complete an approved three-day training course as described in this subsection. The air-monitoring technician course shall include lectures, demonstrations, hands-on individual respirator fit testing, course review and a written examination consisting of 50 multiple choice questions. Successful completion of the course shall be demonstrated by achieving a score of at least 70% correct on the examination. The course shall adequately address the:

(1)-(10) (No change.)

(h)-(i) (No change.)

(j) Examinations.

(1) Each training provider shall administer a closed book examination to persons seeking accreditation who have completed an initial training course. Demonstration testing may also be included as part of the examination. A person seeking initial accreditation in a specific discipline must pass the examination for that discipline in order to receive accreditation. For example, a person seeking accreditation as an abatement project designer must pass the examination for an abatement project designer. Training providers may develop their own examinations or use standardized examinations developed for purposes of accreditation under TSCA Title II. Each examination shall adequately cover the topics included in the training course for that discipline.

(2) The following are the requirements for examination in each discipline:

(A) Worker:

(i) 50 multiple-choice questions; and

(ii) Passing score: 70% correct.

(B) Contractor/Supervisor:

(i) 100 multiple-choice questions; and

(ii) Passing score: 70% correct.

(C) Inspector:

(i) 50 Multiple-choice questions; and

(ii) Passing score: 70% correct.

(D) Management Planner:

(i) 50 Multiple-choice questions; and

(ii) Passing score: 70% correct.

(E) Project Designer:

(i) 100 multiple-choice questions; and

(ii) Passing score: 70% correct.

§295.65 Training: Approval of Training Courses.

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

(c) Full approval. Full approval of an asbestos training course and the training provider license shall be granted for a period of one year after the department has granted contingent approval, has had the opportunity to conduct an on-site observation and evaluation of the training course, its instructors and its facilities, and has determined that the applicant's asbestos training course meets the requirements set forth in these sections. Training course providers shall permit representatives of the department to attend, evaluate, and monitor any training course without charge. The department compliance inspection staff are not required to give advance notice of their inspections.

(d) Applications. An applicant for approval of an asbestos training course must submit an application in writing to the department. Within 30 working days after receiving an application, the department shall acknowledge receipt of the application and notify the applicant of any deficiency in the application. The department will approve or deny the application only upon receipt of the completed application which shall contain the following information:

(1) Initial Training Course Approval. The following minimum information is required for approval of initial training courses:

(A) the name and address of the licensed training provider who will present the course, and the name and phone number of the responsible individual;

(B) the type of course for which approval is being requested, including the length of training in days;

(C) a detailed outline of the course curriculum including the specific topics taught, the amount of time allotted to each topic, the amount and type of hands-on training, the name and qualifications of the individual developing the instruction program for each topic, and copies of all written materials to be distributed to the student;

(D) a description of the type of equipment owned which must be used in all full-length courses for demonstrations and/or "hands-on" exercises, including but not limited to, types of respirators, negative air units, water spray devices, protective clothing, construction materials, high efficiency particulate air (HEPA) vacuum, air purifying panel, glove bags, shower unit, water filter assembly;

(E) documentation, including photos and details of assurance that the number of instructors, the amount of equipment, and the facilities are adequate to provide the students with proper training;

(F) administration of a written multiple choice examination at the conclusion of the course. If copies of the exam are required by the department, measures to protect the confidentiality of the exam as proprietary information will be maintained by the department to the extent authorized by law;

(G) acknowledgement that the minimum grade which must be obtained on the exam for a trainee to successfully complete the course is 70% correct;

(H) a list of any other states that currently approve the training course;

(I) a copy of all course materials (student manuals, instructor notebooks, handouts, and other course related materials);

(J) a detailed statement about the development of the examination used in the course;

(K) names and qualifications of all course instructors. Instructors must have academic and/or field experience in asbestos abatement; and

(L) a description and example of the numbered certificates issued to students who attend the course and pass the examination.

(2) Refresher Training Course Approval. The following minimum information is required for approval of refresher training courses:

(A) the length of training in half-days or days.

(B) the topics covered in the course.

(C) a copy of all course materials (student manuals, instructor notebooks, handouts, and other course related materials).

(D) the names and qualifications of all course instructors. Instructors must have academic and/or field experience in asbestos abatement; and

(E) a description and an example of the numbered certificates issued to students who complete the refresher course and pass the examination, if required.

(3) Withdrawal of Training Course Approval. The following criteria are grounds for suspending or withdrawing approval from accredited training programs under §295.69 of this title (relating to Compliance: Reprimand, Suspension, Revocation). At a minimum, the criteria shall include:

(A) misrepresentation of the extent of a training course's approval by a State or EPA;

(B) failure to submit required information or notifications in a timely manner;

(C) failure to maintain requisite records;

(D) falsification of accreditation records, instructor qualifications, or other accreditation information;

(E) failure to adhere to the training standards and requirements of the EPA MAP or State Accreditation Program;

(F) an approved training course instructor, or other person with supervisory authority over the delivery of training that has been found in violation of other asbestos regulations in a manner that indicates a lack of ability, capacity or fitness to perform training duties and responsibilities. An administrative order under §295.69 of this title or 295.70 of this title (relating to Compliance: Administrative Penalty) constitutes evidence of a failure to comply with relevant statutes or regulations; or

(G) submittal of false information as a part of the self-certification required under Unit V.B. of the revised MAP.

(e) Re-training (refresher) courses. For all disciplines except inspectors, management planners, and air monitoring technicians, a state accreditation program shall include a one-day annual refresher training course for reaccreditation. Refresher courses for inspectors shall be a half-day in length. Management planners shall attend the inspector and management planner refresher courses. Consultants shall attend an approved two-day annual refresher training course, or four separate refreshers consisting of project designer, inspector, management planner, and air monitoring technician. The inspector, management planner, and air monitoring refresher courses shall each be four hours in length. For each discipline, the refresher course shall review and include: federal, state and local regulations; state-of-the-art developments; and a review of the key aspects of the initial training course.

(f) Issuance of certificates. All training certificates shall bear the name, address, and telephone number of the licensed training facility and the name of the instructor. The training provider shall:

(1) issue certificates that bear the school's name, address, telephone number, name of accredited person, discipline of the training course completed, name of instructor, expiration date of one year after the date upon which the person successfully completed the course or examination, as applicable, and a statement that the student passed the examination and the date it was taken. The certificate must include the signature of the instructor and the signature of the course director, principal officer, owner, or CEO. Refresher certificates require all of the above except the examination date;

(2) (No change.)

(3) submit the names, social security numbers, one inch by one inch photos, taken during the course, and a group photo of the class taken at the end of the course, of students receiving an accreditation to the department within 10 days of the completion date of each course on a form provided by the department. Digital or scanned images will not be accepted. The group photographs should be no smaller than a standard 3-1/2 inches X 5 inches print; and

(4) (No change.)

(g) (No change.)

(h) Minimum number of instructors. Each course requiring approval according to the model accreditation plan shall require at least the minimum number of instructors for that course as specified by EPA. Only one instructor is required for courses with five or fewer students. In cases where a second instructor is required, a guest speaker can substitute for one of the required instructors. The person acting as the second instructor shall teach a minimum of two hours. Two instructors are not required for worker courses or refresher courses.

§295.66. Compliance: Deaccreditation.

(a) After notice to the accredited person of an opportunity for a hearing in accordance with subsection (c) of this section, the Texas Department of Health (department) may reprimand the accredited person or modify, suspend, suspend on an emergency basis, or revoke accreditation under the Texas Asbestos Health Protection Act.

(b) The department may reprimand any accredited person, or may suspend or revoke an accreditation for:

(1) performing work requiring accreditation at a job site without being in physical possession of initial and current accreditation certificates;

(2) permitting the duplication or use of one's own accreditation certificate by another;

(3) performing work for which accreditation has not been received; or

(4) obtaining accreditation from a training provider that does not have approval to offer training for the particular discipline from either EPA or from a State that has a contractor accreditation plan at least as stringent as the EPA MAP.

(c) The contested-case hearing provisions of the Administrative Procedure Act, Texas Government Code, Chapter 2001 shall apply to any enforcement action proposed to be taken under this section. The formal hearing procedures of the department in Chapter 1 of this title (relating to the Board of Health) shall also apply. The person charged with the violation shall be notified of the alleged violation; the grounds upon which the suspension, revocation, or withdrawal is based; the time period during which the suspension, revocation, or withdrawal is effective, whether permanent or otherwise; the conditions, if any, under which the affected entity may receive accreditation or approval in the future; any additional conditions which the Commissioner may impose; and the opportunity to request a hearing prior to final department action to suspend or revoke accreditation or suspend or withdraw approval.

(d) If an accreditation received under §295.57 of this title (relating to Accreditation: Asbestos Abatement in Commercial Buildings) has been suspended, the person(s) named in the suspension shall not be eligible to reapply for accreditation under this section for one year.

(e) If an accreditation received under §295.57 of this title has been revoked, the person(s) named in the revocation shall not be eligible to reapply for accreditation under these sections for three years.

§295.68. Compliance: Inspections and Investigations.

(a) The Texas Department of Health (department) has the right to inspect or investigate the practices of any person involved with asbestos abatement or related activity in a facility, public or commercial building.

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

(f) All persons engaged in asbestos-related activities must have the department-issued ID Card present at the worksite except those persons working in a commercial building which must have their accreditation certificate or card.

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 November 23, 1998.

TRD-9817896
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: December 13, 1998
Proposal publication date: May 29, 1998
For further information, please call: (512) 458-7236

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TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 19. Agent's Licensing

Subchapter V. Registration of Full Time Home Office Salaried Employees

28 TAC §§19.3001–19.3006

The Commissioner of Insurance adopts new Subchapter V, §§19.3001-19.3006, concerning the registration of any full-time home office salaried employee who solicits or receives an application for the sale of insurance. Section 19.3002 and §19.3005 are adopted with changes to the proposed text as published in the June 5, 1998, issue of the *Texas Register* (23 TexReg 5935). Sections 19.3001, 19.3003, 19.3004 and 19.3006 of the new subchapter are adopted without changes to the proposed text and will not be republished.

The 75th Legislature enacted Article 21.14 §20A which requires full-time home office salaried employees who solicit insurance to register with the Commissioner of Insurance. Article 21.14 §20A(e) requires the Commissioner to adopt rules to implement the registration requirement. The Commissioner adopts this rule to provide guidance to direct writers in the proper registration of full-time home office salaried employees. The new subchapter defines the terms used in Insurance Code Article 21.14 §20A, and clarifies who must register with the Commissioner.

Certain definitions in §19.3002 were changed in response to comments received. These comments pointed out potential conflicts between the statute and the rule which would have impinged upon the ability of many insurers to comply with the registration requirement. The changes to the definitions of "full-time," "home office" and "insurance carrier" clarify the application of the sections.

The text of §19.3005 was changed to clarify the type of document to be filed with the Department of Insurance to amend an insurer's general plan of operation as required by the rule. This change will reduce the burden on insurers seeking registration.

The requirements contained in the new subchapter reflect the purpose of the 75th Legislature in enacting Article 21.14, §20A, which was, in part, to address the problem of licensing provisions not applying equally to all persons engaged in the solicitation of insurance in this state. The new subchapter defines terms used in the statute and sets forth the registration requirement. In addition, the new subchapter identifies when registration is required and provides the registration requirement will not affect full-time home office salaried employees who do not solicit or receive applications for the sale of insurance.

Comment: One commentor noted that no implementation date and no registration fee was included in the rule. Another commentor noted that the time period within which insurers must be in compliance is not specified in the rule.

Response: The rule will become effective once it has been adopted according to the Administrative Procedures Act and because a fee was not authorized by the statute, the Department is unable to assess a fee at this time. The Department expects all affected companies to be in compliance with the registration requirement no later than January 1, 1999.

Comment: One commentor suggested the new subchapter contain a definition of "solicit" in order to provide insurance companies with the information necessary to determine which employees are required to register under the new law.

Response: The Department does not believe it is necessary to define "solicit" for the purposes of this rule. The Department maintains that the rule and applicable statutes clearly specify which individuals must comply with the registration requirement. §19.3002 (3): A commentor suggested replacing the word "solely" with the word "primarily" in the definition of "full-time" so that the definition would then encompass the employees of a parent company who solicit on behalf of a subsidiary company within the same group.

Response: The Department agrees and has made this change. Section 19.3002 (4): Some commentors requested the definition of "home office" be expanded to encompass service centers which may be located apart from the principal corporate office.

Response: The Department agrees and has made this change. Section 19.3002 (6): One commentor believed the definition of "salaried employee" should be re-written to grant flexibility to employers with regard to compensation. This commentor did not believe it was the legislature's intent to require the employee to be exclusively compensated by salary.

Response: The Department disagrees. The language of Article 21.14 §20A provides the direct writer licensing exemption only if the employee is "salaried." Receiving commissions or other compensation based upon the volume of business is inconsistent with this language and would require licensure. Section 19.3005: Some commentors suggested that companies be allowed to register the location of the "home office" in lieu of the requirement to amend the carrier's general plan of operation. This comment was based upon the likelihood that the activities contemplated by the law may occur in more than one location for a given insurer or its affiliates.

Response: The Department recognizes the burden placed on an insurance carrier by the requirement to amend its general plan of operation. In an effort to lessen this burden, the Department has provided that such amendment may be perfected by a resolution of the board of directors of the insurer. Section 19.3006: Some commentors do not believe that a salaried employee should be required to disclose to customers that they are registered with the state but not licensed. These commentors do not believe the underlying legislation requires such a disclosure and point out the disclosure would be unique and require specific scripting for those employees handling Texas based customers.

Response: The Department disagrees. The statute contains a mandatory disclosure requirement in Article 21.14 §20A(d). The Department believes that the required disclosure is an important consumer protection. The insurance consumer has the right to know that the person with whom they are discussing policy terms, coverages or exclusions is an employee of the insurance company who is properly registered with and regulated by the Department of Insurance.

Comment: A commentor expressed concern about the requirement to maintain continuing education records for each employee and suggested that these records be maintained only in cases where the insurance carrier serves as the continuing education course provider.

Response: The legislative intent behind the registration requirement for salaried home office employees was, in part, to address the problem of licensing provisions not applying equally to all persons engaged in the solicitation of insurance in Texas. Under current regulations, licensed insurance agents in Texas are required to maintain records of their compliance with the state's continuing education requirements. In keeping with the legislative intent, insurance companies who market their products through salaried home office employees will be required to maintain proof that its employees have satisfied the continuing education requirements of the State of Texas.

FOR: Office of Public Insurance Counsel.

FOR WITH CHANGES: American Insurance Association; The Hartford; InsureDirect; Texas Workers' Compensation Insurance Fund; Travelers Property Casualty; USAA.

The new subchapter is adopted under the Insurance Code Articles 21.14, §20A and 1.03A. Insurance Code Article 21.14, §20A requires the commissioner to adopt rules to implement registration requirements for full-time home office salaried employees. Article 1.03A provides that the Commissioner of Insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance only as authorized by statute.

§19.3002. Definitions.

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

(1) Commissioner–The commissioner of insurance.

(2) Department–Texas Department of Insurance.

(3) Full-time–Employment status requiring the efforts of an employee in the business of insurance be devoted primarily to the insurance carrier for whom the employee seeks registration under the Insurance Code Article 21.14, §20A.

(4) Home office–A permanent primary work site or a regional service center of an insurance carrier utilizing full-time salaried employees pursuant to their general plan of operation.

(5) Insurance carrier–An insurance company or a group of insurance companies under common control licensed to do business in Texas whose general plan of operation includes the sale of its policies directly through salaried employees.

(6) Salaried employee–A person compensated by the home office of the insurance carrier on a salaried basis who does not receive commissions.

§19.3005. General Plan of Operation Requirements.

(a) Any insurance carrier that intends on using full-time home office salaried employees to solicit or receive an application for the sale of insurance must include such intent in its general plan of operation filed with the department with its certificate of authority.

(b) The general plan of operation must designate the specific location of the home office.

(c) An insurance carrier may amend its general plan of operation to include the use of full-time home office salaried employees to solicit or receive applications for the sale of insurance by submitting a resolution of the board of directors of the insurance carrier to Insurer Services, Texas Department of Insurance, 333 Guadalupe, Austin, Texas, 78701.

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 November 18, 1998.

TRD-9817699
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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Chapter 21. Trade Practices

Subchapter C. Unfair Claims Settlement Practices

28 TAC §§21.202–21.203

The Commissioner of Insurance adopts amendments to §§21.202-21.203, relating to unfair claims settlement practices. The amendments are adopted with changes to the proposal as published in the July 31, 1998 issue of the *Texas Register* (24 TexReg 7710).

The adopted amendments are necessary to provide clear definitions of terms, and to provide clarification and conformity with provisions and requirements of Subchapter Q, Chapter 21, this title, relating to complaint records to be maintained by insurers for all complaints received. The amendments are necessary to achieve a more effective utilization of public resources in obtaining data that is essential to regulation with respect to claims processing and complaints resolution. The amendments will help assure that complaints relating to claim settlement are maintained consistent with requirements for all complaints and that the maintenance record captures minimum required information for adequate complaint record maintenance. Such maintenance will provide the additional benefit that insurers will be better able to evaluate customer satisfaction and thereby improve the services provided to persons who are benefit recipients under contracts issued by insurers. The adoption includes a change to §21.202(4) by adding the words "to an insurer" after the words "written communication" in defining the term "complaint." The adoption includes a change to §21.202(9) by adding the word "insurer" to identify the recipient of the written communication. The adoption includes a change to §21.202(9) to eliminate the words "but not limited to" in the sentence providing that written communication expressly includes facsimile transmissions and electronic mail transmissions. The adoption includes a conforming change to §21.203(6) indicating a revised caption to §21.2503 (relating to Compliance Standard).

Amendments to §21.202 provide amended definitions for "complaint" and "insurer," and a new definition for "written communication." The amended definition of "complaint" sets out circumstances under which separate written communications are considered to be part of the same complaint. The amended definition for "insurer" removes the reference to health maintenance organizations. The HMO reference is removed because the Insurance Code, Article 20A.12, as amended by the 75th Legislature, chapter 1026, §11, as well as §11.205 of this title (Documents to be Available During Examinations), expressly and specifically provide for complaint record maintenance by HMOs. Amendments to §21.203 provide that failure to maintain a complete record of complaints relating to claims in substantial compliance with the provisions of new §21.2504 is an unfair claim settlement practice. Provisions of new §§21.2501-21.2507, published elsewhere in this issue of the *Texas Register*, address maintenance requirements for the comprehensive complaint record to be maintained by all insurers.

One comment requested that the definition of complaint in §21.202(4) be changed to specifically indicate that a complaint is a written communication "to an insurer," to clarify that it relates only to that insurer's acts or omissions. The department agrees that such a clarifying amendment is helpful, and the adoption includes such clarifying language in the definition of "complaint." One comment recommended that the definition of "written communication" be changed to indicate it is a communication to an insurer primarily expressing a grievance; that the term "recipient" in the definition be clarified to indicate the recipient is an insurer; and that the phrase "but is not limited to" be eliminated from the sentence indicating that written communications include facsimile transmissions and electronic mail transmissions. The department agrees in part and disagrees in part. The department agrees that the final two recommendations will improve the definition. For this reason the adoption adds the word "insurer" to identify the recipient of the written communication, and deletes the phrase "but is not limited to" in the sentence providing that written communication expressly includes facsimile transmissions and electronic mail transmissions. The department does not agree that the definition of "written communication" should be changed to indicate only communications to an insurer primarily expressing a grievance. The definition of "written communication" was added to §21.202 to provide a necessary term for clarification and determination of what constitutes a "complaint" as defined in §21.202(4). It is more general in nature than a complaint that is in writing. Because the definition of "complaint" specifically provides that a complaint is an unsolicited written communication to an insurer primarily expressing a grievance relating to particular practices, the department considers it both unnecessary and not appropriate to make the recommended revision. For these reasons, the adoption does not include such change.

Comments generally in favor of the amendments were received from the Texas Association of Insurance Officials and the Texas Association of Life and Health Insurers. Each had recommendations for changes to the published proposal.

The amendments are adopted pursuant to the Insurance Code, Articles 21.21-2 and 1.03A, and the Government Code, §2001.004. The Insurance Code, Article 21.21-2, Section 8, provides that the commissioner is authorized and directed to issue such reasonable rules and regulations as may be necessary to carry out the various purposes and provisions of the article, and in augmentation of the article. Article 1.03A provides that the commissioner may adopt rules for the conduct and execution of the duties and function of the department only as authorized by a statute. The Government Code, §2001.004 authorizes and requires each state agency to adopt rules of practice setting forth the nature and requirements of available procedures, and prescribes the procedure for adoption of rules by a state administrative agency.

§21.202. Definitions.

The following words or phrases, as used in these regulations, shall have the meanings placed opposite them unless the explicit wording of a regulation shall otherwise direct.

(1) Business day–A day other than a Saturday, Sunday, or holiday recognized by this state.

(2) Claim–A request or demand reduced to writing and filed by a Texas resident with an insurer for payment of funds or

the providing of services under the terms of a policy, certificate, or binder of insurance.

(3) Claimant–A person making or having made a claim.

(4) Complaint–Any written communication to an insurer, not solicited by such insurer, primarily expressing a grievance relating to an unfair claims settlement practice as defined in §21.203 of this title (relating to Unfair Claims Settlement Practices). For purposes of this subchapter, any written communication to an insurer by the same person which relates to the same claim, issue or question and requests or demands the same kind of relief and which arises out of the same transaction or transactions is considered to be part of the same complaint. A complaint is not a misunderstanding or a problem of misinformation that is resolved promptly by clearing up the misunderstanding and/or supplying the appropriate information to the satisfaction of the person submitting the written communication, as applicable.

(5) First-party coverage–Benefits and other rights provided by an insurance contract to an insured.

(6) Insurer–Stock and mutual life, health, accident, fire, casualty, fire and casualty, hail, storm, title, and mortgage guarantee companies; mutual assessment companies; local mutual aid associations; local mutual burial associations; statewide mutual assessment companies; stipulated premium companies; fraternal benefit societies; group hospital service organizations; county mutual insurance companies; Lloyds; reciprocal or interinsurance exchanges; and farm mutual insurance companies.

(7) Policyholder–The owner of a policy, certificate, or binder of insurance, and any insured, named insured, or obligee under a bond.

(8) Third-party coverage–Benefits and other rights provided by an insurance contract to any person other than the insured.

(9) Written communication–Any communication that is documented by publication or otherwise being written onto a medium which is capable at the point of receipt of being viewed, stored, retrieved and reproduced by the recipient without any transcription. Such communication expressly includes, but is not limited to, facsimile transmissions and electronic mail transmissions.

§21.203. Unfair Claim Settlement Practices.

No insurer shall engage in unfair claim settlement practices. Unfair claim settlement practices means committing or performing any of the following:

(1)-(5) (No change)

(6) failure of any insurer to maintain, in substantial compliance with §21.2504 of this title (relating to Complaint Record; Required Elements; Explanation and Instructions), a complete record of all complaints, as that term is defined in §21.202(4) of this title (relating to Definitions), which it has received during the preceding three years or since the date of its most recent financial examination by the commissioner of insurance, whichever time is shorter. For purposes of this section, "substantial compliance" has the meaning set out in §21.2503 of this title (relating to Compliance Standard);

(7)-(19) (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 November 17, 1998.

TRD-9817651
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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Subchapter Q. Complaint Records To Be Maintained

28 TAC §§21.2501-21.2507

The Commissioner of Insurance adopts new Subchapter Q, §§21.2501-21.2507, relating to records that must be maintained by all insurers concerning complaints made against such insurers. New §§21.2501-21.2504 are adopted with changes to the proposed text as published in the July 31, 1998 issue of the *Texas Register* (24 TexReg 7712). New §§21.2505-21.2507 are adopted without change and will not be republished. A public hearing on the sections as proposed and published was requested but later withdrawn. The effective date of the sections as adopted is January 1, 1999.

The new sections are necessary to address comprehensive complaint record maintenance by insurers and to provide for timely presentation of such information to the department. The sections provide definitions of terms, prescribe minimum information items to be maintained by insurers in the complaint record, and set out a recommended uniform maintenance method and presentation format for complaint record information to be kept by insurers. Comprehensive maintenance of complaint information will provide benefits to both insurers and the department. A properly maintained record of the type addressed in the sections will assist insurers to quickly determine the level of consumer satisfaction with the company in its dealings with policyholders and benefit recipients. Moreover, the sections will help assure more effective and economical availability to the department of the information which insurers are required to maintain about claims processing and complaints resolution. Clarifying and conforming amendments to Subchapter C of this chapter, relating to unfair claim settlement practices, are published elsewhere in this issue of the *Texas Register*. The requirements set out in this subchapter are based on the Model Regulation for Complaint Records to be Maintained adopted by the National Association of Insurance Commissioners (NAIC).

All insurers currently are required by statute and rule to maintain a complete record of all complaints for the preceding three years or since the date of the most recent examination by the commissioner, whichever time period is shorter, for all complaints relating to the claims process or claims practices. The new sections do not materially change the items or types of information that must be maintained currently by all insurers for all complaints relating to the claims process and claims practices. Like the NAIC Model, the new sections do not prescribe a format for maintenance of the complaint record, but recommend one patterned on the NAIC Model. For these reasons, any insurer complying with the maintenance provisions of the Model also will be complying with maintenance provisions of the new sections as adopted. The new sections provide for more efficient administrative regulation of insurance licensees, and the more effective utilization of public resources

by obtaining for use data that is essential to such regulation with respect to resolution of all types of complaints.

The adoption includes a change to §21.2501 to eliminate a prescribed format for complaint information at the time such information is presented to the department. The adoption includes a change to §21.2502(2) clarifying that a "complaint" is a written communication "to an insurer" not solicited by the insurer "concerning coverage offered or issued by such insurer in this state and" primarily expressing a grievance. The adoption includes a change to §21.2502(6) to indicate that the recipient of a written communication as defined is the insurer, and to delete the phrase "but not limited to" in the sentence expressly including e-mails and facsimiles as written communications. The adoption includes a change to §21.2503, which has been recaptioned "Compliance Standard." The change removes the declaration that an unfair trade practice results if an insurer fails to maintain a complete complaint record. The adoption includes a change to §21.2503 which places substantial compliance provisions in newly designated paragraph (1). The new paragraph also includes a change requiring that an insurer shall provide complaint information sought by department request "within prescribed statutory time periods or other reasonable time following" department request for such information. The adoption includes a change to §21.2503 which provides that the maintenance of a complaint record and provision of such information to the department do not constitute waiver of any exception to public disclosure provided by law. The adoption includes three changes to §21.2504. Subsection (a)(2) of that section is changed to provide that the format set out in §21.2505 is preferred and recommended for both maintenance and presentation of the complaint record. It further provides that utilization of NAIC Complaint Database System Standard Complaint Data Form classification coding conventions for both complaint and resolution classification is preferred but not required as a maintenance and presentation option. Subsection (a)(3) is changed to remove the required presentation format, including NAIC Complaint Database System Standard Complaint Data Form classification coding conventions, for complaint information insurers provide to the department. Subsection (b) is changed to indicate department preference for a unique insurer-assigned complaint identifier that is numeric. It also indicates department preference that the unique identifier for the placing or servicing agent for any complaint involving an agent also be numeric. Further discussion of specific changes and reasoned justification for the subchapter and agency responses to comments is set out in Section 4, Summary of Comments and Agency Response.

Adopted §21.2501 sets out the purpose and applicability of the sections; §21.2502 provides definitions for the terms "complainant," "complaint," "complaint record," "insurer," "person," and "written communication;" §21.2503 provides a compliance standard for the new sections; §21.2504 provides for minimum items of information required to be maintained by insurers in the complaint record, sets out an option of electronic or hard copy maintenance media, and indicates the department's preferred maintenance/presentation format; §21.2505 provides for a recommended complaint record form; §21.2506 provides for the maintenance basis and compilation frequency of the complaint record; and §21.2507 provides for the effective date of the sections.

The department received written comments on the new sections as published from seven sources.

Statutory Authority Four commenters raised questions focusing on statutory authority for the rules.

COMMENT: One comment stated that the declaration in published §21.2503 probably exceeds the authority of the commissioner and is contrary to the purpose of the rules. While specifically stating that the comment in no way challenged the commissioner's authority to direct companies to maintain complaint information, the comment suggested that reliance on Article 21.21, Section 13 to declare that the failure to do so is an unfair trade practice is not appropriate.

RESPONSE: The department has considered §21.2503 as proposed and published, and as a result has removed the declaration that failure to maintain the record of itself constitutes and unfair trade practice. The adoption continues to rely on Article 21.21 for primary authority, for reasons set out in response to other comments relating to statutory authority. Other specific comments directed to §21.2503 are addressed and resolved later in this section.

COMMENT: One comment said that Article 21.21 does not provide a statutory basis for the rules as proposed and published. One reason given for this conclusion is that Article 21.21 contains no express provision defining failure to maintain complaint handling information as a violation. Another reason given was that the legislature in 1995 amended Article 21.21 as part of tort reform and that although the amendment included incorporating certain provisions relating to unfair claims settlement practices into Article 21.21 as unfair trade practices, such incorporation did not include maintenance of complaint information. A final reason given for the conclusion was that although one purpose of Article 21.21, Section 13 is to encourage uniformity with NAIC Model regulations, the proposed rules as published fail to encourage or result in uniformity because of the required presentation format set out in the rules as published.

RESPONSE: The department disagrees that the Insurance Code, Article 21.21 fails to provide a proper statutory basis for the rules. The Insurance Code, Article 21.21 provides the department with authority through rulemaking and other means to detect and prevent all practices in the business of insurance that represent either unfair competition or deceptive acts. Article 21.21, Section 13, provides that the department is authorized to promulgate and enforce reasonable rules and regulations and order such provision as is necessary in the accomplishment of the purposes of Article 21.21, relating to unfair competition and unfair practices. Article 21.21, §1 expressly states the purpose of the article is to regulate trade practices in the business of insurance by defining or providing for determination of all practices constituting unfair competition or unfair or deceptive acts or practices and prohibiting such practices. The department therefore believes that Article 21.21 provides an appropriate and sufficient basis for the rules. With respect to the changes to Article 21.21 occasioned by the legislature in 1995, the department disagrees with the reasoning of the comment because the legislative record is quite clear that the reason for inclusion of certain unfair claims settlement practices in Article 21.21 was to specifically provide for a private cause of action with respect to the practices so included. The legislature retained the provision in the statutory framework that the failure to maintain a complaint record with respect to claims handling remains an unfair claims settlement practice, but did not create a private cause of action for such failure. Likewise, the legislature maintained the department's duty and authorization to detect and prevent all practices constituting

unfair competition and deceptive acts, regardless of whether a private cause of action results from such practices. The rules as proposed and published do not attempt to create a private cause of action, and the department is persuaded they represent a necessary and essential exercise of regulatory authority. Finally, the rules as proposed and published represent an effort by the department to permit a maintenance format that mirrors the NAIC Model. In addition, the changes to §§21.2503 and 21.2504 discussed later in this section, which remove the presentation format requirements from the rules, result in the new sections that parallel the NAIC Model so that compliance with the NAIC Model translates to compliance with the adopted sections.

COMMENT: One comment suggested that better statutory authority for the rules might be the Insurance Code, Article 1.15. Article 1.15, Section 6, provides that the department is to adopt procedures for the filing and adoption of examination reports and for hearings to be held under Article 1.15.

RESPONSE: The department disagrees that Article 1.15 provides a preferable or more appropriate basis for the maintenance of complaint information, primarily because it is directed to procedures specific to the filing and adoption of examination reports and hearings. For reasons discussed elsewhere in this notice of final adoption, the department is persuaded that Article 21.21 provides the appropriate primary authority to require complaint information maintenance. However, the department notes that all information relating to complaints obtained in the examination process continues to be maintained as a closed confidential record pursuant to Article 1.15 in connection with the overall examination process and procedures.

COMMENT: One comment suggested that since the requirements of the NAIC Model Regulation for Complaint Records to be Maintained is not a matter that has been expressly authorized by Texas statute, the proposal as published might violate the Insurance Code, Article 1.27. Article 1.27 provides that the department may not require an insurer to comply with any NAIC adoption unless application of such adoption is expressly authorized by statute and approved by the commissioner.

RESPONSE: The department disagrees with the comment because it believes the comment does not focus accurately on the intent and purpose of the rules. The purpose of the rules is not to require insurers to comply with a rule, regulation, directive or standard adopted by the NAIC. Rather, its purpose is to require insurers to maintain certain complaint information and provide such information to the department upon examination or pursuant to other department request. Any inclusion or incorporation of standards or other provisions adopted by the NAIC results from specific requests by multistate insurers to pattern requirements in such a manner as to ease the compliance burden for such insurers. In fact, some comments submitted on the proposal as published strongly suggested it departed from the model more significantly than it should. For all these reasons, the department does not believe that the rule as proposed or adopted conflicts with Article 1.27.

Published §21.2501

COMMENT: Several commenters complained of the prescribed presentation format in the published proposal for complaint information at the time of examination of insurers. These complaints focused primarily on inclusion of four-digit codes and conversion from a maintenance format other than the one set out in §21.2505 to that format at the time complaint information is presented to TDI.

RESPONSE: The department agrees that requirements for uniform maintenance and presentation should be deferred at this time. Department response to comments about maintenance and presentation format requirements in §21.2504 as published, discussed later in this section, necessitate a change to §21.2501 to remove the published proposal's statement that the sections prescribe a presentation format for complaint information. The adoption includes this change.

Published §21.2502

COMMENT: Three commenters suggested nonsubstantive changes to the definition of "complaint" in §21.2502(2), collectively suggesting clarification that a complaint is a written communication "to an insurer," unsolicited and "concerning coverage offered or issued by such insurer in this state."

RESPONSE: The department agrees to this change and the adoption includes the requested language.

COMMENT: One comment suggested replacing the word "clearing" with "reasonable efforts to clear" in the final sentence of §21.2502(2) defining "complaint." The suggested change would result in the sentence reading: "A complaint is not a misunderstanding or a problem of misinformation that is resolved promptly by reasonable efforts to clear up the misunderstanding and/or supplying the appropriate information to the satisfaction of the person submitting the written communication, as applicable." The stated basis for the language change was perceived difficulty in determining individual satisfaction about resolving misunderstanding.

RESPONSE: The department disagrees that the recommended change is necessary. Language in the exclusionary sentence is closely patterned after statutory language relating to complaints in the HMO context. The department believes the statutory standard as set out in the published proposal is preferable because it is consistent with statutory provisions and is more clear. For these reasons, the adoption does not change the final sentence of §21.2502(2) as published.

COMMENT: A commenter suggested identification of the recipient in the definition of "written communication" as an "insurer." It also suggested deletion of the words "but is not limited to" in the clarification that written communications include facsimile transmissions and electronic mail transmissions.

RESPONSE: The department agrees the recommended changes should be made and the adoption includes such changes.

Published §21.2503

COMMENT: Some commenters objected to the declaration in §21.2503 as published that failure to substantially comply with maintenance provisions of itself constitutes an unfair or deceptive trade practice. The commenters urged that failure to maintain the information as set out in the published proposal would not necessarily of itself be unfair or constitute deception. One commenter added that declaring the failure to maintain a complaint record to be an unfair trade practice might create unintended results, since such a declaration would in the estimation of the commenter give the Office of the Attorney General dual authority with the department to regulate insurers over record keeping practices. Commenters also objected to the substantial compliance standard in the proposal as published,

suggesting it really amounted to literal or strict compliance and was therefore inconsistent with Texas case law on the subject. Commenters also suggested that §21.2503 should specifically state that complaint information requested by the department outside the examination context should be provided "within prescribed statutory time periods or other reasonable time following" the information request. Finally, two commenters suggested inclusion of a provision that maintenance of the complaint record and provision of such information to TDI does not constitute waiver of any exception to public disclosure provided by law.

RESPONSE: The department agrees that the failure to maintain a complaint record does not of itself necessarily constitute an unfair or deceptive practice. It also agrees that complaint information submitted upon department request should be provided according to statutory time periods which address such responses. For these reasons, §21.2503 has been recaptioned "Compliance Standard" and the adoption includes removal of the declaration of unfair trade practice, replacing it with a required compliance standard. Substantial compliance provisions are changed to exclude elements addressing presentation format. The provision retains the requirement that a full record of all complaints be made efficiently available to examiners or upon other TDI request. Section 21.2503 as adopted includes two paragraphs, the first of which is essentially a revision of substantial compliance provisions as published. This paragraph contains the language providing that requested complaint information in a non-examination context is to be provided to the department within statutorily imposed or derived time periods. The second paragraph is an acknowledgment that provision of information to the department under the rule does not constitute waiver of any exception to public disclosure provided by law. The department currently treats complaint information received during the course of examination as workpapers, which are maintained as confidential, closed records under the Insurance Code, Article 1.15.

Published §21.2504

COMMENT: Some commenters criticized §21.2504 as published as being misleading by creating the impression that Texas had adopted the NAIC Model Regulation for Complaint Records to be Maintained. The comment pointed out that the NAIC Model only has recommended format and coding, and minimum requirements only for the types of information that must be captured. The proposal as published was criticized as departing too significantly from the NAIC Model Regulation, and in the commenter's opinion beyond the authority of the Insurance Code, Article 21.21, Section 13. The basis of this criticism was that although Article 21.21, Section 13, allows for department rules to achieve conformity with adopted procedures of the NAIC, the published proposal does not conform to the Model because it requires strict compliance with §21.2505 presentation format, while the Model has no such requirement. Another comment directed to §21.2504 complaint information presentation provisions highlighted departure from the NAIC Model from the standpoint that the Model actually encourages variation in the types of information which may be maintained, while the published proposal does not appear to. The comment also emphasized that TDI provisions permitting an insurer to maintain complaint information in any chosen format are illusory as a matter of practice, because companies are likely to choose to maintain information in the same format that they would present it due to the expense required to create a conversion system. Related comments focused on the perceived onerous nature of having to present complaint information in a format that would require conversion and coding unless the insurer chose to maintain such information in the preferred format. Some comments characterized the rules as creating an excessive and unnecessary compliance burden for insurers by setting an unjustified uniform standard for presentation of complaint information to the department. Most of such comments focused on departure from the NAIC Model, primarily in terms of the compliance standard, and the corresponding computer reprogramming costs necessary to achieve compliance at arguably higher service fees because of scarce resources attributable to Year 2000 issues which insurers are confronting right now. Such commenters also raised concerns about the sufficiency of the cost note, based on the level and cost of resources they perceived would be necessary to comply with the published proposal.

RESPONSE: The department did not intend to create an excessive, unnecessary or onerous compliance burden on insurers in the maintenance and presentation of information about complaints. In developing the proposal as published, the department considered and incorporated features intentionally designed to minimize the compliance burden to insurers as much as possible. Among the features folded into the proposal were the option of the insurer to maintain the complaint record digitally or in hard copy media, the prospective-only application of the provisions to complaint information maintained by insurers so that complaints pending on the effective date would not have to be converted, and an effective date that provided adequate time for insurers to come into compliance. However, after having carefully considered all the concerns of commenters focusing on the required presentation format and the coding of data necessary to comply with rule provisions, the department has decided also to eliminate any required presentation format provisions. As a result, the adoption includes two revisions to §21.2504(a) as published. Section 21.2504(a)(2) as adopted declares that the format set out in §21.2505 is preferred and recommended for both maintenance and presentation of complaint information. Paragraph (2) as adopted also contains information transferred to it from paragraph (3) as published, indicating that utilization of the NAIC standard classification coding conventions in both maintenance and presentation is preferred. The change to §21.2504(a)(3) removes the requirement that presentation be strictly in the form set out in §21.2505. It also removes the requirement that presentation utilize the NAIC standard complaint data codes. Provisions of the paragraph as adopted continue to clearly require, however, that if an insurer maintains a decentralized record, it must be capable of providing TDI a single and complete record of all complaints at time of examination or other TDI request. The department believes that removal of these requirements addresses and resolves all concerns directed to the reasonableness of complaint information maintenance requirements and the corresponding ability to comply with presentation requirements without incurring expenses for additional computer programming at a time when other Year 2000 issues are being addressed. The removal of such requirements also results in complaint information maintenance rules that are parallel to the NAIC Model. Elimination of the prescribed presentation format makes the NAIC Model the measure of compliance for the adoption. Insurers in compliance with maintenance provisions of the Model also will be in compliance with maintenance provisions of the sections as adopted.

COMMENT: One comment objected to the requirement in published §21.2504(b) that the unique complaint identifier be numeric.

RESPONSE: The department agrees to the removal of this requirement; for that reason the adoption states a preference in §21.2504(b) that the unique complaint identifier be numeric, and that the agent identifier in instances of complaints involving agents also be numeric, but requires neither to be numeric.

COMMENT: One commenter recommended that §21.2504(e) be changed to include a disposition involving satisfactory explanation to the complainant.

RESPONSE: Since the department believes this kind of information is addressed by the exclusionary provisions of §21.2502(2) in the definition of "complaint," the adoption makes no change to §21.2504(e) as published.

Written comments generally in favor of the new sections as published were received from the Association of Fire Casualty Companies in Texas (AFACT), Old American Insurance Company and the Texas Association of Insurance Officials (TAIO), although AFACT made recommendations for material but nonsubstantive changes to the proposal as published. Old American and TAIO also recommended changes to the published proposal. TAIO also requested a hearing on the new sections. Comments generally opposed to the new sections as published were received from Allstate Insurance Company, the National Association of Independent Insurers (NAII), the Texas Association of Life and Health Insurers (TALHI) and USAA. Each of these commenters also recommended changes to the published proposal, in addition to requesting a hearing on the sections. All hearing requests were later withdrawn in writing.

The new sections are adopted pursuant to the Insurance Code, Articles 21.21 and 1.03A, and the Government Code, §2001.004. The Insurance Code, Article 21.21 provides the department with authority through rulemaking and other means to detect and prevent all practices in the business of insurance that represent either unfair competition or deceptive acts. Article 21.21, Section 13, provides that the department is authorized to promulgate and enforce reasonable rules and regulations and to order such provision as is necessary in the accomplishment of the purposes of Article 21.21, relating to unfair competition and unfair practices. Article 21.21, §1 expressly states the purpose of the article is to regulate trade practices in the business of insurance by defining or providing for determination of all practices constituting unfair competition or unfair or deceptive acts or practices and prohibiting such practices. Article 1.03A provides that the commissioner may adopt rules for the conduct and execution of the duties and function of the department only as authorized by a statute. The Government Code, §2001.004 authorizes and requires each state agency to adopt rules of practice setting forth the nature and requirements of available procedures, and prescribes the procedure for adoption of rules by a state administrative agency.

§21.2501. Applicability and Purpose.

This subchapter applies to all insurers as defined in §21.2502 of this title (relating to Definitions). The purpose of this subchapter is to prescribe the minimum information required to be maintained in the complaint record of an insurer, to provide a recommended format for the maintenance of such a record by insurers, and to require presentation of such information at the time of examination of insurers or upon other request for complaint record information by the department. Complaint record maintenance provisions of this subchapter apply to all complaints of an insurer not specifically excepted by this subchapter, including complaints relating to the claims settlement practices of an insurer.

(1) This subchapter does not apply to complaints received and maintained by Health Maintenance Organizations. The Insurance Code, Article 20A.12, as amended, as well as §11.205 of this title (Documents to be Available During Examinations), expressly and specifically provide for complaint record maintenance by HMOs.

(2) This subchapter does not apply to the complaints received by an insurer in its capacity as a utilization review agent. Complaint record maintenance and reporting for such complaints are addressed in §19.1716 of this title (relating to Complaints and Information).

§21.2502. Definitions.

The following words or phrases, as used in these sections, shall have the meanings placed opposite them unless the explicit wording of a section or part of a section shall otherwise direct.

(1) Complainant–A person making or having made a complaint.

(2) Complaint–Any written communication to an insurer, not solicited by such insurer, concerning coverage offered or issued by such insurer in this state and primarily expressing a grievance. For purposes of this subchapter, any written communication to an insurer by the same person which relates to the same claim, issue or question and requests or demands the same kind of relief and which arises out of the same transaction or transactions is considered to be part of the same complaint. A complaint is not a misunderstanding or a problem of misinformation that is resolved promptly by clearing up the misunderstanding and/or supplying the appropriate information to the satisfaction of the person submitting the written communication, as applicable.

(3) Complaint record–An electronic or hard copy record maintained by an insurer on a calendar-year basis and consisting of all complaints it has received during the preceding three years or since the date of its most recent financial examination, whichever time period is shorter.

(4) Insurer–Stock and mutual life, health, accident, fire, casualty, fire and casualty, hail, storm, title, and mortgage guarantee companies; mutual assessment companies; local mutual aid associations; local mutual burial associations; statewide mutual assessment companies; stipulated premium companies; fraternal benefit societies; group hospital service organizations; county mutual insurance companies; Lloyds; reciprocal or interinsurance exchanges; and farm mutual insurance companies.

(5) Person–Any natural or artificial entity, including but not limited to, an individual, an association, or a partnership, trust or corporation.

(6) Written communication – Any communication that is documented by publication or otherwise being written onto a medium which is capable at the point of receipt of being viewed, stored, retrieved and reproduced by the recipient insurer without any transcription. Such communication expressly includes facsimile transmissions and electronic mail transmissions.

§21.2503. Compliance Standard.

An insurer must maintain a complete record of all complaints which it has received during the preceding three years or since the date of its most recent financial examination by the commissioner of insurance, whichever time period is shorter, in substantial compliance with the provisions of this subchapter.

(1) For purposes of this subchapter, "substantial compliance" shall mean that the record maintained by the insurer must capture the prescribed minimum complaint information items set out in this subchapter, and must be provided to the department upon examination of the insurer or within prescribed statutory time periods or other reasonable time following a request from the department for such complaint information. Substantial compliance includes presenting such information to the department so that, if requested, a complete record of all complaints as set out in §21.2504 of this title (relating to Complaint Record; Required Elements; Explanation and Instructions) is provided upon examination or pursuant to a request for such complaint information by the department.

(2) Maintenance of a complaint record and provision of such complaint information to the department under this subchapter do not constitute a waiver of any exception to public disclosure provided by law.

§21.2504. Complaint Record; Required Elements; Explanation and Instructions.

(a) Complaint record: general information. The complaint record provided for in this subchapter shall be maintained by all insurers. The complaint record is based on the Model Regulation for Complaint Records to be Maintained adopted by the National Association of Insurance Commissioners (NAIC), and incorporates the prescribed minimum information required to be maintained in a complaint record complying with all maintenance provisions of the NAIC Model regulation. The complaint record is intended and recommended to be maintained as a single, comprehensive record. The complaint record presented to the department at time of examination or in response to department request must indicate the total number of complaints received for the applicable time interval as set out in this subchapter.

(1) The complaint record may be maintained at the option of the insurer in either an electronic format or a hard-copy format.

(2) The format set out in §21.2505 of this title (relating to Complaint Record Form) is preferred and recommended for both maintenance and presentation. Moreover, utilization of NAIC Complaint Database System Standard Complaint Data Form classification coding conventions for the classifications and categories set out in subsections (b) through (h) of this section, as applicable, is preferred as a maintenance and presentation option.

(3) If the complaint record is maintained in a format other than the recommended form or as a decentralized record, the insurer must nonetheless be capable of providing the department a complete complaint record upon examination or other departmental request. Subsections (b) through (i) of this section set out information items to be included in the complaint record and refer to the recommended documentary format.

(b) Complaint identification information. The complaint record must include, as indicated in Column (1) of the Complaint Record Form, entry of a unique complaint identifier, preferably numeric, assigned by the insurer to the underlying originally-submitted complaint. For any complaint involving an agent, the complaint record must also include a unique identifier, preferably numeric, for the placing or servicing agent.

(c) Function and reason categories for the complaint. The complaint record must include, as indicated in Column (2) of the Complaint Record Form, an entry for both the function code category, and the reason code category applicable to the complaint. Each complaint is to be classified hierarchically so that each is first assigned a function code category, followed by a reason code category. The function code categories set out in this subsection relate to particular kinds of company activities. The reason code categories relate to the more specific transactions entered into or actions taken by the insurer and contributing to the complaint. It is recommended but not required that the four-digit reason codes set out by the NAIC in its Complaint Database System Standard Complaint Data Form be utilized in maintenance of reasons for complaints addressed in this subsection. The function categories are set out with descriptive specificity in paragraphs (1) through (5) of this subsection, with particular reason categories similarly set out as subparagraphs within those paragraphs, as follows:

(1) Underwriting

(A) Company underwriting

(B) Individual application underwriting (applicable to complaints where misrepresentations or declarations in an application results in insurer action that is the subject of the complaint)

(C) Cancellation

(D) Rescission

(E) Nonrenewal

(F) Premiums and rating

(G) Delays

(H) Refusal to insure

(I) Miscellaneous (any reason not specified in subparagraphs (A) through (H) of this paragraph)

(2) Marketing and Sales

(A) General Advertising

(B) Mass marketing advertising (any advertising essentially directed to reach more people than in a one-to-one relationship)

(C) Agent handling

(D) Replacement

(E) Dividend illustration

(F) Delays

(G) Misleading statement or misrepresentation

(H) Miscellaneous (any reason not specified in subparagraphs (A) through (G) of this paragraph)

(3) Claims

(A) Claims procedure

(B) Delays

(C) Unsatisfactory settlements

(D) Natural disaster adjusting (situations producing a large number of claims)

(E) Unsatisfactory settlement offers

(F) Denial of claim

(G) Miscellaneous (any reason not specified in subparagraphs (A)-(F) of this paragraph)

(4) Policyholder service

(A) Failure to respond

(B) Delays

(C) Miscellaneous (any reason not specified in subparagraphs (A) or (B) of this paragraph)

(5) Miscellaneous

(d) Line type. The complaint record must include, as indicated in Column (3) of the Complaint Record Form, an entry which indicates the line of insurance involved, utilizing the classification categories set out in paragraphs (1) through (14) of this subsection. It is recommended but not required that the four-digit reason codes set out by the NAIC in its Complaint Database System Standard Complaint Data Form be utilized in maintenance of line type indication addressed in this subsection. The line type categories are as follows:

(1) Automobile

(2) Fire

(3) Homeowners-Farmowners

(4) Crop

(5) Inland Marine

(6) Individual Life

(7) Group Life

(8) Annuities

(9) Individual Health-Accident and Sickness

(10) Group Health-Accident and Sickness

(11) Workers' Compensation

(12) Liability Insurance other than Automobile

(13) Mobile Homeowners

(14) Miscellaneous (any line not specified in paragraphs (1) through (13) of this subsection)

(e) Company disposition after receipt. The complaint record must include, as indicated in Column (4) of the Complaint Record Form, an entry indicating manner of final disposition of the complaint. The department prefers and recommends, but does not require, that the disposition codes or reasons set out in paragraphs (1) through (15) of this subsection be utilized by insurers in categorizing the manner in which a complaint is disposed of or resolved. The department recommends use of such reason categories because, although the NAIC Model Regulation for Complaint Records to be Maintained does not include specific categories, the NAIC Complaints Database System includes such disposition categories, along with four-digit numeric identifiers, as standard complaint coding conventions. Although not intended to be exhaustive of all disposition descriptions, the recommended disposition reasons in paragraphs (1) through (15) of this subsection are as follows:

(1) Policy issued/restored.

(2) Claim settled

(3) Additional claim payment made

(4) Refund of premium

(5) Advertising withdrawn/amended

(6) Underwriting practice resolved

(7) Cancellation notice withdrawn

(8) Nonrenewal notice rescinded

(9) Premium or rate problem resolved

(10) Question of fact

(11) Contract provision/legal issue

(12) Company position upheld

(13) Insufficient information

(14) Claim resolved through arbitration or mediation

(15) Other (Any disposition not addressed in paragraphs (1) through (14) of this subsection.)

(f) Date received. The complaint record must include, as indicated in Column (5) of the Complaint Record Form, entry of the date the complaint was received. The date received is the date the insurer originally received the complaint.

(g) Date closed. The complaint record must include, as indicated in Column (6) of the Complaint Record Form, entry of the date the complaint was closed. The date closed is the date on which the complaint was finally disposed of, either by a single action or by the final in series of actions as might be necessary for some complaints.

(h) Source of complaint. The complaint record must include, as indicated in Column (7) of the Complaint Record Form, an entry classifying origin of the complaint. At a minimum, the entry must clearly indicate any complaint originating from TDI or another insurance department. It is recommended but not required that the NAIC Complaints Database System standard complaint coding conventions for "complainant type" be utilized for classifying the origin of complaints other than those from insurance departments.

(i) State of origin. The complaint record must include, as indicated in Column (8) of the Complaint Record Form, an entry classifying origin of the complaint by state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 17, 1998.

TRD-9817652
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: December 7, 1998
Proposal publication date: July 31, 1998
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 11. Contracts

30 TAC §11.2, §11.3

The Texas Natural Resource Conservation Commission (commission) adopts new §11.2 and §11.3, concerning Protest Procedures for Vendors and Bid Opening and Tabulation. Section §11.2 is adopted with changes to the proposed text as published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8358). Section §11.3 is adopted without changes and will not be republished.

applicant to request consolidated permit processing and the issuance of a consolidated permit. Federal operating permits are prohibited from consolidation. The statute establishes a voluntary program by which a plant, facility, or site can request consolidated permit processing. It provides for designation of a lead permitting program for coordination of application reviews, a consolidated permit hearing on all permits requested by the applicant, and issuance of one consolidated permit. It also allows the applicant to opt-out of the process before public notice of the opportunity to request a hearing and request separate processing either before or after referral to the State Office of Administrative Hearings (SOAH), depending on certain, specified circumstances.

The statute provides that the renewal period for a consolidated permit is the shortest term set by any state or federal statute or rule governing one or more of the authorizations in the consolidated permit. It also clarifies the commission's authority to modify, amend, or renew existing permits containing authority from more than one permit program (including so-called "one-stop" permits).

The statute requires the fee for a consolidated permit to be computed as if the permits that are consolidated had been processed separately. However, TWC, §5.405, authorizes the commission to reduce the fee by rule for a consolidated permit if processing results in savings to the agency.

Finally, TWC, §5.406, as added by HB 1228, allows the commission to adopt rules to implement the program, including rules that provide for consolidated notice and procedures for issuing such permits.

The rules are necessary for the implementation of the statute. They provide general procedural requirements governing consolidated processing of permit applications and the issuance of consolidated permits. The rules do not impact the voluntary nature of the program established by TWC, Chapter 5, Subchapter J. Applicants will retain the flexibility to determine if consolidated permitting would be consistent with their needs and processes.

The rules also do not represent a fundamental change to the commission's permitting processes. Due to the limited and voluntary nature of TWC, Chapter 5, Subchapter J, as well as other statutory limitations, such as permit and notice requirements under federal programs for which the commission is seeking authorization, implementation of this statute will be conducted under current commission rules and processes. Consequently, the rules cover only those areas where the commission believes rules are necessary, such as clarifying notice requirements. Other details relating to implementation, such as the role of the designated lead coordinating office, will be addressed in guidance rather than by rule.

New §33.1, concerning Purpose and Applicability, provides that the purpose of the chapter is to implement the commission's authority under TWC, Chapter 5, Subchapter J. The section also sets forth the chapter's applicability. The rules apply to units, plants, facilities, or sites required to have more than one permit issued by the commission. The language is nearly identical to the statutory language, though the commission did modify the proposal to add the term "unit" in response to comment. The commission believes this approach will provide as much flexibility, and allow as much participation, as possible. Under this approach, any entity that has to obtain more than one authorization can take part in the program. The section also states that federal operating permits may not be consolidated. The section implements TWC, §5.401.

New §33.3, concerning Definitions, defines consolidated permit as a permit issued under TWC, Chapter 5, Subchapter J, and that contains authorizations for activities in more than one program. The new section also provides a definition for component authorization, which describes an authorization within a consolidated permit. These definitions are necessary for program implementation.

Subchapter B provides general provisions concerning consolidated permit processing and the issuance of consolidated permits. The subchapter includes provisions concerning renewals and changes to permits, as well as fee requirements. The general provisions are necessary to clarify that consolidated permit processing will be conducted, and consolidated permits will be issued, under current commission statutory authority and rules, unless otherwise provided by TWC, Chapter 5, Subchapter J.

New §33.11, concerning Issuance of Consolidated Permit, requires the commission to conduct coordinated application reviews if requested by an applicant. It also requires the commission to issue a consolidated permit if that is requested by an applicant. The proposed language has been modified to add the term "unit" to conform with the change made to §33.1. In addition, the commission has added language that clarifies that applicants can simply pursue coordinated application reviews without obtaining a consolidated permit. These changes were made in response to comments. The section implements TWC, §5.401.

New §33.13, concerning Applications for Consolidated Permits, requires applicants to use existing applications required under current commission rules.

New §33.15, concerning Fees for Consolidated Permit Processing, provides that the fee for a consolidated permit will be equal to the sum of the fees normally required if the applications were processed separately. In addition, the section allows the executive director to reduce the fee if there are savings to the agency. The section implements TWC, §5.405.

New §33.17, concerning Public Notice, provides that all notice requirements applicable to each separate authorization being requested must be satisfied. The section also clarifies that if an applicant is required under commission rules to mail notice for any part of a consolidated public notice, then the applicant must fulfill all mailed notice requirements. This clarification is necessary to avoid any duplication of notice mailed to interested entities. Rules concerning notice are authorized by TWC, §5.406.

New §33.19, concerning Renewal of Consolidated Permits, provides that the renewal period for a consolidated permit is the shortest term for one or more of the authorizations sought in the consolidated permit. The section also provides for the separation of a consolidated permit at renewal if requested by an applicant. The section requires renewal applications to be filed in a timely fashion. If they are not, the consolidated permit would expire in its entirety. Finally, the section provides that a component authorization that has been separated from a consolidated permit may be renewed for the full term provided by applicable law governing that authorization. The section was modified from the proposal to provide that current one-stop permits may be renewed as one-stop permits, converted to consolidated permits, or separated for renewal. This change

was made in response to comments. The section includes provisions necessary to implement TWC, §5.403 and §5.404, as well as provisions necessary for program implementation.

New §33.21, concerning Amendment of a Consolidated Permit, and new §33.23, concerning Transfer of a Consolidated Permit, provide requirements for amendments to, or transfers of, consolidated permits. Both sections provide that a consolidated permit can remain consolidated, or be separated at the request of the applicant, for purposes of processing amendments or transfers. In addition, the sections provide for the terms of any component authorizations that are separated at the request of the applicant. Both sections also provide that current commission rules apply to actions taken under the sections. The proposed language in §33.21 was modified from the proposal to clarify that the amendment requirements also apply to one-stop permits. This change was made upon recommendation of commission staff to more accurately reflect the statute.

New §33.25, concerning Correction of a Consolidated Permit, provides that any corrections to consolidated permits will be conducted under 30 TAC §50.45, concerning Corrections to Permits. The proposed language was modified to correct a minor typographical error. The commission filed a correction with the *Texas Register* on July 20, 1998, and that correction was published on August 14, 1998.

New §33.27, concerning Consolidated Permit Denial, Suspension, and Revocation, provides that all denials, suspensions, and revocations will be administered under existing commission rules.

New §33.29, concerning Modification of a Consolidated Permit, provides that a modification of a consolidated permit, or any constituent part of that permit, will be administered under existing commission rules. In addition, any component authorization separated for purposes of modification will retain the term of the consolidated permit. The language was modified from the proposal to clarify that the section also applies to one-stop permits. This change was made upon recommendation of commission staff to more accurately reflect statutory intent.

New §33.31, concerning Emergency or Temporary Orders, provides that the issuance of an emergency order or a temporary order will be administered under 30 TAC Chapter 35.

New Subchapter C, concerning Consolidated Permit Processing, sets forth procedural requirements for processing consolidated applications and issuing consolidated permits.

New §33.41, concerning Pre-submittal Conference, provides for a preliminary meeting between an applicant considering consolidated permitting and commission staff to discuss the consolidated permit process and various options that are available to applicants. The conference is not mandatory; however, the commission recommends it to help potential applicants determine if participation in this voluntary program would suit their needs and requirements. The conference would cover a variety of topics, identify important issues, and assist a potential applicant with the decision of whether to participate in the consolidated permitting process.

New §33.43, concerning Intent to File Applications for Consolidated Permit Processing and a Consolidated Permit, provides procedures for filing applications for consolidated processing with the commission. The section requires a letter of intent and prescribes its minimum contents. The section also contains the requirement that applications be filed within a 30-day time period, as required by TWC, §5.401. The section also provides that applications will not be processed until all have been received, and provides for the return of an incomplete set of applications by the executive director. These procedural requirements are necessary for processing and issuing consolidated permits.

New §33.45, concerning Separation by Executive Director, provides for separate processing of consolidated applications at the direction of the executive director. The executive director may require separate processing if an applicant has submitted an incomplete application or failed to respond as requested to any notices of deficiency. The section implements TWC, §5.401.

New §33.47, concerning Request for Separate Processing Before Public Notice of Opportunity to Request a Hearing, authorizes an applicant to request separation of applications before public notification of the opportunity to request a hearing. The section provides that these requests must be filed with the executive director. The section implements TWC, §5.402(a).

New §33.49, concerning Separate Processing After Notice of Opportunity to Request a Hearing and Before Referral to SOAH, authorizes the executive director to separate applications after notice is issued but before referral to SOAH, if an applicant demonstrates good cause. Good cause is defined by TWC, §5.402(b) and the proposed rule as a change in a statutory requirement, or a substantial change in factual conditions surrounding the applications. The section also prescribes requirements concerning the request for separation that are necessary for implementation, and the disposition of any hearing requests that were received on the consolidated applications. Finally, the section provides for renotification of the separate applications in accordance with commission public notice rules.

New §33.51, concerning Separate Processing After Referral to SOAH, authorizes an applicant to have applications processed separately after the consolidated applications have been referred to SOAH. The applicant must comply with commission rules relating to the withdrawal of an application. This section implements TWC, §5.402(c).

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that it is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rule is not a major environmental rule because it prescribes limited procedural requirements governing a voluntary program. In addition, this action is expressly authorized by state statute, TWC, Chapter 5, Subchapter J.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to implement the statutory provisions of TWC, Chapter 5, Subchapter J, concerning consolidated permit processing. The rules will substantially advance this purpose by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they concern commission procedural rules.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and found that it is a rulemaking identified in the Coastal Coordination Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will, therefore, require that applicable goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission has prepared a consistency determination for the proposed rules under 31 TAC §505.22, and found that the rules are consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the rules include the administrative policies and the policies for specific activities related to: construction and operation or solid waste treatment, storage, and disposal facilities; and discharge of municipal and industrial wastewater to coastal areas. Promulgation and enforcement of these rules is consistent with the applicable CMP goals and policies because the rules have no impact on existing commission rules concerning affected activities. They establish a voluntary program that will utilize existing commission rules and practices to the maximum extent required. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because they will have no impact on existing commission rules concerning affected activities.

HEARING AND COMMENTERS

A public hearing on the proposed rule was held in Austin on August 17, 1998, and the comment period also closed on August 17, 1998. No oral testimony was received at the public hearing, but Dow Chemical Company (Dow) and the Texas Chemical Council (TCC) submitted written comments on the proposal.

Dow expressed general support for the proposal, specifically citing the following provisions and concepts: the program's voluntary nature; the fee provisions; the voluntary pre-submittal conference; the lead program concept; coordinated reviews; voluntary combined notice; the flexibility to request one hearing; and the flexibility to separate consolidated permits at various points in the process.

The commission appreciates the support and views these provisions and concepts as providing applicants with maximum flexibility to determine whether to obtain coordinated application reviews and/or a consolidated permit. The commission views this voluntary program as an opportunity to improve its permitting system, and will continue to look for further enhancements.

Dow and TCC commented that the statutory requirement that the term of a consolidated permit is the shortest term for a component authorization is a disincentive to obtaining a consolidated permit. Both commenters recommended that the commission consider pursuing a statutory change that would allow the longest term of a component authorization to dictate the term of a consolidated permit.

The commission recognizes that certain authorizations would likely not be consolidated because of the term provisions. For example, an air permit and a wastewater discharge permit would probably not be consolidated because the discharge permit's five-year term would shorten the term of the air component, which by itself would have a ten-year term. However, the term limitation provided in statute is viewed at this time to be necessary to not compromise the federal authorizations for certain permitting programs (e.g., Resource Conservation and Recovery Act permits). Therefore, the commission would propose no changes at this time, but directs staff to continue to examine this issue.

The commission notes, however, that the issuance of a consolidated permit is but one element of this voluntary program. Applicants may still take advantage of coordinated application reviews, one hearing, and one notice, without obtaining a consolidated permit, if they so choose. In addition, the voluntary pre-submittal conference in proposed §33.41 provides applicants an opportunity to weigh all of the benefits and disincentives of the program and determine for themselves whether to participate. Finally, applicants are able to separate a consolidated permit at various points in the process. The commission believes that these program elements provide significant benefits to applicants in terms of greater consistency among their authorizations, maximum flexibility and choice, and better coordination with and among commission staff.

Dow recommended that the rules include a provision allowing the applicant to request a specific lead program for coordination.

The commission has made no changes in response to this comment. The commission believes that such a change is unnecessary, since an applicant would not be precluded from suggesting a lead program either in a pre-submittal meeting or in a letter of intent. However, the commission believes that it is appropriate for the executive director to have the final decision on the lead program. This would ensure that the appropriate program serves as the lead. Additionally, it ensures effective resource management, allowing the executive director to weigh work loads and make appropriate assignments.

Dow recommended that the commission reevaluate the 30-day period for submitting applications required in the statute, stating that a 60-day period would allow for better coordination.

The commission has made no changes in response to this comment. The provision to which the commenter refers implements TWC, §5.401. Thus, the commission is limited in its ability to modify the proposal. The commission notes that the intent of the 30-day period is to allow coordinated application reviews and/or the processing of consolidated permits to begin in a timely fashion. The commission believes that the 30-day period is reasonable, particularly if potential applicants avail themselves of the pre-submittal conference, which will foster planning.

Dow recommended a legislative change that would allow an applicant to obtain a one-stop permit instead of a consolidated permit.

Legislative recommendations are beyond the scope of this rulemaking action.

Dow recommended that the commission develop a single application form to address any overlaps among separate permit applications.

The commission has developed an optional General Request form that applicants may use to provide general information (a draft version of the form was provided in the draft guidance doc-

ument). The form provides applicants an opportunity to provide the types of permits that would be reviewed together or consolidated, general facility information, and operator/owner information. Applicants who use the form would not have to fill out duplicate information on the individual application form. The commission declined to create a single consolidated permitting form because of the possibility that permit applications undergoing coordinated reviews, or for which a consolidated permit has been requested, could be separated by the executive director or at the request of the applicant.

Dow recommended that the commission provide for expeditious processing times based on work process enhancements.

The commission believes that the commenter refers to its recent Business Process Review, which closely examined the commission's permitting systems and made recommendations for streamlining and standardization. At this time, the commission is considering implementation options, but its overall goal is to gain as much standardization as possible within state and federal statutory requirements. The commission welcomes the input of all interested parties on how to best achieve this standardization while improving permitting process, maintaining effective public participation, and protecting the environment.

TCC commented that the terms "plant, facility, or site" in proposed §33.1 should be clarified in the rules, preamble, or guidance. TCC specifically noted that the language is unclear with respect to how it would apply to site-wide permits and recommended that the commission specify that the consolidated permit could be unit, plant, site, or facility-specific.

The commission believes that the intent of the statute and proposed rules is to provide as much flexibility as possible to applicants. However, the commission agrees that further clarification is necessary and has amended proposed §33.1 and §33.11 to include the term "unit." The term is commonly used within the commission's permitting system, and the commission believes its addition is consistent with the statute's intent to maximize participation in this voluntary program. The commission notes, however, that this modification would in no way affect an applicant's obligation to comply with any applicable federal or state permitting requirements, including, but not limited to, corrective action or federal prevention of significant deterioration and/or nonattainment new source review, or Title III maximum available control technology.

Dow requested that proposed §33.11 be amended to clarify that applicants may obtain coordinated application review and processing with or without the issuance of a consolidated permit, and with or without a combined notice and hearing.

The commission agrees that further clarification is necessary and has amended proposed §33.11(a) to state that applicants may obtain coordinated application reviews and still receive separate permits. The commission believes that this modification is consistent with TWC, §5.401, which envisions providing applicants with the flexibility to request coordinated reviews only, or a consolidated permit. Therefore, applicants will have the ability to determine all of the facets of the permitting process that they wish to combine or leave separate. The commission recommends that potential applicants use the optional pre-submittal conference established by §33.41 to help them make that decision.

Dow commented that proposed §33.13 and §33.29 should be amended to provide for expeditious review and issuance of multiple component authorizations at the request of an applicant. Dow stated that component authorizations for which reviews have been completed should be issued and not held up by any component(s) with longer processing times, thereby allowing the timely start of any construction or start-up activities.

The commission has made no changes in response to this comment. The issue raised by the commenter would be of primary concern to applicant requesting a consolidated permit. However, a consolidated permit, just as a normal permit issued by the commission, has a single term. Therefore, component authorizations of a consolidated permit cannot be issued separately. The commission notes, however, that applicants have the flexibility to determine whether to pursue coordinated application reviews and/or obtain a consolidated permit. In addition, the pre- submittal conference created by the proposed rules should provide applicants a forum to determine the types of applications for which reviews will be coordinated and the benefits or disadvantages of using this process.

Dow and TCC recommended that proposed §33.19(c) be revised to provide flexibility to applicants which have one-stop permitting in their existing permits to maintain the one-stop option upon renewal, change to consolidated permit processing, or separate the permits upon renewal. TCC further noted that processing the renewal as a component of the existing permit allows expeditious renewal without major disruptions, and that without the option, one-stop permits may be separated, creating a burden for the commission and facilities.

The commission agrees with the commenters and has modified proposed §33.19(c) to provide that current one-stop permits may be renewed as one-stop permits, converted to consolidated permits, or separated, all at the discretion of the applicant. Further, the commission has modified proposed §33.21 and §33.29 similarly to allow one-stop permits to be amended or modified as one-stop permits. The commission believes this change is consistent with the intent of HB 1228 to provide flexibility to permittees with respect to how their one-stop permits are addressed at renewal. The commission also believes that it is consistent with the permitting sections of the Texas Solid Waste Disposal Act (TSWDA), Texas Health and Safety Code, Chapter 361. The commission has added references to the appropriate TSWDA sections in the statutory authority section of the preamble.

Dow requested that §33.19(d) be modified to provide that, for a consolidated permit that has been separated at the time of renewal, only the component authorization that is requested for renewal has to be considered administratively complete, not the other permits that have been separated. This comment is in response to the requirement that a consolidated permit expires in its entirety if renewal applications are not submitted in a timely fashion.

The commission has made no changes to the rules in response to this comment. The intent of the provision is that when a consolidated permit comes due for renewal, all of its components are due at the same time. This is because all of the component authorizations have the same term. Like any permit issued by the commission, the term is fixed and applicants must comply with any renewal requirements. In this sense, a consolidated permit is no different from a normal permit. The commission notes that an applicant may request separation after applications for renewal have been submitted, and upon issuance of separate permits, the permit may be renewed for the full term

allowed under its enabling federal or state statute. The commission also notes that this is one of many issues that can be addressed at the pre-submittal conference.

TCC submitted comments on proposed §33.21 in support of allowing a component authorization to be amended without opening the entire consolidated permit. TCC also expressed support for distinguishing between amendment and modification by including proposed §33.29. However, TCC questioned why the two sections were separated and not incorporated together.

The commission made no change to the rules as proposed. The sections were separate in the proposal to acknowledge the different terminology and clearly show that the requirements apply to modifications as well as amendments. The commission believes this clarity improves the readability of the rules.

However, the commission has revised proposed §33.21 and §33.29 to clarify that those sections also apply to one-stop permits. This change was made upon staff recommendation, and the commission believes that the language more accurately reflects Texas Water Code, §5.404.

Dow requested that proposed §33.29 be amended to provide that a component authorization that is separated when modified assumes the term mandated in its applicable regulations.

The commission has made no changes in response to this comment. As with the requirements for amendments and transfers, the commission has provided that a component authorization that is separated from a consolidated permit retains the term of the consolidated permit. However, at the time of renewal of that component authorization, at the end of the original consolidated permit term, it may be renewed for the full term allowed by its enabling statute.

Dow recommended amending proposed §33.43(a) to add a requirement that the applicant indicate in the letter of intent the degree of consolidation it is seeking.

The commission has made no change in response to this comment. Section 33.43(a) provides only the minimum content requirements for the notice of intent. Applicants may include any other information they consider relevant to their needs, including whether they are simply requesting coordinated application reviews or a consolidated permit. The commission also notes that the information to be included in the notice of intent could be discussed at the pre-submittal conference.

Dow commented that the commission should not wait to begin coordinated application reviews until all applications are received, as provided in proposed §33.43(b). Dow recommended amending the proposal to allow for processing to begin on each application as soon as it is received. Additionally, Dow stated that the permit review process should be as expedient as the most efficient regulatory authorization component and not slowed by the most complex review component.

The commission has made no changes in response to these comments. Regarding the first comment, the commission believes that it is appropriate to wait for all applications to be received before beginning coordinated application reviews. The commission believes that effective internal coordination would be hampered if applications were being reviewed on different time lines. Having reviews begin at the same time will facilitate effective reviews, which will ensure greater consistency among permits. In addition, waiting for the applications will also help with consolidating notices, which may help applicants to save resources.

Regarding the second comment, as noted in the proposal preamble, these rules do not and cannot represent a fundamental change in commission permitting operations. The statute is limited with respect to its impact on permitting processes, and the commission has, therefore, determined that it is appropriate to implement this legislation within the constraints of current processes. This is necessary primarily because the commission must comply with federal and state requirements governing the specific permitting programs. However, within the confines of those requirements, commission staff will endeavor to make the review process as expedient as possible. The commission believes this is possible with coordinated application reviews. The commission notes that it is currently in the process of implementing the results of its comprehensive Business Process Review, and that the implementation of recommendations concerning permitting should result in greater standardization among the permitting processes.

Dow opposed the provision in proposed §33.49(c) which requires applicants who separate applications after notice to request a contested case hearing has been issued to re-notice the separate applications. Dow stated that this should only be required if separate processing will change the scope of an application.

The commission has made no change in response to this comment. The commission believes that separation of the applications would always represent a change in the scope of the proceedings on the application, and that it is therefore appropriate and desirable to notify the public of that change. The public should be given notice that any challenges to the required authorizations would need to be pursued under separate proceedings, rather than through one consolidated proceeding. The separation may affect resource allocation decisions for members of the public who oppose one or more of the requested authorizations. Additionally, although any person who has requested a hearing on the consolidated applications would not be required to submit additional requests on the separated applications, notice of the separate applications may result in requestors submitting supplemental communication to the commission to clarify their intent to challenge all requested authorizations or only one or more specific authorizations.

Subchapter A. Purpose and Applicability

30 TAC §33.1, §33.3

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.401 et seq., which establishes the commission's authority concerning consolidated permit processing. Other relevant sections under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule. This action is also taken under Texas Health and Safety Code, §361.061, which establishes the commission's authority to issue permits for solid waste facilities; §361.088, which establishes the commission's authority to issue, amend, extend, or renew solid waste permits; and §382.017, which establishes the commission's rulemaking authority.

§33.1. Purpose and Applicability.

(a) The purpose of this chapter is to implement the commission's authority under Texas Water Code, Chapter 5, Subchapter J,

to conduct coordinated permit processing and issue one consolidated permit.

(b) This chapter applies to any plant, facility, unit, or site that is required to have more than one permit issued by the commission and that files applications with the commission under Texas Water Code, Chapter 5, Subchapter J. This chapter sets forth the standards and requirements for applications and actions concerning consolidated permits and amendments, modifications, renewals, transfers, corrections, revocations, and suspensions of those permits.

(c) A federal operating permit governed by the requirements of Texas Health and Safety Code, §§382.054-382.0543, may not be consolidated with other permits under 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 November 20, 1998.

TRD-9817777
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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Proposal publication date: July 17, 1998
For further information, please call: (512) 239-1966

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Subchapter B. General Provisions

30 TAC §§33.11, 33.13, 33.15, 33.17, 33.19, 33.21, 33.23, 33.25, 33.27, 33.29, 33.31

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.401 et seq., which establishes the Texas Natural Resource Conservation Commission's (commission) authority concerning consolidated permit processing. Other relevant sections under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; and §5.105, which establishes the commission's authority to set policy by rule. This action is also taken under Texas Health and Safety Code, §361.061, which establishes the commission's authority to issue permits for solid waste facilities; §361.088, which establishes the commission's authority to issue, amend, extend, or renew solid waste permits; and §382.017, which establishes the commission's rulemaking authority.

§33.11. Issuance of Consolidated Permit.

(a) If a plant, facility, unit, or site is required to have more than one permit issued by the commission, and the applications for all permits are filed within a 30-day period, the commission, on request of the applicant, shall conduct coordinated application reviews and one hearing on all permits requested to be consolidated by the applicant. The commission may issue one consolidated permit, or issue separate permits after consolidated processing under this chapter.

(b) The commission shall issue one consolidated permit upon request of an applicant meeting the requirements of this chapter.

§33.19. Renewal of Consolidated Permits.

(a) The renewal period for a consolidated permit is the shortest term set by any state or federal statute or rule governing one or more of the authorizations in the consolidated permit.

(b) A consolidated permit may be renewed as a consolidated permit; or may be separated at the request of the applicant and the applications processed separately. Consolidated permits shall be subject to the renewal requirements of applicable laws and commission rules governing operations at the facility, plant, or site.

(c) A permit issued before and effective on September 1, 1997, that authorizes more than one permit program, may be renewed under rules applicable to that existing permit, as a consolidated permit, or, upon request of the applicant, may be separated by programs and the permits processed separately.

(d) An applicant shall submit permit renewal applications in a timely fashion, as required in commission rules. Failure to submit permit renewal applications in a timely fashion shall cause a consolidated permit to expire in its entirety.

(e) If a component authorization has been separated from a consolidated permit when amended, transferred, or modified, as provided by this chapter, it may be renewed for the full term provided by applicable law governing that authorization.

§33.21. Amendment of a Consolidated Permit.

(a) A consolidated permit, or a permit issued before and effective on September 1, 1997, that authorizes more than one permit program, may be amended as a consolidated permit or, upon request of an applicant, separated by program and the permits processed separately. A component authorization that is separated from a consolidated permit for amendment shall retain the same term as the consolidated permit, unless the applicant requests a change in the term as part of a major amendment.

(b) A consolidated permit shall be amended under all applicable commission rules concerning amendments for the programs in the consolidated permit.

§33.25. Correction of a Consolidated Permit.

A consolidated permit, or a component authorization of that permit, shall be corrected under §50.45 of this title (relating to Corrections to Permits).

§33.29. Modification of a Consolidated Permit.

(a) A consolidated permit, or any component authorization of that permit, shall be modified under all applicable rules required for the programs in the consolidated permit. A component authorization that is separated from a consolidated permit for modification shall retain the same term as the consolidated permit.

(b) A permit issued before and effective on September 1, 1997, that authorizes more than one permit program, shall be modified under rules applicable to that existing permit.

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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Margaret Hoffman
Director, Environmental Law Division
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Subchapter C. Consolidated Permit Processing

30 TAC §§33.41, 33.43, 33.45, 33.47, 33.49, 33.51

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.401 et seq., which establishes the Texas Natural Resource Conservation Commission's (commission) authority concerning consolidated permit processing. Other relevant sections under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; and §5.105, which establishes the commission's authority to set policy by rule. This action is also taken under Texas Health and Safety Code, §361.061, which establishes the commission's authority to issue permits for solid waste facilities; §361.088, which establishes the commission's authority to issue, amend, extend, or renew solid waste permits; and §382.017, which establishes the commission's rulemaking authority.

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 35. Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions

The Texas Natural Resource Conservation Commission (commission) adopts new §§35.1-35.3, 35.11-35.13, 35.21-35.30, 35.101, 35.201, 35.202, 35.301-35.303, 35.401, 35.402, 35.501, 35.502, 35.601, 35.701, 35.801-35.809, and 35.901, concerning emergency and temporary orders. This action implements Senate Bill (SB) 1876, 75th Legislature, 1997, and continues the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs. This action also includes certain changes necessary to implement SB 1, 75th Legislature, 1997, which are noted as follows. Finally, certain provisions of the rules will constitute a revision to the state implementation plan (SIP). Specifically, Chapter 35, Subchapters A, B, C, and K and revised §116.410 are adopted as changes to the SIP. This submission replaces the 1993 submission of the rules in Chapter 116, Subchapter E that are being revised or repealed in this action.

Sections 35.24, 35.302, 35.303, 35.801, 35.802, and 35.804-35.808 are adopted with changes to the proposed text as published in the July 3, 1998, issue of the *Texas Register* (23 TexReg 6899). Sections 35.1-35.3, 35.11-35.13, 35.21-35.23, 35.25-35.30, 35.101, 35.201, 35.202, 35.301, 35.401, 35.402, 35.501, 35.502, 35.601, 35.701, 35.803, 35.809, and 35.901 are adopted without changes and will not be republished.

The new Chapter 35 is largely derived from previously existing rules. The commission is concurrently adopting amendments to emergency and temporary order provisions in 30 TAC §§116.410, 291.14, 291.22, 291.142, 291.143, 305.21, 305.29, 305.31, 305.535, 321.80, 321.132, 321.134, 321.152, 321.158, 321.219, 321.232, 321.239, 321.258, and 334.83. The commission is also adopting the repeal of the following current rules relating to emergency and temporary orders: 30 TAC §§116.411-116.418, 291.10, 291.13, 297.57, 305.22-305.28, 305.30, and 305.32. The commission is also adopting new 30 TAC §297.57 and §305.30. These changes are concurrently published in this edition of the *Texas Register.*

EXPLANATION OF ADOPTED RULES

SB 1876 consolidated various statutory provisions governing emergency and temporary orders under new Texas Water Code (TWC), Chapter 5, Subchapter L. The new statute expressly authorizes the commission to issue temporary or emergency mandatory, permissive, or prohibitory orders, and issue temporary permits or suspend permit conditions by temporary or emergency order. It allows the commission to issue emergency orders with or without notice. Additionally, it authorizes the commission to delegate authority to the executive director to receive applications and issue emergency orders and authorize representatives to act on his or her behalf. General application, term, and hearing requirements applicable to all affected programs are included. Finally, specific requirements are listed for specific program areas. The statute will allow the commission or the executive director to act expeditiously to address unforeseen circumstances.

These adopted rules conform with the provisions provided in TWC, Chapter 5, Subchapter L, and provide procedural requirements for implementation. TWC, §5.501, concerning Emergency and Temporary Order or Permit; Temporary Suspension or Amendment of Permit Condition, expressly authorizes the commission to prescribe rules necessary to carry out and administer Subchapter L.

The adopted new Chapter 35 contains both general provisions that are applicable to all affected programs and program-specific requirements. The latter are largely derived from emergency and temporary order rules that already exist in other chapters within Title 30 of the Texas Administrative Code (for example, Chapter 305, Subchapter B). These provisions have been derived from current commission rules and placed into the new Chapter 35, and the commission is not adopting many substantive changes to these rules as they currently exist.

However, there are some substantive changes being adopted. As authorized by TWC, §5.501, the adopted new Chapter 35 provides for the delegation of authority to issue certain orders to the executive director. Additionally, the commission is adopting changes to program-specific requirements that result from the passage of SBs 1 and 1876. Finally, the commission adopts changes to clarify some notice requirements for temporary and emergency orders, and is adopting a fee increase. These changes are noted where applicable.

Adopted new Subchapter A, concerning Purpose, Applicability, and Definitions, sets forth certain general provisions necessary for administration of the chapter. Adopted new §35.1, concerning Purpose, provides that the purpose of the new chapter is

to implement the commission's authority under TWC, Chapter 5, Subchapter L, to issue temporary or emergency mandatory, permissive, or prohibitory orders, and by those orders to issue temporary permits or temporarily suspend or amend permit conditions. This provision is in accordance with TWC, §5.501, which contains the statutory authorization for the issuance of these orders. This subchapter will also be submitted to the United States Environmental Protection Agency (EPA) as a revision to the SIP.

Adopted new §35.2, concerning Applicability, provides that the chapter applies to any application under TWC, Chapter 5, Subchapter L, to issue temporary or emergency mandatory, permissive, or prohibitory orders.

Adopted new §35.3, concerning Definitions, provides definitions for emergency order, severe property damage, and temporary order. The purpose of this section to provide general definitions for the chapter and to help administer the provisions of TWC, Chapter 5, Subchapter L. An emergency order is defined as an order that must be issued immediately in order to protect human health and safety or the environment; or for reasons specified in adopted new §35.302, concerning Application for Emergency and Temporary Orders to Discharge. The definition of severe property damage is the same as that in §305.2, concerning Definitions, and is necessary for the requirements governing water quality emergency and temporary orders. Temporary order is defined as an order of short-duration which must be issued as quickly as possible, or which might allow an authorization for a short-term activity, setting conditions and limitations that will adequately protect human health or safety or the environment, or for the reasons specified in new §35.302.

Adopted new Subchapter B, concerning Authority of Executive Director, is comprised of three sections and regards delegation to the executive director, as authorized by TWC, §5.501. New §35.11, concerning Purpose and Applicability, provides that the purpose of Subchapter B is to allow the executive director to act on behalf of the commission. This subchapter will also be submitted to EPA as a revision to the SIP.

Adopted new §35.12, concerning Authority of the Executive Director, authorizes the executive director, or a representative or representatives authorized in writing by the executive director, to act on his or her behalf to receive applications for and issue emergency orders. The section also provides notice and hearing procedures.

Adopted new §35.13, concerning Eligibility of Executive Director, provides for the authority of the executive director or the executive director's representative to act on Texas pollutant discharge elimination system (TPDES) permits or other TPDES-related approvals if the executive director meets the qualifications specified in §50.41, concerning Eligibility of Executive Director.

Adopted new Subchapter C, concerning General Provisions, provides general requirements for issuing emergency and temporary orders. Adopted new §35.21, concerning Action by Commission or Executive Director, allows the commission or executive director to issue temporary or emergency orders and, by temporary or emergency order, to issue a temporary permit or temporarily suspend or amend a permit condition. The new provisions implement TWC, §5.501. This subchapter will also be submitted to EPA as a revision to the SIP.

Adopted new §35.22, concerning Term and Renewal of Orders, provides that unless otherwise noted by a program-specific requirement, the term of an emergency order is a maximum of 180 days, and that an emergency order may be renewed once for an additional period of up to 180 days by submittal of a new application. The section also provides that a temporary order is limited to a reasonable time specified by the order. This provision implements TWC, §5.505, concerning Term of Order.

Adopted new §35.23, concerning Effect of Orders, provides that an emergency or temporary order does not vest any rights in the permit holder or recipient and expires in accordance with its terms.

Adopted new §35.24, concerning Application for Emergency or Temporary Order, specifies requirements governing applications. The section prescribes the necessary contents of the application and requires its filing with the chief clerk. Subsection (b) specifies that an application for an emergency or temporary order for a bypass of untreated and partially treated wastewater will constitute prior notice of an anticipated bypass, as required by §305.535. Section 35.24 also requires copies of the application to be provided to the division director of the appropriate program on behalf of the executive director, and to the public interest counsel, at the same time it is filed with the chief clerk. Finally, the section prescribes the manner in which applications are to be signed. The new section implements TWC, §5.502, concerning Application for Emergency or Temporary Order, and contains procedural requirements necessary for implementation. The section was modified from the proposal to reflect the recent delegation of the national pollutant discharge elimination system (NPDES) authorization.

Adopted new §35.25, concerning Notice and Opportunity for Hearing, provides the notice and hearing requirements for emergency and temporary orders. The section provides that an emergency order can be issued with or without notice and/or opportunity for hearing, and that if one is issued without a hearing, the order will set a time and place for a hearing to affirm, modify, or set aside the order to be held before the commission or its designee as soon as practicable after the order is issued. In addition, the section provides that unless otherwise provided by program-specific requirements, notice of a hearing for issuance of an emergency order or to affirm, modify, or set aside the order must be given not later than the tenth day before the date set for the hearing and provide that an affected person may request an evidentiary hearing on the issuance of the emergency order. The section also provides that temporary orders require a hearing before their issuance, and that notice must be given not later than the 20th day before the hearing and provide that an affected person can request an evidentiary hearing on issuance of the temporary order. Program-specific notice requirements are also set out. Some of these notice requirements are not in existing Chapter 305 and provide clarification of notice requirements. In addition, the newspaper notice for air catastrophes is in addition to the requirement for notice to be given in the *Texas Register.* The adopted section implements TWC, §5.504.

Adopted new §35.26, concerning Contents of Emergency or Temporary Order, contains the minimum requirements for information that must be included in these types of orders. The contents are derived from the application requirements contained in TWC, §5.502.

Adopted new §§35.27-35.29, concerning Hearing Required, Hearing Requests, and Procedures for a Hearing, respectively, provide for hearings, hearing requests, and procedures for hearings on emergency and temporary orders. The rules provide that hearings will be conducted in accordance with the Administrative Procedure Act and commission rules. The hearing procedures implement TWC, §5.115(a), concerning Persons Affected in Commission Hearings, and TWC, §5.504, concerning Hearing to Affirm, Modify, or Set Aside Order.

Adopted new §35.30, concerning Application Fees, provides that the application fee for an emergency or temporary order under this chapter is $500, plus the actual cost of the required notice. TWC, §5.501, authorizes the adoption of fees for administering the program. In addition, the increase is authorized by TWC, §5.235, which establishes fee authority, and by Rider 9 under the commission's appropriation in Article VI of HB 1, 75th Legislature, 1997, the General Appropriations Act. The commission is increasing the current fee from $100 to $500 in order to more adequately cover commission expenses incurred when issuing these orders.

Adopted new Subchapter D concerns Emergency Suspension of Beneficial Inflows. The subchapter implements TWC, §5.506, concerning Emergency Suspension of Permit Condition Relating to Beneficial Inflows to Affected Bays and Estuaries and Instream Uses, and contains previously existing requirements that have been moved to the new Chapter 35.

New §35.101, concerning Emergency Suspension of Permit Conditions Relating to Beneficial Inflows to Affected Bays and Estuaries and Instream Uses, provides the criteria to be used by the commission in its review and action on an application by a water right holder for the temporary suspension of conditions relating to beneficial inflows to bays and estuaries and instream uses during an emergency. The new section is entirely derived from previous §297.57, concerning Emergency Suspension of Permit Conditions, and the commission adopts no substantive changes to the requirements as they existed in Chapter 297.

Adopted new Subchapter E concerns Emergency Orders for Utilities. The subchapter implements TWC, §5.507, concerning Emergency Order for Operation of Utility that Discontinues Operation or is Referred for Appointment of Receiver, and §5.508, concerning Emergency Order for Rate Increase in Certain Situations. Adopted Subchapter E also includes provisions necessary to implement SB 1, and it includes commission rules from Chapter 291 that have been moved to new Chapter 35. While largely derived from preexisting commission rules, the commission is also allowing the executive director to issue the orders under this subchapter, as authorized by TWC, §5.501.

Adopted new §35.201, concerning Emergency Order for Operation of Utility that Discontinues Operation or is Referred for Appointment of a Receiver, authorizes the commission or executive director to appoint a person by emergency order to temporarily manage and operate a utility that has discontinued or abandoned operations, or which has been or is being referred to the attorney general for the appointment of a receiver under TWC, §13.412. This provision implements both TWC, §5.508, concerning these types of orders; and TWC, §13.412, as amended by SB 1, which expanded the definition of abandonment. The adopted new section also authorizes the issuance of an emergency order in accordance with current §291.142, concerning Operation of Utility that Discontinues Operation or is Referred for Appointment of a Receiver, and §291.143, concerning Operation of a Utility by a Temporary Manager.

Adopted new §35.202, concerning Emergency Order for Rate Increase in Certain Situations, authorizes the commission or executive director to authorize an emergency rate increase for a utility under certain conditions. Specific requirements in the section are entirely derived from §291.22, concerning Notice of Intent to Change Rates, that have been moved to the new Chapter 35, and the commission adopts no substantive changes to those requirements as they previously existed.

Adopted new Subchapter F concerns Water Quality Emergency and Temporary Orders. The subchapter implements TWC, §5.509, concerning Temporary or Emergency Order Relating to Discharge of Waste or Pollutants, and includes existing commission rules that have been moved to the new Chapter 35 from Chapter 305, Subchapter B. While largely derived from those preexisting commission rules, the rules as adopted allow the executive director to issue the orders under this subchapter, as authorized by TWC, §5.501. The commission takes this action in order to provide for the more expeditious issuance of emergency and temporary orders.

Adopted new §35.301, concerning Emergency and Temporary Orders Authorized, authorizes the commission or executive director to issue emergency orders, and the commission to issue temporary orders, for the discharge of waste or pollutants into or adjacent to any water in the state when expeditious action is necessary.

Adopted new §35.302, concerning Application for Emergency and Temporary Orders to Discharge, contains application requirements that are specific to Subchapter F. In addition to the application requirements specified in adopted §35.24, this adopted section requires a person desiring to obtain an emergency or temporary order to provide specific information, including a statement that the order is necessary to enable action to be taken more expeditiously than is otherwise provided by TWC, Chapter 26, to effectuate the policy and purposes of that chapter, and statements on the nature of the adopted discharge. Additionally, the section reflects a change in the law that provides that amelioration of serious drought conditions can be a condition necessitating the issuance of an emergency or temporary order to the extent consistent with state assumption of the NPDES program. Further, since the state assumed the NPDES program on September 15, 1998, the commission has changed the language of the proposed rule to delete references to emergency and temporary orders issued prior to assumption of the program.

Adopted new §35.303, concerning Emergency Orders and Temporary Orders, provides the conditions under which the commission or executive director may issue emergency or temporary orders.

Adopted new Subchapter G concerns Solid Waste and Uranium By-product Emergency Orders. It implements TWC, §5.511, concerning Emergency Administrative Order Concerning Imminent and Substantial Endangerment, and §5.512, concerning Emergency Order Concerning Activity of Solid Waste Management, and contains provisions from existing commission rules. While largely derived from preexisting commission rules, the commission is allowing the executive director to issue the orders under this subchapter, as authorized by TWC, §5.501.

Adopted new §35.401, concerning Emergency Orders for Nonhazardous Solid Waste Activities and Underground Injection of Uranium By-product Materials, authorizes the commission or executive director to issue a mandatory or prohibitory emergency order regarding any activity of solid waste management within its jurisdiction, whether the activity is covered by permit or not, if it determines that an emergency exists. The section also provides for terms of these orders. The new section was derived from §305.29, concerning Emergency Orders for Solid Waste Activities. As noted, the commission authorizes the executive director to issue these orders, as allowed by statute. In addition, the commission is adding requirements for underground injection control emergency orders previously only set out in federal rules.

Adopted new §35.402 concerns Emergency Actions Concerning Hazardous Waste, and was derived in its entirety from previous §305.30, concerning Emergency Actions Concerning Hazardous Waste. As previously noted, the commission is allowing the executive director to issue orders under the adopted section.

Adopted Subchapter H concerns Radioactive Substances and Materials Emergency Orders. The adopted subchapter implements TWC, §5.516, which authorizes the issuance of emergency orders under Health and Safety Code (HSC), §401.056, concerning Emergency Orders.

Adopted new §35.501, concerning Emergency Orders Relating to Radioactive Substances, provides for commission or executive director action if it is determined that radioactive substances threaten the public health or safety or the environment, and that a licensee managing the radioactive substances is unable to remove the threat. The section also provides program-specific notice and hearing requirements, as well as provisions relating to financial assurance. The section is entirely derived from §305.31, concerning Emergency Orders Relating to Radioactive Substances, but the commission does adopt the following requirements that were not contained in the preexisting rules. The adopted rule provides for action by the executive director. In addition, adopted §35.501(g), concerning financial assurance, contains changes to what is in previous §305.31(h), to better reflect the relevant statutory language. Additionally, former §305.31(b) and (c), concerning by- product material, were not moved to new §35.501 due to the transfer of jurisdiction over those wastes to the Texas Department of Health, under SB 1857, 75th Legislature, 1997. The commission adopts no other changes to the rules concerning this matter as they currently exist, and the provisions are simply incorporated into the new Chapter 35.

Adopted new §35.502, concerning Emergency Impoundment of Radioactive Material, provides for commission and executive director action to impound or order the impoundment of radioactive material possessed by any person not equipped to observe, or failing to observe, the provisions of the Texas Radiation Control Act (TRCA), the rules of 30 TAC Chapter 336 (concerning Radioactive Substance Rules), or a license or order issued by the commission under TRCA or Chapter 336. The section also provides for the disposition of the radioactive material. The section is derived from §305.32, concerning Emergency Impoundment of Radioactive Material, and the only change to the rules as they previously existed is to provide for action by the executive director. The commission adopts no other changes to the rules concerning this matter as they previously existed, and the provisions are simply incorporated into the new Chapter 35.

Adopted new Subchapter I concerns Storage Tank Emergency Orders. The subchapter implements TWC, §5.510, which authorizes the issuance of these orders. Adopted §35.601, concerning Emergency Order Concerning Underground or Aboveground Storage Tanks, authorizes the commission or executive director to issue an order to the owner or operator of an underground storage tank regulated under TWC, Chapter 26, and 30 TAC Chapter 334 (concerning Underground and Aboveground Storage Tanks). The section contains program-specific requirements concerning the content of the order, and it provides for the delivery of the order to people identified in the order. The section is derived from §334.83, concerning Emergency Orders. The only significant change from the previous rules adopted by the commission is to provide for action by the commission, as well as the executive director, whereas the existing rule provides only for action by the executive director. Otherwise, the commission adopts no other changes to the rules concerning this matter as they previously existed, and the provisions are simply incorporated into the new Chapter 35.

Adopted new Subchapter J, concerning Imminent and Substantial Endangerment, implements TWC, §5.511, concerning Emergency Administrative Order Concerning Imminent and Substantial Endangerment. Adopted §35.701, concerning Emergency Orders, allows the commission or the executive director to issue an emergency administrative order under HSC, §361.272, in the manner prescribed by adopted Chapter 35.

Adopted new Subchapter K, concerning Air Orders, implements TWC, §5.514 and §5.515, concerning Order Issued Under Air Emergency and Emergency Order Because of Catastrophe, respectively. The adopted rules are derived from Chapter 116, Subchapter E, concerning Emergency Orders. The commission adopts changes to make the provisions consistent with SB 1876. This subchapter will also be submitted to EPA as a revision to the SIP. It replaces the rules that were found in Chapter 116, Subchapter E.

Adopted new §35.801, concerning Emergency Orders Because of Catastrophe, authorizes the commission or executive director to issue an emergency order authorizing immediate action for the addition, replacement, or repair of facilities or control equipment, and authorizing associated emissions of air contaminants, whenever a catastrophe necessitates such action that would otherwise be precluded by the Texas Clean Air Act (TCAA). Catastrophe is defined. The commission revised the term "catastrophic event" to "catastrophe" to be consistent with the statute.

Adopted new §35.802, concerning Application for an Emergency Order, requires the submission of an application in accordance with adopted §35.24. The section also provides the information that must be submitted in addition to the general application requirements. The section is derived from §116.411, concerning Application for an Emergency Order. The commission clarified the proposed rule language by providing that the term "facility," as used in Subchapter K, is the same definition of that term in TCAA, §382.003. The requirement that the application include a statement that any construction or modification will not interfere with the attainment or maintenance of the national ambient air quality standards (NAAQS) or violate applicable portions of the control strategy was added, and is consistent with expectations in previous emergency orders. These changes were made in response to comments. In addition, the commission revised the term "catastrophic event" to "catastrophe" to be consistent with the statute.

Adopted new §35.803, concerning Public Notification, is derived from §116.412 and contains changes to rules as they previously existed in that section. In addition to the publication of notice in the *Texas Register,* the new section requires the commission or executive director to prepare the notice of the emergency order and the hearing to affirm, modify, or set aside for the applicant to publish in a newspaper of general circulation in the nearest municipality not later than the tenth day before the hearing. This is a change from prior §116.412, which required only *Texas Register* notice as soon as practicable after issuance, but not later than the tenth day before the hearing. The new section also contains changes allowing either the commission or the executive director to act.

Adopted new §35.804, concerning Issuance of Order, authorizes the commission or executive director to issue an order under this subchapter if certain conditions are found to exist. The requirement that the executive director or commission must find that any construction or modification will not interfere with the attainment or maintenance of the NAAQS or violate applicable portions of the control strategy was added. This change was made in response to comment. In addition, the commission revised the term "catastrophic event" to "catastrophe" to be consistent with the statute.

Adopted new §35.805, concerning Contents of an Emergency Order, prescribes content requirements that are in addition to those specified in §35.38. The provisions are derived entirely from §116.415, concerning Contents of an Emergency Order. The requirement that the order include the requirement that any construction or modification will not interfere with the attainment or maintenance of the NAAQS or violate applicable portions of the control strategy was added. This change was made in response to comment. In addition, the commission revised the term "catastrophic event" to "catastrophe" to be consistent with the statute.

Adopted new §35.806, concerning Requirement to Apply for a Permit or Modification, requires the owner or operator of a facility for which an emergency order has been issued to submit an application within 60 days of issuance of the order in accordance with statute and commission rules. The section is derived from the previous §116.416, concerning Requirement to Apply for a Permit or Modification. The citation to the repealed statute, TCAA, §382.063, has been replaced with the correct citation to the TWC.

Adopted new §35.807, concerning Affirmation of an Emergency Order, provides the conditions under which the commission affirms a adopted or issued order. The section is derived in its entirety from §116.414, concerning Affirmation of an Emergency Order. The requirement that the order include the requirement that any construction or modification will not interfere with the attainment or maintenance of the NAAQS or violate applicable portions of the control strategy was added. This change was made in response to comment. In addition, the commission revised the term "catastrophic event" to "catastrophe" to be consistent with the statute.

Adopted new §35.808, concerning Modification of an Emergency Order, provides the conditions under which an emergency order must be modified. The section is derived from previous §116.417, concerning Modification of an Emergency Order. The commission revised the term "catastrophic event" to "catastrophe" to be consistent with the statute.

Adopted new §35.809, concerning Setting Aside an Emergency Order, requires a adopted or issued order to be set aside if the hearing record does not show that the order should be affirmed or modified. The section is derived from previous §116.418, concerning Setting Aside an Emergency Order.

Adopted Subchapter L, concerning On-site Sewage Disposal System, implements TWC, §5.513, which authorizes the issuance of these orders. Adopted §35.901, concerning Emergency Order Concerning On-site Sewage Disposal System, authorizes the commission to issue an emergency order suspending the registration of an installer of an on-site sewage disposal system, regulating an on-site sewage disposal system, or both, under certain conditions.

FINAL REGULATORY IMPACT ANALYSIS

Staff has reviewed the proposed rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rules are not major environmental rules because their primary intent is to consolidate already existing emergency and temporary order rules under one chapter. In addition, the applicability requirements do not apply because the commission is expressly granted authority by TWC, 5.501.The rules also concern procedural requirements of the agency, such as delegation of the authority to issue such orders by the commission to the executive director, and are a result of the commission's continuing regulatory reform effort.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to implement the statutory provisions of TWC, Chapter 5, Subchapter L. Adoption of these rules will also provide for the delegation of authority to issue emergency orders by the commission to the executive director, consolidate agency procedural rules, and make certain processes consistent among different agency programs. Adoption of these rules will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they only establish a new procedural mechanism for these types of orders.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and found that the adoption is a rulemaking identified in the Coastal Coordination Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will, therefore, require that applicable goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission has prepared a consistency determination for the adopted rules under 31 TAC §505.22, and found that the adopted rules are consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the adopted rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity,

functions, and values of coastal natural resource areas. CMP policies applicable to the adopted rules include the administrative policies and the policies for specific activities related to: construction and operation or solid waste treatment, storage, and disposal facilities; discharge of municipal and industrial wastewater to coastal areas; nonpoint source water pollution; and appropriations of water. Promulgation and enforcement of these adopted rules is consistent with the applicable CMP goals and policies because the adopted rules will establish clear and consistent requirements governing the issuance of emergency and temporary orders, as authorized by TWC, Chapter 5, Subchapter L. Under the authority granted by statute, the commission may issue emergency or temporary orders to address unforeseen circumstances, such as drought conditions or potential catastrophes. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because they will allow the commission to take steps to mitigate emergency or potential emergency situations, which will result in environmental benefits for the entire state, including coastal areas.

HEARING AND COMMENTERS

A public hearing regarding the proposed rules was held in Austin on August 3, 1998, and the public comment period also closed on August 3, 1998. No oral comments were received at the public hearing, but EPA submitted written comments on the proposal.

ANALYSIS OF TESTIMONY

EPA expressed concern about how multimedia regulations authorized by the TWC, including the air portion in Subchapter K, can be incorporated into the SIP if not authorized by the TCAA. EPA suggested that revising 30 TAC §101.1 by adding a reference to the TWC may be necessary to add the emergency order rules to the SIP.

EPA is correct that Chapter 35 is a compilation of multimedia regulations. These are authorized by various statutory authorities, including the TWC and the TCAA. Authority for the rules associated with emergency orders allowing emissions of air contaminants is found in both the TWC and the TCAA. The TWC authorizes the commission to protect the state's air quality in addition to the authority specifically included in the TCAA, and therefore the TWC and TCAA are both appropriate statutory bases for SIP submissions. Therefore, the commission has made no change in response to this comment. The commission does not believe that a revision to §101.1, concerning Definitions, is necessary at this time, but the commission will further consider this comment in its review of Chapter 101 which is anticipated to begin later this year.

The remainder of EPA's comments were specifically directed at the air orders in Subchapter K. EPA indicated that its understanding is that Chapter 116, Subchapter E has been moved to Chapter 35, Subchapter K with no substantive changes.

Although many of the rules in Subchapter K were moved verbatim from Chapter 116, there are provisions in Chapter 35 which are different from the previous rules. Applicable definitions have been added to Subchapter A. The authority for the executive director to act is also included in Subchapter B. The hearing provisions were moved to Subchapter C. Term limits and application fees have been added and are included in Subchapter C. In addition, the requirement for notice in a newspaper of general circulation has been added in Subchapter K.

EPA stated that the rules referenced in Chapter 116, Subchapter E are not now part of the approved SIP and that this is implied otherwise in the preamble to the proposed rules. EPA suggested that the commission clarify that the Chapter 35 rules will be submitted to EPA as a new portion of the SIP.

The commission agrees that the sentence used in the preamble gave the impression that Subchapter E is currently part of the SIP. Chapter 116, Subchapter E was submitted to the EPA as a SIP revision in 1993 and no SIP approval has been given by EPA as of this date. Therefore, the commission is withdrawing the 1993 SIP submission of Chapter 116, Subchapter E, and is submitting Chapter 35, Subchapters A, B, C, and K, and revised §116.410 as a revision to the SIP. The commission has made this clarification.

EPA expressed concern that allowing a major source or major modification subject to prevention of significant deterioration (PSD) or nonattainment new source review (NNSR) regulations to commence construction before a permit is issued may compromise the commission's discretion to make the decisions affecting the air quality or maintenance and attainment of the NAAQS. Specifically, the EPA wants the commission to ensure that any rule allowing for construction activities prior to issuance of a PSD or NNSR permit meets existing EPA policy regarding the scope of preconstruction activities.

The purpose of the Subchapter K rules is to allow a facility to reconstruct or make significant repairs and emit the associated air contaminants necessary for the addition, replacement, or repair of facilities or control equipment, necessitated by a catastrophe, where it is essential to prevent loss of life, serious injury, severe property damage, or severe economic loss not attributable to the applicant's actions. The review of emergency order applications conducted by the commission consists of evaluation of best available control technology and review of potential impacts of human health and the environment by use of air dispersion modeling and evaluation by the commission's Toxicology and Risk Assessment Section. The review also includes input from the regional office and New Source Review Permits Division in the commission's Office of Air Quality, as appropriate. The review will ensure that the construction is subject to current and possibly more stringent requirements than were in existence for facilities that are being replaced. This technical review process is at least as comprehensive as the commission's review of permit applications. It is possible, although highly unlikely, that construction on the property where the catastrophe occurred will result in a significant net emissions increase which meets the federal definition of a major source or major modification, as defined in 40 Code of Federal Regulations 51.165, where the purpose of the construction is to protect human health and the environment. It is critical for the commission to be able to respond to such situations when they occur. Therefore, in performing the reviews of the application and issuing orders, the commission is not compromising its responsibility to protect air quality or to attain or maintain the NAAQS, consistent with applicable portions of the state's control policy. To clarify, the commission has added this requirement to §§35.802, 35.804, 35.805, and 35.807.

EPA expressed concern that these rules could authorize a source to add or replace a unit at a site other than the site

at which the catastrophe occurred, prior to issuance of a permit and without adequate review.

The commission has made no changes in response to this comment. The statute allows construction at another site only under limited conditions. The other property must be owned by the owner or operator of the damaged facility; the same intermediates, products, or by-products must be produced at this other property; and there will be no more than a *de minimis* increase in the predicted concentration of the air contaminants at or beyond the property line at such other property. These limitations are in addition to the review process discussed previously. The review of the application, and issuance of orders, as discussed previously, will ensure that there will be no violation of the control strategy or interference with attainment or maintenance of the NAAQS.

EPA expressed concern that the ability of the EPA and citizens to challenge the permit that is eventually issued is limited under these rules.

These rules and the statutes under which they are promulgated do not in any way affect the existing requirements for notice of the permit or the opportunity to comment and request a contested case hearing under the TWC, TCAA, and the procedural rules of the commission. In addition, notice of the emergency order, as well as opportunity for public comment and opportunity to challenge the emergency order, are included in Chapter 35. Notice of the emergency order must be published in both the *Texas Register* and a newspaper of general circulation in the nearest municipality. The newspaper notice requirement, which was not included in previous §116.412, is intended to enhance public notice of these sections. Although the statute and emergency orders require an applicant to submit a permit application within 60 days, there will be cases in which no permit application is filed because the facility may no longer be in existence 60 days after the issuance of the emergency order.

EPA requested that the preamble discuss how the rules in Subchapter K and 30 TAC §101.11 interact.

The commission notes that there is no direct connection between §101.11, concerning Exemptions from Rules and Regulations, and the rules in Subchapter K. Although it is possible that an event that is reportable under 30 TAC §101.6 or §101.7, concerning Upset Reporting and Recordkeeping Requirements; and Maintenance, Start-up and Shutdown Reporting, Recordkeeping, and Operational Requirements, whether or not exempt via §101.11, could be associated with an application for an emergency order, the scope of emergency orders is for emissions associated with construction necessitated by a catastrophe. The exemption for certain unauthorized emissions in §101.11 covers emissions associated with upsets and maintenance, start-up, and shutdown activities. Whether or not an event qualifies for an exemption does not affect the issuance of an emergency order. An upset may be caused by a catastrophe, but the emissions associated with the repair and replacement of the facility would be subsequent to the upset event. Repair or replacement of facilities is beyond the usual interpretation of the term "maintenance," which is generally interpreted to mean that the maintenance is performed to meet the requirement in §101.7 that all pollution emission capture equipment and abatement equipment be maintained in good working order and operated properly during normal facility operations. In addition, no construction is authorized by §101.11.

EPA suggested adding rule language that states that the owner or operator assumes all risks when constructing under an emergency order prior to obtaining a permit.

The statute and §35.805 and §35.806 require that the applicant file an application for a permit within 60 days, with no guarantee that such permit will be issued. New §35.22 now places a term limit of up to 180 days on air emergency orders, with one possible 180-day extension, which will limit the time in which a facility can operate under the emergency order authorization. The commission interprets this as adequate for applicants to understand the risks associated with constructing before obtaining a permit and therefore has not made any changes in response to this comment.

EPA recommended that the rules specifically prohibit the owner or operator and the commission from considering any information associated with the construction under the emergency order in the commission's permit review.

Section 35.806 specifically states that the permit application shall be reviewed and acted upon by the executive director without regard to construction activity authorized by the emergency order. This means that construction allowed by an emergency order may not be allowed later by the permit without additional changes or controls to the facility, and any expense associated with those changes will not be considered in the determination of the reasonableness of appropriate controls. However, certain information associated with the emergency order, such as emission estimates, may also be relevant and should be duplicated in the permit application. The commission's independent review of a permit application is based on the information submitted by the applicant in the permit application, not what is submitted as an emergency order application.

Subchapter A. Purpose, Applicability, and Definitions

30 TAC §§35.1-35.3

STATUTORY AUTHORITY

The new sections are adopted under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.235, as amended by Article VI, Rider 9, House Bill 1, 75th Legislature, 1997, which establishes fee authority; §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses; §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13; §26.011, which establishes the commission's authority over water quality in the state; §26.351, which establishes the commission's authority concerning corrective action; §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks, and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §366.012, which es-

tablishes the commission's authority to establish rules for on-site disposal systems; §382.017, which establishes the commission's rulemaking authority; §382.024 and §382.025 which establish the authority of the commission to issue air orders and what factors the commission must consider when issuing such orders; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.056, which establishes the commission's authority to issue emergency orders concerning radiation; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

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 B. Authority of Executive Director

30 TAC §§35.11-35.13

STATUTORY AUTHORITY

The new sections are adopted under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.235, as amended by Article VI, Rider 9, House Bill 1, 75th Legislature, 1997, which establishes fee authority; §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses; §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13; §26.011, which establishes the commission's authority over water quality in the state; §26.351, which establishes the commission's authority concerning corrective action; §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks, and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §366.012, which establishes the commission's authority to establish rules for on-site disposal systems; §382.017, which establishes the commission's rulemaking authority; §382.024 and §382.025 which establish the authority of the commission to issue air orders and what factors the commission must consider when issuing such orders; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.056, which establishes the commission's authority to issue emergency orders concerning radiation; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter C. General Provisions

30 TAC §§35.21-35.30

STATUTORY AUTHORITY

The new sections are adopted under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.235, as amended by Article VI, Rider 9, House Bill 1, 75th Legislature, 1997, which establishes fee authority; §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses; §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13; §26.011, which establishes the commission's authority over water quality in the state; §26.351, which establishes the commission's authority concerning corrective action; §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks, and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §366.012, which establishes the commission's authority to establish rules for on-site disposal systems; §382.017, which establishes the commission's rulemaking authority; §382.024 and §382.025 which establish the authority of the commission to issue air orders and what factors the commission must consider when issuing such orders; §382.051, which establishes the commission's authority

to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.056, which establishes the commission's authority to issue emergency orders concerning radiation; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

§35.24. Application for Emergency or Temporary Order.

(a) A person wanting an emergency or temporary order under this chapter shall submit a written application to the chief clerk. Unless the person submitting the application is the executive director or the executive director's representative, the application must be sworn.

(b) If a person seeks an emergency or temporary order for a bypass of untreated or partially treated wastewater, as that term is defined in §305.2 of this title (relating to Definitions), from a facility that is subject to a Texas pollutant discharge elimination system permit, the filing of the application for an emergency or temporary order constitutes prior notice of an anticipated bypass. Filing of the application for bypass shall be done, if possible, at least ten days before the date of the bypass. The person must comply with all bypass requirements under §305.535 of this title (relating to Bypasses from TPDES Permitted Facilities).

(c) The application must:

(1) state the name, address, and telephone number of the applicant, the person submitting the application on the applicant's behalf, and the person signing the application on the applicant's behalf;

(2) contain information sufficient to identify the facility and location to be affected by the order;

(3) describe the condition of emergency or other condition justifying the issuance of the order;

(4) allege facts to support any findings required under this chapter;

(5) estimate the dates on which the proposed order should begin and end and the dates on which the activity proposed to be allowed, mandated, or prohibited should begin and end;

(6) describe the action sought and the activity proposed to be allowed, mandated, or prohibited;

(7) include any other statement or information required by this chapter; and

(8) be accompanied by payment of any application fees required by the commission.

(d) A copy of the application must be provided to the division director of the appropriate program on behalf of the executive director, and to the public interest counsel, at the same time it is filed with the chief clerk. The division director may designate another representative of the executive director for this service.

(e) All applications shall be signed as follows.

(1) For a corporation, the application shall be signed by a responsible corporate officer. For purposes of this paragraph, a responsible corporate officer means a president, secretary, treasurer, or vice- president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation; or the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures. Corporate procedures governing authority to sign permit applications may provide for assignment or delegation to applicable corporate positions rather than to specific individuals. Documentation of authority to sign must be provided with the application.

(2) For a partnership or sole proprietorship, the application shall be signed by a general partner or the proprietor, respectively.

(3) For a municipality, state, federal, or other public agency, the application shall be signed by either a principal executive officer or a ranking elected official. For purposes of this paragraph, a principal executive officer of a federal agency includes the chief executive officer of the agency, or a senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., regional administrator of the United States Environmental Protection Agency).

(4) For the executive director, the application shall be signed by the executive director or any duly authorized representative;

(5) A person other than the executive director or the executive director's representative signing an application shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

(6) For hazardous solid waste applications, the owner and operator of a facility must sign the application.

(7) For radioactive material license applications under Chapter 336 of this title (relating to Radioactive Substance Rules), the applicant or person duly authorized to act for and on the applicant's behalf must sign the application.

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. Emergency Suspension of Beneficial Inflows

30 TAC §35.101

STATUTORY AUTHORITY

The new section is adopted under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses.

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Subchapter E. Emergency Orders for Utilities

30 TAC §35.201, §35.202

STATUTORY AUTHORITY

The new sections are adopted under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13.

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Subchapter F. Water Quality Emergency and Temporary Orders

30 TAC §§35.301-35.303

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code (TWC), Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and §26.011, which establishes the commission's authority over water quality in the state.

§35.302. Application for Emergency and Temporary Orders to Discharge.

(a) A person desiring to obtain an order to discharge waste into the waters in the state under this subchapter shall submit an application in accordance with §35.24 of this title (relating to Application for Emergency or Temporary Order). The application must contain the information required by that section and the following:

(1) statements that:

(A) the order is necessary to enable action to be taken more expeditiously than is otherwise provided by Texas Water Code, Chapter 26, to effectuate the policy and purposes of that chapter;

(B) the discharge is unavoidable to:

(i) prevent loss of life, serious injury, or severe property damage;

(ii) to make necessary and unforeseen repairs to the facility; or

(iii) to ameliorate serious drought conditions to the extent consistent with the requirements of the federal Clean Water Act for authorization of the NPDES program.

(C) there is no feasible alternative to the proposed discharge;

(D) the discharge will not cause significant hazard to human life and health, unreasonable damage to property of persons other than the applicant, or unreasonable economic loss to persons other than the applicant; and

(E) the proposed discharge will not present a significant hazard to the uses that may be made of the receiving water after the discharge;

(2) statements that there are no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass from occurring during normal periods of equipment downtime or preventive maintenance;

(3) a statement of the volume and quality of the proposed discharge;

(4) an explanation of measures proposed to minimize the volume and duration of the discharge;

(5) an explanation of measures proposed to maximize the waste treatment efficiency of units not taken out of service or facilities provided for interim use; and

(6) for temporary orders, a list of potentially affected persons in accordance with §305.48(a)(2) of this title (relating to Additional Contents for Applications for Wastewater Discharge Permits).

(b) A person desiring to obtain an order to discharge adjacent to waters in the state under this subchapter shall submit an application

in accordance with §35.24 of this title. The application must contain the information required by that section and the following:

(1) statements that:

(A) the order is necessary to enable action to be taken more expeditiously than is otherwise provided by Texas Water Code, Chapter 26, to effectuate the policy and purposes of that chapter;

(B) the discharge is unavoidable to:

(i) prevent loss of life, serious injury, severe property damage, or severe economic loss;

(ii) ameliorate serious drought conditions; or

(iii) make necessary and unforeseen repairs to a facility;

(C) there is no feasible alternative to the proposed discharge;

(D) the discharge will not cause significant hazard to human life and health, unreasonable damage to property of persons other than the applicant, or unreasonable economic loss to persons other than the applicant; and

(E) the proposed discharge will not present a significant hazard to the area of or surrounding the discharge;

(2) a statement of the volume and quality of the proposed discharge;

(3) an explanation of measures proposed to minimize the volume and duration of the discharge;

(4) an explanation of measures proposed to maximize the waste treatment efficiency of units not taken out of service or facilities provided for interim use; and

(5) for temporary orders, a list of potentially affected persons in accordance with §305.48(a)(2) of this title.

§35.303. Emergency Orders and Temporary Orders.

(a) The commission or executive director may issue emergency orders, and the commission may issue temporary orders, under this subchapter only if it is found that:

(1) the order is necessary to enable action to be taken more expeditiously than is otherwise provided by Texas Water Code, Chapter 26 to effectuate the policy and purposes of that chapter;

(2) for discharges into water in the state, the discharge is unavoidable to:

(A) prevent loss of life, serious injury, or severe property damage; or

(B) to ameliorate serious drought conditions, to the extent consistent with the requirements of the federal Clean Water Act for authorization of the NPDES program.

(3) for discharges adjacent to waters in the state, the discharge is unavoidable to prevent loss of life, serious injury, severe property damage, to ameliorate serious drought conditions, or to make necessary and unforeseen repairs to a facility;

(4) there is no feasible alternative to the proposed discharge;

(5) the discharge will not cause significant hazard to human life and health, unreasonable damage to property of persons other than the applicant, or unreasonable economic loss to persons other than the applicant;

(6) the proposed discharge will not present a significant hazard either to the uses that may be made of the receiving water after the discharge, or the area surrounding the discharge;

(7) the dates on which the proposed discharge will begin and end and the volume and quality of the proposed discharge are reasonable and attainable; and

(8) the measures proposed to minimize the volume and duration of the discharge and the measures proposed to maximize the waste treatment efficiency of units not taken out of service or facilities provided for interim use are reasonable.

(b) The issuing authority may issue emergency orders and temporary orders to discharge waste or pollutants into water in the state under this subchapter only if the discharge is from an NPDES or Texas pollutant discharge elimination system-permitted treatment facility.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter G. Solid Waste and Uranium By-Product Emergency Orders

30 TAC §35.401, §35.402

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code (TWC), Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; and §361.024, which establishes the commission's authority to establish rules for the control of solid waste.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter H. Radioactive Substances and Materials Emergency

30 TAC §35.501, §35.502

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code (TWC), Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; and §5.105, which establishes the commission's authority to set policy by rule. Additionally, relevant sections of the Health and Safety Code include: §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.056, which establishes the commission's authority to issue emergency orders concerning radiation; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter I. Storage Tank Emergency Orders

30 TAC §35.601

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code (TWC), Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §26.351, which establishes the commission's authority concerning corrective action; and §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks.

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 J. Imminent and Substantial Endangerment

30 TAC §35.701

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code (TWC), Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule. Additionally, relevant sections of the HSC include: §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; and §361.024, which establishes the commission's authority to establish rules for the control of solid waste.

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 K Air Orders

30 TAC §§35.801-35.809

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code (TWC), Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; and §5.105, which establishes the commission's authority to set policy by rule. Additionally, relevant sections of the Health and Safety Code include: §382.017, which establishes the commission's rulemaking authority; §382.024 and §382.025 which establish the authority of the commission to issue air orders and what factors the commission must consider when issuing such orders; §382.051, which establishes the commission's authority to adopt rules concerning air permits; and §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions.

§35.801. Emergency Orders Because of Catastrophe.

The commission or executive director may issue emergency orders under Texas Water Code, §5.515, to authorize immediate action for the addition, replacement, or repair of facilities or control equipment, and authorizing associated emissions of air contaminants, whenever a catastrophe necessitates such construction and emissions otherwise precluded under the TCAA. For purposes of this section, a catastrophe is an unforeseen event including, but not limited to, an act of God, an act of war, severe weather conditions, explosions, fire, or other similar occurrences beyond the reasonable control of the operator, which renders a facility or its functionally related appurtenances inoperable.

§35.802. Application for an Emergency Order.

The owner or operator of a facility, as that term is defined in Texas Health and Safety Code, §382.003, desiring to obtain an order under this subchapter shall submit an application in accordance with §35.24 of this title (relating to Application for Emergency or Temporary Order). The application must contain the information required by that section and the following:

(1) a statement that the proposed construction and emissions are essential to prevent loss of life, serious injury, severe property damage, or severe economic loss not attributable to the applicant's actions, and are necessary for the addition, replacement, or repair of facilities or control equipment necessitated by a catastrophe;

(2) a description of the catastrophe;

(3) a statement that there are no practicable alternatives to the proposed construction and emissions;

(4) a statement that the emissions will not cause or contribute to a condition of air pollution;

(5) a statement that the proposed construction and emissions will occur only at the property where the catastrophe occurred or on other property owned by the owner or operator of the damaged facility, which produces the same intermediates, products, or by-products, providing that no more than a *de minimis* increase will occur in the predicted concentration of the air contaminants at or beyond the property line at such other property;

(6) a description of the proposed construction and the type and quantity of air contaminants to be emitted;

(7) an estimate of the dates on which the proposed construction and emissions will begin and end;

(8) an estimate of the date on which the facility will begin operation;

(9) a statement that any construction or modification will not interfere with the attainment or maintenance of national ambient air quality standards or violate applicable portions of the control strategy; and

(10) any other information or item the executive director may require to support or explain the need for, or to expedite the issuance of, an emergency order; including information regarding the applicability of and compliance with any federal requirements for new or modified sources.

§35.804. Issuance of Order.

The commission or executive director may issue an order under this subchapter if it is found that:

(1) the proposed construction and emissions are essential to prevent loss of life, serious injury, severe property damage, or severe economic loss not attributable to the applicant's actions and are necessary for the addition, replacement, or repair of facilities or control equipment that is necessitated by a catastrophe;

(2) there are no practicable alternatives to the proposed construction and emissions;

(3) the emissions will not cause or contribute to a condition of air pollution;

(4) any construction or modification will not interfere with the attainment or maintenance of national ambient air quality standards or violate applicable portions of the control strategy;

(5) the proposed construction or emissions will occur only:

(A) at property where the catastrophe occurred; or

(B) at other property owned by the owner or operator of the damaged facility which produces the same intermediates, products, or by-products, so long as there will be no more than a *de minimis* increase in the predicted concentration of the air contaminants at or beyond the property line at such other property;

(6) the time limits in the order for the beginning and completion of the proposed construction and emissions are reasonable; and

(7) the schedule in the order for submission of a complete permit application is reasonable.

§35.805. Contents of an Emergency Order.

In addition to the requirements of §35.26 of this title (relating to Contents of Emergency or Temporary Order), an emergency order issued under this subchapter shall contain at least the following:

(1) a description of the emergency construction and emissions to be authorized;

(2) reasonable time limits for the beginning and the completion of the proposed construction and emissions;

(3) authorization for action only at the property where the catastrophe occurred or on other property owned by the owner or operator of the damaged facility, which also produces the same intermediates, products, or byproducts, provided there will be no more than a *de minimis* increase in the concentration of air contaminants at or beyond the property line at such other property;

(4) the requirement that any construction or modification will not interfere with the attainment or maintenance of national ambient air quality standards or violate applicable portions of the control strategy; and

(5) a schedule for submission of a complete construction permit application under provisions of TCAA, §382.0518.

§35.806. Requirement to Apply for a Permit or Modification.

The owner or operator of a facility for which an emergency order has been issued under this subchapter shall submit an application within 60 days of issuance of the order under Texas Water Code, §5.515; TCAA, §382.0518; and Chapter 116, Subchapter B of this title (relating to New Source Review Permits). The application shall be reviewed and acted upon by the executive director without regard to construction activity authorized by the emergency order. The appropriate permit fee shall be due and payable under §§116.140, 116.141, and 116.143 of this title (relating to Permit Fees). Costs and expenses related to additions, replacement, or repair of facilities or control equipment shall not be a consideration in any determination in the review of this application.

§35.807. Affirmation of an Emergency Order.

The commission shall affirm a proposed or issued order if the applicant shows at the hearing, by a preponderance of the evidence, that:

(1) the proposed construction and emissions are essential to prevent loss of life, serious injury, severe property damage, or severe economic loss not attributable to the applicant's actions and are necessary for the addition, replacement, or repair of facilities or control equipment that is necessitated by a catastrophe;

(2) there are no practicable alternatives to the proposed construction and emissions;

(3) the emissions will not cause or contribute to a condition of air pollution;

(4) any construction or modification will not interfere with the attainment or maintenance of national ambient air quality standards or violate applicable portions of the control strategy; and

(5) the proposed construction or emissions will occur only:

(A) at property where the catastrophe occurred; or

(B) at other property owned by the owner or operator of the damaged facility which produces the same intermediates, products, or by-products, so long as there will be no more than a *de minimis* increase in the predicted concentration of the air contaminants at or beyond the property line at such other property;

(6) the time limits in the order for the beginning and completion of the proposed construction and emissions are reasonable; and

(7) the schedule in the order for submission of a complete permit application is reasonable.

§35.808. Modification of an Emergency Order.

The commission shall modify a proposed or issued order if the hearing record shows that:

(1) construction and emissions otherwise precluded under the TCAA are essential to prevent loss of life, serious injury, severe property damage, or severe economic loss not attributable to the applicant's actions and are necessary for the addition, replacement, or repair of facilities or control equipment that is necessitated by a catastrophe;

(2) there is no practicable alternative to such construction and emissions; and

(3) modification of certain terms of the proposed or issued order is necessary to make the order, construction, and/or emissions meet the requirements stated in §35.807 of this title (relating to Affirmation of an Emergency Order).

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For further information, please call: (512) 239-1966

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Subchapter L. On-site Sewage Disposal System

30 TAC §35.901

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code (TWC), Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; and §5.105, which establishes the commission's authority to set policy by rule. Additionally, relevant sections of the Health and Safety Code include: §366.012, which establishes the commission's authority to establish rules for on- site disposal systems.

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 November 20, 1998.

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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-1966

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Chapter 39. Public Notice

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§39.1, 39.5, and 39.251, concerning public notice, and new §39.401, concerning public notice for applications for consolidated permits. The amendments and new section are adopted without changes to the proposed text as published in the July 17, 1998, issue of the *Texas Register* (23 TexReg 7353).

This action is part of the commission's implementation of House Bill (HB) 1228, 75th Legislature, 1997, which granted the commission authority to conduct consolidated permit processing and issue consolidated permits. It also includes minor corrections and clarifications to preexisting rules. In addition, the commission is concurrently adopting a new 30 TAC Chapter 33, concerning Consolidated Permit Processing. This action is published in this edition of the *Texas Register*.

EXPLANATION OF ADOPTED RULES

HB 1228 created a new Texas Water Code (TWC), Chapter 5, Subchapter J. The new statute creates a process for an applicant to request consolidated permit processing and the issuance of a consolidated permit. Federal operating permits are prohibited from consolidation. The statute establishes a voluntary program by which a plant, facility, or site can request consolidated permit processing. It provides for designation of a lead permitting program for coordination of application reviews, a consolidated permit hearing on all permits requested by the applicant, and issuance of one consolidated permit. It also allows the commission to adopt rules to implement the

program, including rules that provide for consolidated notice and procedures for issuing such permits.

These rules are necessary to implement the notice provisions of the statute and do not represent a fundamental change to the commission's notice processes. Due to the limited and voluntary nature of TWC, Chapter 5, Subchapter J, as well as other statutory limitations, such as permit and notice requirements under federal programs for which the commission is seeking authorization, implementation of HB 1228 will be conducted under current commission rules and processes.

The rules also include corrections to certain provisions in Chapter 39. These are adopted for clarification purposes.

The amendment to §39.1, concerning Applicability, provides that Chapter 39 applies to applications for consolidated permit processing.

The amendment to §39.5, concerning General Provisions, removes redundant language concerning the publication of newspaper notice. This change is nonsubstantive, and its intent is to correct a mistake in the existing rule.

The amendment to §39.251, concerning Application for Injection Well Permit, clarifies that the rules apply to both existing and proposed facilities.

New §39.401, concerning Public Notice for Applications for Consolidated Permits, provides that combined notices for applications consolidated under TWC, Chapter 5, Subchapter J, and Chapter 33, will be given only when requested by an applicant and when the combined notice satisfies all statutory and regulatory requirements applicable if each application had been processed separately. This provision clarifies that all applicable notice requirements must be met when an applicant requests consolidated permit processing. The commission notes that combined notices are not mandatory, and that an applicant retains the ability to do separate notices if it prefers.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rule is not a major environmental rule because it prescribes limited procedural requirements governing a voluntary program, and it provides for minor clarifications to existing rules. In addition, the provisions concerning notice for consolidated permits are expressly authorized by state statute, TWC, Chapter 5, Subchapter J.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to implement the statutory provisions of TWC, Chapter 5, Subchapter J, concerning consolidated permit processing, and to make necessary clarifications to existing rules. The rules will substantially advance this purpose by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they concern commission procedural rules.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. These rules concern procedural requirements of the agency relating to public notice. Therefore, the rules are not subject to the CMP.

HEARING AND COMMENTERS

A public hearing on the proposed rules was held in Austin on August 17, 1998, and the comment period also closed on August 17, 1998. No written or oral comments were received regarding the proposal.

Subchapter A. Applicability and General Provisions

30 TAC §39.1, §39.5

STATUTORY AUTHORITY

The amendments are adopted under the following sections of the TWC: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and §5.401 et seq., which establishes the commission's authority concerning consolidated permit processing. This action is also taken under Texas Health and Safety Code, §382.017, which establishes the commission's rulemaking authority.

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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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Subchapter E. Public Notice of Other Specific Applications

30 TAC §39.251

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which establishes the Texas Natural Resource Conservation Commission's (commission) general authority to adopt rules; and §5.105, which establishes the commission's authority to set policy by rule. This action is also taken under Texas Health and Safety Code, §382.017, which establishes the commission's rulemaking authority.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Natural Resource Conservation Commission
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Subchapter G. Public Notice for Applications for Consolidated Permits

30 TAC §39.401

STATUTORY AUTHORITY

The new section is adopted under the following sections of the TWC: §5.103, which establishes the Texas Natural Resource Conservation Commission's (commission) general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and §5.401 et seq., which establishes the commission's authority concerning consolidated permit processing. This action is also taken under Texas Health and Safety Code, §382.017, which establishes the commission's rulemaking authority.

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 114. Control of Air Pollution From Motor Vehicles

Subchapter G. Transportation Planning

30 TAC §114.260

The commission adopts amendments to Chapter 114, Subchapter G, §114.260, concerning Transportation Conformity, and a revision to the State Implementation Plan (SIP) concerning Transportation Conformity. Section 114.260 is adopted with changes to the proposed text as published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8364).

EXPLANATION OF PROPOSED RULE The Texas transportation conformity rule (§114.260) and its associated SIP were adopted on October 19, 1994, in response to the Federal Clean Air Act (FCAA) requirements. The FCAA required each state to submit a revision to its SIP no later than November 25, 1994 establishing enforceable criteria and procedures for making conformity determinations for metropolitan transportation plans, transportation improvement programs, and projects funded by the Federal Highway Administration (FHWA) or the Federal Transit Administration (FTA). Emissions estimates of transportation plans, programs, and projects must be found to conform with their corresponding emissions estimates or budgets, i.e. limitations, contained in the applicable SIP before they are approved or funded by the U. S. Department of Transportation or the Metropolitan Planning Organizations (MPOs) in nonattainment and maintenance areas. Failure to demonstrate transportation conformity will result in a partial loss of federal highway funding. The Texas transportation conformity SIP and rule were approved by the United States Environmental Protection Agency (EPA) on November 8, 1995. Since their initial promulgation, EPA has amended the federal transportation conformity rules three times; on August 7, 1995, November 14, 1995, and August 15, 1997. As a result of the August 15, 1997 amendments, Texas was required to amend the state transportation conformity rule and SIP to incorporate the federal amendments by August 15, 1998.

The adopted amendments will incorporate, by reference, the August 15, 1997, amendments to the federal transportation conformity rule (40 CFR, Part 51 Subpart T and Part 93 Subpart A) with the exception of §93.102(d) and §93.105. Section 93.102(d) established a grace period for new nonattainment areas and has been disallowed as a result of Sierra Club v. EPA, 129 F.3d 137 (D.C. Cir. 1997). Section 93.105 cannot be incorporated by reference because it requires states to develop their own consultation procedures subject to EPA guidelines. These interagency and public consultation procedures are established in §114.260(d).

Most of the amendments to the federal transportation conformity rule are organizational changes or are slightly less stringent in nature than previous versions. The amendment, however, that requires nonattainment areas to demonstrate transportation conformity to a nitrogen oxide (NO_x) motor vehicle emissions budget regardless of the area's NO_x waiver status, and is more stringent than the current Texas transportation conformity rule, which includes exemptions from NO_x budgets. The adopted revisions to §114.260 will incorporate the new federal NO_x requirements by reference.

This adopted rule also simplifies the transportation control measure (TCM) requirements by deleting references to §114.270(d), which is the TCM Enforcement Rule. Instead of being required to develop new TCMs consistent with the transportation conformity process to make up an emissions reduction shortfall, the nonattainment and maintenance area MPOs would only be required to ensure timely TCM implementation and report the implementation and emissions reductions status of adopted TCMs annually to the commission. Finally, this adopted rule will clarify the transportation conformity determination process by identifying who makes the determinations, who issues the joint conformity finding, and when the conformity is effective. MPOs and their governing bodies, or the Texas Department of Transportation (TxDOT), if applicable, would make the transportation conformity determinations. Upon completion of the transportation conformity review process, the FHWA and the FTA would issue a joint conformity finding, indicating the transportation conformity status of the documents under review. The transportation conformity would be effective on the date of the joint conformity finding.

FINAL REGULATORY IMPACT ANALYSIS The adopted rulemaking is a "major environmental rule" because it deals with

the construction of highway and other transportation projects within the nonattainment and maintenance areas of the state, most of which are major metropolitan areas. Incorporation of the new federal transportation conformity requirements by reference means that all nonattainment and maintenance areas will be required to demonstrate conformance of an emissions budget for NO_x or be subject to loss of highway or other transportation funding. Under the existing rules, the nonattainment areas have not been required to conform to a NO_x budget.

This rulemaking does not, however, meet the other criteria for being subject to §2001.0025 because it does not exceed a standard set by federal law, does not exceed an express requirement of state law, does not exceed a requirement of a delegation agreement or contract to implement a state and federal program, is not being adopted solely under the general powers of the commission, and is not being adopted on an emergency basis to reduce risks to human health from environmental exposure.

Therefore, the commission has reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and has determined that the rulemaking is not subject to §2001.0025.

TAKINGS IMPACT ASSESSMENT The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated, Section 2007.043. The following is a summary of that assessment. The specific purpose of the rule is to meet the federal requirement to incorporate recent EPA changes to the federal transportation conformity rule, which requires all transportation plans, programs, and projects in nonattainment or maintenance areas to conform to the SIP. The rule will substantially advance this specific purpose by incorporating the required sections of the federal transportation conformity rule, as amended on August 15, 1997, by reference. Other adopted amendments simplify and reduce TCM requirements and clarify the transportation conformity determination process. Promulgation and enforcement of this rule will not affect private real property which is the subject of the rule because the proposed rule only serves to ensure that transportation plans, programs, and projects in nonattainment and maintenance areas conform with the SIP.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW The commission has determined that this rulemaking action is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et. seq.), the rules of the Coastal Coordination Council (31 TAC Chapters 501-506), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3) relating to actions and rules subject to the CMP, agency rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this action for consistency, and has determined that this rulemaking is consistent with the applicable CMP goals and policies. The primary CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations at 40 CFR, to protect and enhance air quality in the coastal area. This rule merely adopts the changes EPA has made to 40 CFR Parts 51 and 93, and therefore, is in agreement with the CMP policy governing air pollutant emissions. In compliance with 31 TAC §505.22(e), the commission affirms that this rule is consistent with CMP goals and policies. No persons submitted comments regarding the consistency of the proposed rules with the CMP during the comment period.

HEARING AND COMMENTERS A public hearing on the proposal was held in Austin on May 13, 1998. Six persons attended the hearing, but only one commenter, the Houston-Galveston Area Council (H-GAC), gave oral comments. In addition, two commenters, EPA and H-GAC provided written comments. The comment period closed on May 26, 1998. Based on the comments received, the commission decided to make suggested changes to the proposal and re-propose for another public comment period. A second public hearing on this adoption was held in Austin on September 8, 1998. No persons attended the second hearing. The EPA provided additional written comments and one individual provided written comments during the second comment period which closed on September 14, 1998.

EPA and H-GAC supported the cooperation during the rulemaking process, but suggested several changes in their first set of comments. The changes were incorporated into the second proposal, and EPA fully supported the rules in its second written comment letter. H-GAC did not submit additional comments on the second proposal. One individual expressed opposition to several portions of the proposal but did not make any suggestions for change.

EFFECTIVE DATE The EPA noted in its initial comments that the statement in the proposed SIP Narrative Document (Section VI.H.3.b.) which specifies that "all conformity determinations made after August 24, 1998, will be made according to the applicable portions of the final EPA rules on transportation conformity, as amended on August 15, 1997 " is contrary to federal rule. EPA cited both 40 CFR 51.390 (b) and the preamble to the August 15, 1997 Transportation Conformity Rule Amendments (62 FR 43798) as specifying that the proposed transportation conformity rule will not be effective in areas that have approved transportation conformity SIPs until that SIP is revised and approved by EPA. EPA further stated that "therefore, conformity determinations must comply with the provisions of the current approved transportation conformity SIP. Since we realize the importance of using the 1997 rule in the conformity determinations, EPA will ensure that priority be given processing and approving the revised conformity SIP in areas such as Texas with approved conformity SIPs."

Although Texas rules are generally enforceable 20 days after filing with the *Texas Register,* the commission agrees to incorporate the EPA comment into the Texas transportation conformity SIP and rule. Both the SIP and rule were revised to indicate that the Texas transportation conformity rule will be effective on the date the Texas transportation conformity SIP is approved by EPA. The rule was re-proposed in the *Texas Register* on August 14, 1998 and a second public comment hearing was held on September 8, 1998. EPA stated during the second public comment period that the second rule proposal satisfactorily incorporated its comments. The commission appreciates the EPA commitment to expedite processing and approval of the Texas transportation conformity SIP. Section 114.260(e) is adopted with changes in order to insert the appropriate adoption and filing dates.

ROLES AND RESPONSIBILITIES OF AFFECTED AGENCIES The EPA stated that §114.260(d)(2)(A)(ix) of the original proposed rule did not include all the requirements of 40 CFR 93.105(c)(4). In particular, the section did not include the re-

quirement for "any non-federal entity, designing or constructing any transportation facility, to report design or construction plans or any changes to the existing plan to the MPO." The EPA recommended revising the section by adding the following: "In addition, any group, entity, or individual planning to construct a regionally significant transportation project which is not a FHWA-FTA project (including a project for which alternative locations, design concept and scope, or the no-build option is still being considered), including those projects planned by recipients of funds under Title 23 U.S.C. or Federal Transit Act, shall ensure that these plans are disclosed to the MPO on regular basis (or as soon as they are identified), including immediate notification of changes to the existing plans, so that these transportation projects can be incorporated in the regional emissions analysis and modeling of the area."

The commission agrees that the original proposal omitted the requirements of 40 CFR 93.105(c)(4), regarding the roles and responsibilities of any non-federal entity, designing or constructing any transportation facility of a regionally significant nature, but which is not an FHWA-FTA project. The commission did not, however, add those roles and responsibilities to §114.260(d)(2)(A) regarding MPO roles and responsibilities; but instead created a new §114.260(d)(2)(C), which addresses the roles and responsibilities of non-federal entities. The rule was re-proposed on August 14, 1998, and a second public comment hearing was held on September 8, 1998. EPA stated during the second public comment period that the second rule proposal satisfactorily incorporated its comments.

TRANSPORTATION CONFORMITY REVIEW PROCESS The EPA commented that §114.260(d)(3)(E) of the original proposed rule did not clearly define the transportation conformity review process and the final effective date of the conformity determination. EPA requested that the language be clarified to better reflect what must be completed before FHWA and FTA issue a joint conformity finding. EPA also requested that the language state that the effective date of the conformity determination for an area is the date of joint conformity determination made by FHWA-FTA.

The commission agrees. Language was been added to §114.260(d)(3)(E) to clarify the transportation conformity review process and the final effective date. The rule was re-proposed on August 14, 1998, and a second public comment hearing was held on September 8, 1998. EPA stated during the second public comment period that the second rule proposal satisfactorily incorporated its comments.

An individual stated opposition to the requirements in §114.260(d)(3)(E) for the MPO and TxDOT to make conformity determinations for Metropolitan Transportation Plans (MTPs), Transportation Improvement Programs (TIPs), and other projects. The commenter stated that the commission should provide oversight and make a final determination for these projects.

The commission disagrees because the MPOs are required by 40 CFR 93.104 to determine conformity of MTPs, TIPs, and projects within the metropolitan planning area. In addition, 40 CFR 93.105 requires a process to ensure the MPO and state departments of transportation, i.e. TxDOT, use "cooperative planning and analysis for purposes of determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area." Section 114.260(d)(2)(A)(xii) addresses this process by stating that "the MPOs shall, for the purpose of determining the conformity of all projects outside the metropolitan planning area, but within the nonattainment or maintenance area, enter into a memorandum of agreement involving the MPO and TxDOT for cooperative planning and analysis of projects." Given the requirements of the federal rule and the process outlined in §114.260(d)(2)(A)(xii), the commission believes that the MPOs and TxDOT should be responsible for making conformity determinations for the MTPs, TIPs and other projects, and does not believe a change in the rule is warranted. Section 114.260(d)(3)(E) also addresses the transportation conformity determination review process, which includes requirements for interagency consultation and public participation. The commission does participate in the transportation conformity determination review process. In addition, §114.260(d)(3)(E) states that upon completion of the review process, the FHWA and the FTA will issue a joint conformity finding indicating the transportation conformity status of the document(s) under review. This statement is consistent with 40 CFR 93.104 and gives final approval authority of transportation conformity determinations to FHWA and FTA.

TRANSPORTATION CONFORMITY PUBLIC HEARING REQUIREMENTS The EPA suggested that §114.260(d)(2)(B)(ii) be revised to ensure clarity by indicating that the public hearings will be conducted in accordance with the SIP public hearing requirements found in 40 CFR 51.102.

The commission agrees. Section 114.260(d)(2)(B)(ii) has been revised to indicate that the public hearings will be in accordance with 40 CFR 51.102. The rule was re-proposed on August 14, 1998, and a second public comment hearing was held on September 8, 1998. EPA stated during the second public comment period that the second rule proposal satisfactorily incorporated its comments.

CONSULTATION PROCESS H-GAC stated that the commission has been highly responsive to the needs of the transportation planning and conformity process when receiving MTPs and TIPs from H-GAC, but has been less consultative when developing SIPs. H-GAC also stated that consultation on the Metropolitan Transportation Plan by H-GAC with the commission has worked well, however, consultation with the MPO by the commission has worked less well, particularly with regard to the most recent attainment demonstration SIP. H-GAC also provided a proposal with several suggestions to improve the consultation process between the commission and the MPO.

The commission assumes that since the proposal was submitted as a comment on the proposed transportation conformity rule, H-GAC's intent was for the proposal to be incorporated into the rule. Therefore, the commission will comment on each item of the proposal in that context.

H-GAC stated that consultation must be reciprocal to carry out the vision of coordinated transportation and air quality planning contained in the transportation conformity rule.

The commission agrees and believes that the consultation requirements in the proposed rule define a reciprocal consultation process.

H-GAC stated that consultation by the commission with MPOs is required whenever the commission develops transportation related SIP revisions, air quality modeling, general emissions analysis, emissions inventory, and all related activities. H-GAC also indicated that most of what it is requesting from the consultation process is already required by the regulation.

The commission agrees. Section 114.260(d)(2)(B) of both the existing rule and of this rulemaking states that the commission shall work in consultation with the agencies specified in §114.260(d)(1)(A) in developing applicable transportation related SIP revisions, air quality modeling, general emissions analysis, emissions inventory, and all related activities. Since nonattainment area MPOs are specified in §114.260(d)(1)(A), this requirement applies to H- GAC and other nonattainment area MPOs.

H-GAC requested that the commission use a broader vision of "transportation-related" so that issues that will affect the control strategy, and which will include transportation emission budgets, could be highlighted to the MPO early so that planning assumptions can change as needed. H-GAC further stated that the context in which transportation planning takes place affects the transportation controls that would be imposed or the strategies that are developed. Finally, H-GAC noted that reciprocal consultation addresses these issues up front rather than at public hearings.

The commission interprets this request to mean that any issue which will establish or affect the motor vehicle emissions budgets contained in a SIP should be brought to the MPO's attention as soon as possible. The commission agrees, but believes that §114.260(d)(2)(B) adequately addresses this concern. Section 114.260(d)(2)(B) of both the existing rule and of this rulemaking states that the commission shall work in consultation with the agencies specified in §114.260(d)(1)(A) in developing applicable transportation related SIP revisions, air quality modeling, general emissions analysis, emissions inventory, and all related activities. Section 114.260(d)(2)(B)(i) also states that the commission shall set agendas and schedule meetings to seek advice and comments from all agencies specified in §114.260(d)(1)(A) during preparation of applicable transportation related SIP revisions. The commission believes that the inclusion of a precise definition of "transportation related" into the rule could ultimately prove to be unduly constraining, because transportation issues, programs, and policies continue to evolve.

H-GAC stated that while informal consultation is great, the regulation requires more formal consultation as well. H-GAC suggested that written documentation, in the form of letters, memos, or other records, should be required to record all discussions.

Although H-GAC's definition of informal and formal consultation is unclear, the commission assumes that H-GAC is equating formal consultation with written documentation and informal consultation with verbal communication. If this is H-GAC's intent, then the commission refers to the proposed rule which requires both formal and informal consultation in specific instances as defined in §114.260(d)(2). In addition, §114.260(d)(1)(B) lists the designated points of contact for all correspondence addressed to the affected agencies in §114.260(d)(1)(A). The commission agrees that letters or memos written to the relevant agency point of contact may help document informal consultation, and will incorporate such practices into its operating procedures as appropriate. However, the commission believes that adding requirements to the rule language for letters or memos documenting informal consultation would be unduly burdensome and constraining.

H-GAC suggested that the commission should enable the MPO to participate in the development of technical methodologies for emission estimation and provide early opportunities to participate when travel data is to be used for any reason.

The commission must follow federal emission estimation methodologies and guidelines when applicable. However, §114.260(d)(2)(B) of both the existing rule and of this rulemaking states that the commission shall work in consultation with the agencies specified in §114.260(d)(1)(A) in developing applicable transportation related SIP revisions, air quality modeling, general emissions analysis, emissions inventory, and all related activities. This section enables the MPO to participate in the development of technical methodologies for emission estimation that are not defined by federal methodologies or guidelines. Because travel data is an integral part of the activities listed in §114.260(d)(2)(B), the commission believes that the MPO has early opportunities to participate when travel data is used by the commission.

H-GAC stated that it wants to receive hard copies of final documents adopted by the commission that relate to its region.

Section 114.260(d)(2)(B)(iii) of the existing rule and of this rulemaking requires the commission to provide copies of final documents, including applicable adopted or approved transportation related SIP revisions and supporting information, to all agencies specified in §114.260(d)(1)(B). Nonattainment area MPOs are specified in §114.260(d)(1)(B), therefore this requirement applies to H-GAC and other nonattainment area MPOs.

UNRESOLVED ISSUES WITH THE FEDERAL AND STATE TRANSPORTATION CONFORMITY PROCESS H-GAC stated that it understands most of the changes to the regulation must be an adoption by reference to EPA regulatory changes. H-GAC also stated that it will continue to work with other stakeholders and press for further clarity of the state and federal rules. H-GAC stated that it remains concerned about issues not fully resolved by the EPA changes, such as the continuing discrepancy between SIP timelines (attainment year - 2007) and the mandated 20+ year extent of the metropolitan transportation plan (2025). H-GAC hoped that further resolution of this issue will come soon. H-GAC believes that with emissions budgets, having to demonstrate conformity for all plan analyses in the years beyond the attainment year may be impossible.

Although this comment is out of scope of this rule proposal, the commission recognizes the need for further improvement in the transportation conformity process. The commission will transmit the H-GAC concerns to appropriate EPA staff. The commission appreciates the cooperation and input provided by H-GAC and the other stakeholders.

TCM IMPLEMENTATION AND EFFECTIVENESS MONITORING An individual commented that he was opposed to removing the requirement under §114.270(d) (called 260(d)(2)(A)(x)) for local governments to recover emissions reductions if a shortfall is found due to a lack of TCM implementation or effectiveness.

The commission notes that §114.270(d) and §114.260(d)(2)(A)(x) are two different sections of Chapter 114, Control of Air Pollution From Motor Vehicles. Section 114.270 is the TCM Enforcement Rule and §114.260 is the Transportation Conformity Rule. The requirement for local governments to recover emission reductions if a shortfall is found due to a lack of TCM implementation and effectiveness is found in §114.270. This rule proposal did not remove the requirement from §114.270, but did remove references to this requirement from §114.260. The federal transportation

conformity rule, as a condition of transportation conformity, does not require local governments to recover emission reductions if a shortfall is found due to TCM implementation and effectiveness, or develop alternative TCMs. The reference to §114.270 was removed from §114.260 in order to make the state transportation conformity rule more accurately reflect the requirements of the federal transportation conformity rule.

An individual commented that the implementation and resulting effectiveness of TCMs have not been properly monitored by the commission. The commenter further stated that the commission has allowed park and ride lots in Houston to be empty or partially full for 10 years, even though the commission knows that empty or partially full lots mean little or no emission reductions.

Section 114.270 requires MPOs to report to the commission annually on TCMs included in the SIP. This report includes, but is not limited to, information on TCM implementation, funding, emission reductions and modifications. The commission believes that the TCM annual report provides adequate monitoring of TCM implementation and effectiveness. The commission agrees that underutilized or ineffective TCMs do not contribute to effective emission reduction strategies, and it is in the interest of the commission and the nonattainment area to have TCMs that result in actual emission reductions. In accordance with §114.270(d), it is, however, the responsibility of the MPO to implement effective TCMs, such as park-and-ride lots, and if information regarding the status of the TCMs in the SIP indicates that any TCM has not been adequately implemented, the MPO is required to develop, submit, and initiate an alternative TCM that demonstrates the required emission reduction.

UNDEFINED TERMS An individual commented that §114.260(d)(2)(A)(iv) does not adequately define "significant change" or "significantly affect." The individual further stated that this means the definitions can change, and that arbitrary and subjective definitions can be applied each time there is a need to apply the definition. The commenter recommended stable and permanent definitions for these terms.

The commission believes that although the terms are not specifically defined in the definitions section, they are adequately defined in the context of the rule language. Section 114.260(d)(2)(A)(iv) contains the phrases "significant change in design concept and scope" and "significantly affect." The language in the same section defines the phrases "as a revision of a project in the MTP or TIP that would significantly affect model speeds, vehicle miles traveled, or network connections." The next sentence of Section 114.260(d)(2)(A)(iv) states that "in addition to new facilities, examples include changes in the number of through lanes or length of project (more than one mile), access control, addition of major intermodal terminal facilities (such as new international bridges, park- and-ride lots, and transfer terminals), addition/deletion of interchanges, or changing between free and toll facilities." The terms "design concept" and "design scope" are also defined in 40 CFR 93.101 of the federal transportation conformity rule, which §114.260 incorporates by reference.

STATUTORY AUTHORITY. This amendment is adopted under the TCAA, Texas Health and Safety Code, §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. Revisions to §114.260 are also adopted under TCAA, §382.011, which provides the commission with the authority to control the quality of the state's air; §382.012, which allows the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning monitoring requirements and examinations of records; and §382.019, which provides the commission with the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles.

§114.260. Transportation Conformity.

(a) Purpose. The purpose of this section is to implement the requirements set forth in Title 40 of the Code of Federal Regulations (40 CFR) Part 93, Subpart A (relating to Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded, or Approved Under Title 23 United States Code or the Federal Transit Laws), which are the regulations developed by the EPA under the FCAA Amendments of 1990, §176(c). It includes policy, criteria, and procedures to demonstrate and assure conformity of transportation planning activities with the State Implementation Plan (SIP).

(b) Applicability. This section applies to transportation-related pollutants for which an area is designated nonattainment or is subject to a maintenance plan. The pollutants include ozone, carbon monoxide, nitrogen dioxide, particles with an aerodynamic diameter of ten micrometers (PM_{10}) and smaller, and the precursors of those pollutants. The affected nonattainment and maintenance areas are listed in §101.1 of this title (relating to Definitions).

(c) CFR incorporation. The Transportation Conformity Rules, as specified in 40 CFR 93, Subpart A, (62 FR 43780) dated August 15, 1997, are incorporated by reference with the exception of §93.102(d) and §93.105. The requirements of §93.105 are addressed in this section.

(d) Consultation. Under 40 CFR, §93.105, regarding consultation, the following procedures shall be undertaken in nonattainment and maintenance areas before making conformity determinations and before adopting applicable SIP revisions.

(1) General factors.

(A) For the purposes of this subsection, concerning consultation, the affected agencies shall include:

(i)-(vii) (No change.)

(viii) local air quality agencies in nonattainment or maintenance areas (recipients of FCAA, §105 funds).

(B) All correspondence with the affected agencies in subparagraph (A) of this paragraph shall be addressed to the following designated points of contact:

(i)-(v) (No change.)

(vi) FTA: Director of Office of Program Development or designee - FTA Region 6;

(vii) EPA: Regional Administrator or designee - EPA Region 6.

(viii)-(xi) (No change.)

(2) Roles and responsibilities of affected agencies.

(A) The MPO, in cooperation with TxDOT and publicly owned transit services, shall consult with the agencies in paragraph (1)(A) of this subsection in the development of Metropolitan Transportation Plans (MTPs), Transportation Improvement Programs (TIPs), projects, technical analyses, travel demand or other modeling, and data collection. Specifically, the MPOs shall:

(i) allow the commission's Air Quality Planning and Assessment Division Director, or a designated representative, to be a voting member of technical committees on surface transportation and air quality in each nonattainment and maintenance area in order to consult directly with the particular committee during the development of the transportation plans, programs, and projects;

(ii) send information on time and location, an agenda, and supporting materials (including preliminary versions of MTPs and TIPs) for all regularly scheduled meetings on surface transportation or air quality to each of the agencies specified in paragraph (1)(B) of this subsection. This information shall be provided in accordance with the locally adopted public involvement process as required by 23 CFR, Part 450, §450.316(b)(1);

(iii) (No change.)

(iv) for the purposes of regional emissions analysis, initiate a consultation process with the affected agencies specified in paragraph (1)(A) of this subsection during the development stage of new or revised MTPs and TIPs to determine which transportation projects should be considered regionally significant and which projects should be considered to have a significant change in design concept and scope from the effective MTP and TIP. Regionally significant projects will include, at a minimum, all facilities classified as principal arterial or higher, or fixed guideway systems or extensions that offer an alternative to regional highway travel. Also, these include minor arterials included in the travel demand modeling process which serve significant interregional and intraregional travel, and connect rural population centers not already served by a principal arterial, or connect with intermodal transportation terminals not already served by a principal arterial. A significant change in design concept and scope is defined as a revision of a project in the MTP or TIP that would significantly affect model speeds, vehicle miles traveled, or network connections. In addition to new facilities, examples include changes in the number of through lanes or length of project (more than one mile), access control, addition of major intermodal terminal facilities (such as new international bridges, park-and-ride lots, and transfer terminals), addition/deletion of interchanges, or changing between free and toll facilities. When a significant change in the design and scope of a project is proposed, the MPO shall document the rationale for the change and give the affected agencies specified in paragraph (1)(A) of this subsection a 30-day opportunity to comment on their rationale. The MPO shall consider the views of each agency that comments, and respond in writing before any final action on these issues. If the MPO receives no comments within 30 days, the MPO may assume concurrence by the agencies specified in paragraph (1)(A) of this subsection;

(v) include in the TIP a list of projects exempted from the requirements of a conformity determination under 40 CFR, Part 93, §93.126 and §93.127. The MPO shall consult with the affected agencies specified in paragraph (1)(A) of this subsection in determining if a project on the list has potentially adverse emissions for any reason, including whether or not the exempt project will interfere with implementation of an adopted transportation control measure (TCM). The MPO shall respond in writing to all comments within 30 days on final MTP and TIP documents. In addition, if no comments are received as part of the subsequent public involvement process for the TIP, the MPO may proceed with implementation of the exempt project;

(vi) notify the affected agencies specified in paragraph (1)(A) of this subsection in writing of any MTP or TIP revisions or amendments which add or delete the exempt projects identified in 40 CFR, §93.126;

(vii) as required by 40 CFR, §93.116 and §93.123, and in cooperation with TxDOT, make a preliminary identification of those projects located at sites in PM_{10} nonattainment and maintenance areas that require quantitative PM_{10} Hot Spot analyses. After these projects have been identified, the MPO shall submit a list of these projects and sufficient data to the agencies specified in paragraph (1)(A) of this subsection for review and comment;

(viii)-(ix) (No change.)

(x) ensure timely TCM implementation and report on the implementation and emissions reductions status of adopted TCMs annually to the commission;

(xi)-(xii) (No change.)

(B) The commission, as the lead air quality planning agency, shall work in consultation with the agencies specified in paragraph (1)(A) of this subsection in developing applicable transportation related SIP revisions, air quality modeling, general emissions analysis, emissions inventory, and all related activities. Specifically, the commission shall:

(i) (No change.)

(ii) schedule public hearings in order to gather public input on the applicable transportation-related SIP revisions in accordance with 40 CFR, §51.102 and notify the agencies specified in paragraph (1)(B) of this subsection of the hearings;

(iii) (No change.)

(iv) after consultation with the MPO regarding TCMs, distribute to all agencies specified in paragraph (1)(B) of this subsection and other interested persons the list of TCMs proposed for inclusion in the SIP. In consultation with the agencies specified in paragraph (1)(A) of this subsection, the commission shall determine whether past obstacles to implementation of TCMs have been identified and are being overcome, and determine whether the MPOs and the implementing agencies are giving maximum priority to approval or funding for TCMs. Also, the commission shall consider, in consultation with the affected agencies, whether delays in TCM implementation necessitate a SIP revision to remove TCMs or to substitute TCMs or other emission reduction measures.

(v) consult with the applicable agencies specified in paragraph (1)(A) of this subsection, in order to cooperatively choose conformity tests and methodologies for isolated rural nonattainment and maintenance areas, as required by 40 CFR, §93.109(g)(2)(iii).

(C) Any group, entity, or individual planning to construct a regionally significant transportation project which is not an FHWA-FTA project (including projects for which alternative locations, design concept and scope, or the no-build option are still being considered) must disclose project plans to the MPO on a regular basis and disclose any changes to those plans immediately. This requirement also applies to recipients of funds designated under Title 23 U.S.C. or the Federal Transit Laws.

(3) General procedures.

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

(C) For the purposes of evaluating and choosing a model (or models) and associated methods and assumptions to be used in Hot-Spot and Regional Emissions Analyses, agencies specified in paragraph (1)(A) of this subsection shall participate in a working group identified as the Technical Working Group for Mobile Source Emissions (TWG). The frequency of meetings and agendas for them will be cooperatively determined by the agencies specified in

paragraph (1)(A) of this subsection. The function of this working group may be delegated to an existing group with similar composition and purpose.

(D) The commission, affected MPOs, affected local air quality agencies, and TxDOT shall cooperatively evaluate events which will trigger the need for new conformity determinations. New conformity determinations may be triggered by events established in 40 CFR, §93.104 as well as other events, including emergency relief projects that require substantial functional, locational, and capacity changes, or in the event of any other unforeseeable circumstances.

(E) The MPO and its governing body, or TxDOT if applicable, shall make conformity determinations for all MTPs, TIPs, regionally significant projects, and all other events as required by 40 CFR, Part 93, Subpart A and this section. Upon completion of the transportation conformity determination review process, (including consultation, public participation, and all other requirements of this section), FHWA and FTA will issue a joint conformity finding, indicating the transportation conformity status of the document(s) under review. The effective date of the conformity determination for an area is the date of the joint conformity finding made by FHWA-FTA.

(4) Conflict resolution.

(A) The commission and the MPO (or TxDOT where appropriate) shall make a good-faith effort to address the major concerns of the other party in the event they are unable to reach agreement on the conformity determination of a proposed MTP or TIP. The efforts shall include meetings of the agency executive directors, if necessary.

(B) In the event that the MPO or TxDOT determines that every effort has been made to address the commission's concerns, and that no further progress is possible, the MPO or TxDOT shall notify the commission executive director in writing to this effect. This subparagraph shall be cited by the MPO or TxDOT in any notification of a conflict which may require action by the Governor, or his or her delegate under subparagraph (C) of this paragraph.

(C) The commission has 14 calendar days from date of receipt of notification, as required in subparagraph (B) of this paragraph, to appeal to the Governor. If the commission appeals to the Governor, the final conformity determination must then have the concurrence of the Governor. The Governor may delegate his or her role in this process, but not to the commission or commission staff, a local air quality agency, the Texas Transportation Commission or TxDOT staff, or an MPO. This subparagraph shall be cited by the commission in any notification of a conflict which may require action by the Governor or his or her delegate. If the commission does not appeal to the Governor within 14 calendar days from receipt of written notification, the MPO or TXDOT may proceed with the final conformity determination.

(5) Public comment on conformity determinations. Consistent with the requirements of 23 CFR, Part 450, concerning public involvement, the agencies making conformity determinations on transportation plans, programs, and projects shall establish a proactive public involvement process which provides opportunity for public review and comment. This process shall, at a minimum, provide reasonable public access to technical and policy information considered by the agency at the beginning of the public comment period and before taking formal action on conformity determinations for all MTPs and TIPs, as required by 23 CFR §450.316 (b) and this section. Any charges imposed for public inspection and copying should be consistent with the fee schedule contained in 49 CFR §7.95. In addition, these agencies shall address in writing any public comment claiming that a non-FHWA/FTA funded, regionally significant project has not been properly represented in the conformity determination for an MTP or TIP. Finally, these agencies shall provide opportunity for public involvement in conformity determinations for projects where otherwise required by law.

(6) (No change.)

(e) Effective date. The revisions to this section adopted by the commission on November 18, 1998, and filed with the Secretary of State on November 23, 1998, shall be in effect on the date of EPA approval of the transportation conformity SIP associated with this rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 23, 1998.

TRD-9817908
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: December 13, 1998
Proposal publication date: August 14, 1998
For further information, please call: (512) 239-1970

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Chapter 116. Control of Air Pollution by Permits for New Construction or Modification

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §116.410, concerning emergency orders. The commission also adopts the repeal of §§116.411-116.418, concerning emergency orders. The amendment is adopted with changes to the proposed text as published in the July 3, 1998, issue of the *Texas Register* (23 TexReg 6920). The repeals are adopted without changes and will not be republished. This action will also be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

This action is part of the commission's implementation of Senate Bill (SB) 1876, 75th Legislature, 1997, which consolidated the commission's emergency and temporary order authority. In addition to these amendments and repeals, the commission is concurrently adopting the consolidated agency emergency and temporary order provisions under a new Chapter 35, concerning Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions. The commission is also concurrently adopting amendments to emergency and temporary order provisions in 30 TAC §§291.14, 291.22, 291.142, 291.143, 305.21, 305.29, 305.31, 305.535, 321.80, 321.132, 321.134, 321.152, 321.158, 321.219, 321.232, 321.239, 321.258, and 334.83, and the repeal of the following rules relating to emergency and temporary orders: 30 TAC §§291.10, 291.13, 297.57, 305.22-305.28, 305.30, and 305.32. The commission is also adopting new 30 TAC §297.57 and §305.30. These changes are concurrently published in this edition of the *Texas Register*.

EXPLANATION OF ADOPTED RULES

SB 1876 consolidated various statutory provisions governing emergency and temporary orders under new Texas Water Code (TWC), Chapter 5, Subchapter L. The new statute expressly authorizes the commission to issue temporary or emergency mandatory, permissive, or prohibitory orders, and issue temporary permits or suspend permit conditions by temporary or emergency order. It allows the commission to issue emergency orders with or without notice. Additionally, it authorizes the commission to delegate authority to the executive director to receive applications and issue emergency orders and authorize representatives to act on his or her behalf. Finally, general application, term, and hearing requirements that are applicable to all affected programs are included. The statute will allow the commission or the executive director to act expeditiously to address unforeseen circumstances. TWC, §5.515, as added by SB 1876, expressly authorizes the commission to issue these emergency orders.

The adopted amendments to §116.410, concerning Applicability, add a reference to new Chapter 35, make a conforming change, and delete the definition of a catastrophic event, which now defines "catastrophe" in adopted new §35.801, concerning Emergency Orders Because of Catastrophe. This amended section will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the SIP. The term "catastrophic event" has been changed to "catastrophe" to be consistent with the statute.

The adopted repeals concern provisions incorporated into the new Chapter 35. These provisions are moved in their entirety to new §35.12 and Chapter 35, Subchapter K. In that new subchapter, the commission does change notice requirements. Adopted new §35.803 requires the commission or executive director to prepare the notice of the emergency order and the hearing to affirm, modify, or set aside for the applicant to publish in a newspaper of general circulation in the nearest municipality not later than the tenth day before the hearing, but not later than the tenth day before the hearing. This is a change from prior §116.412, which requires only *Texas Register* notice as soon as practicable after issuance. The commission also adopts conforming changes, as well as regulatory reform changes to terminology that were identified during the commission's review of Chapter 116 under Article IX, §167, of House Bill 1, 75th Legislature, 1997, the General Appropriations Act.

FINAL REGULATORY IMPACT ANALYSIS

Staff has reviewed the proposed rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rules are not major environmental rules because their primary intent is to consolidate already existing emergency and temporary order rules under one chapter. In addition, the applicability requirements do not apply because the commission is expressly granted authority by TWC, 5.501. The rules also concern procedural requirements of the agency, such as delegation of the authority to issue such orders by the commission to the executive director, and are a result of the commission's continuing regulatory reform effort.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to implement the statutory provisions of TWC, Chapter 5, Subchapter L. Adoption of these rules will also provide for the delegation of authority to issue emergency orders by the commission to the executive director, consolidate agency procedural rules, and make certain processes consistent among different agency programs. Adoption of these rules will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they only establish a new procedural mechanism for these types of orders.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program, nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rules are not subject to the CMP.

HEARING AND COMMENTERS

A public hearing regarding the proposed rules was held in Austin on August 3, 1998, and the public comment period also closed on August 3, 1998. No oral comments were received at the public hearing, but EPA submitted written comments on the proposal.

ANALYSIS OF TESTIMONY

EPA stated that the rules referenced in Chapter 116, Subchapter E are not now part of the approved SIP and that this is implied otherwise in the preamble to the proposed rules. EPA suggested that the commission clarify that the Chapter 35 rules will be submitted to EPA as a new portion of the SIP.

The commission agrees that the sentence used in the preamble gave the impression that Subchapter E is currently part of the SIP. Chapter 116, Subchapter E was submitted to the EPA as a SIP revision in 1993 and no SIP approval has been given by EPA as of this date. The commission has made this clarification suggested by EPA.

EPA indicated that its understanding is that Chapter 116, Subchapter E has been moved to Chapter 35, Subchapter K with no substantive changes.

Although many of the rules in Subchapter K were moved verbatim from Chapter 116, there are provisions in Chapter 35 which are different from the previous rules. Applicable definitions have been added to Subchapter A. The authority for the executive director to act is included in Subchapter B. The hearing provisions are in Subchapter C. Term limits and application fees have been added and are included in Subchapter C. In addition, the requirement for notice in a newspaper of general circulation has been added in Subchapter K.

Subchapter E. Emergency Orders

30 TAC §116.410

STATUTORY AUTHORITY

The amendment is adopted under TWC, §§5.103, 5.105, and 5.501 and Texas Health and Safety Code, §§382.017, 382.051,

and 382.0513. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of TWC, Chapter 5, Subchapter L. Section 382.017 establishes the commission's authority to adopt rules. Sections 382.024 and 382.025 establish the authority of the commission to issue air orders and what factors the commission must consider when issuing such orders. Section 382.051 establishes the authority of the commission to adopt rules concerning permits. Section 382.0513 establishes the authority of the commission to establish certain permit conditions.

§116.410. Applicability.

The owner or operator of a facility may apply to the commission or the executive director for an emergency order under Texas Water Code, §5.515, and Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions), to authorize immediate action for the addition, replacement, or repair of facilities or control equipment, and authorizing associated emissions of air contaminants, whenever a catastrophe necessitates such construction and emissions otherwise precluded under the TCAA.

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 November 20, 1998.

TRD-9817757
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: December 10, 1998
Proposal publication date: July 3, 1998
For further information, please call: (512) 239-1966

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30 TAC §§116.411-116.418

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §§5.103, 5.105, and 5.501 and Texas Health and Safety Code, §§382.017, 382.024, 282.025, 382.051, and 382.0513. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 382.017 establishes the commission's authority to adopt rules. Sections 382.024 and 382.025 establish the authority of the commission to issue air orders and what factors the commission must consider when issuing such orders. Section 382.051 establishes the authority of the commission to adopt rules concerning permits. Section 382.0513 establishes the authority of the commission to establish certain permit conditions.

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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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Chapter 291. Water Rates

The Texas Natural Resource Conservation Commission (commission) adopts the repeal of §291.10 and §291.13, concerning procedural rules related to utilities. The commission also adopts amendments to §§291.14, 291.22, 291.142, and 291.143, concerning emergency orders and the operations of certain utilities. The repeals and amendments are adopted without changes to the proposed text as published in the July 3, 1998, issue of the *Texas Register* (23 TexReg 6922) and will not be republished.

This action includes certain changes related to the operation of certain utilities necessary to implement Senate Bill (SB) 1, 75th Legislature, 1997. This action is also part of the commission's implementation of SB 1876, 75th Legislature, 1997, which consolidated the commission's emergency and temporary order authority.

In addition to these amendments, the commission is concurrently adopting the consolidation of agency emergency and temporary order provisions under a new Chapter 35, concerning Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions. The commission is also concurrently adopting amendments to emergency and temporary order provisions in 30 TAC §§116.410, 305.21, 305.29, 305.31, 305.535, 321.80, 321.132, 321.134, 321.152, 321.158, 321.219, 321.232, 321.239, 321.258, and 334.83, and the repeal of the following rules relating to emergency and temporary orders: 30 TAC §§116.411-116.418, 297.57, 305.22-305.28, 305.30, and 305.32. The commission also adopts new 30 TAC §297.57 and 305.30. These changes are concurrently published in this edition of the *Texas Register*.

EXPLANATION OF ADOPTED RULES

SB 1 amended Texas Water Code (TWC), §13.412, to expand the definition of abandonment and modified TWC, §13.4132, to allow a person who has been appointed to temporarily manage a utility to access all utility system components. The commission is adopting changes to Chapter 291 that will make the rules conform to these amendments.

SB 1876 consolidated various statutory provisions governing emergency and temporary orders under new TWC, Chapter 5, Subchapter L. The new statute expressly authorizes the commission to issue temporary or emergency mandatory, permissive, or prohibitory orders, and issue temporary permits or suspend permit conditions by temporary or emergency order. It allows the commission to issue emergency orders with or without notice. Additionally, it authorizes the commission to delegate authority to the executive director to receive applications and issue emergency orders and authorize representatives to act on his or her behalf. Finally, general application, term, and hearing requirements that are applicable to all affected programs are included. The statute will allow the commission or the executive director to act expeditiously to address unforeseen circumstances. TWC, §5.507 and §5.508, as added by SB 1876,

expressly authorize the commission to issue emergency orders for the appointment of a temporary utility manager, and for rate increases under certain conditions.

The adopted repeal of §291.10, concerning Request for Public Hearing, removes procedural requirements that are duplicative of those in Chapter 55, concerning Requests for Contested Case Hearings; Public Comment. The commission takes this action to continue the consolidation of agency procedural rules.

The adopted repeal of §291.13, concerning Record of Proceeding, eliminates the requirement that a record be kept of all proceedings before the commission. This requirement is duplicative of requirements in current commission procedural rules and is therefore unnecessary.

The adopted amendments to §291.14, concerning Emergency Orders, make nonsubstantive clarifying and conforming changes to reference TWC, §5.507 and §5.508, and the new Chapter 35.

The adopted amendment to §291.22, concerning Notice of Intent to Change Rates, amends subsection (g) to reference the new Chapter 35 and make conforming changes. The amendment also eliminates specific requirements governing emergency rate increases that have been moved to §35.202, concerning Emergency Order for Rate Increase in Certain Situations.

The adopted amendments to §291.142, concerning Operation of a Utility that Discontinues Operation or is Referred for Appointment of a Receiver, implement both SB 1 and SB 1876. The section is amended to allow the commission or the executive director to authorize a willing person to temporarily manage and operate a utility that is being referred to the attorney general for appointment of a receiver for having expressed an intent to abandon operation of its facilities. Additionally, the definition of abandonment is expanded in accordance with TWC, §13.412, as amended by SB 1. Finally, the section is amended to reference new Chapter 35 and remove the provision that notice of the action is adequate if the notice is mailed or hand-delivered to the last known address of the utility's headquarters. This provision is moved to new §35.201, and is therefore unnecessary.

The adopted amendments to §291.143, concerning Operation of a Utility by a Temporary Manager, also implement both SB 1 and SB 1876. The section is amended to expressly grant to a person appointed to temporarily manage and operate a utility the power to take certain actions. The amendment also allows the person, in addition to the previously existing duties, to access all system components. These changes implement TWC, §13.4132, as amended by SB 1. Finally, the amendments make nonsubstantive conforming changes to reference TWC, §5.507, and the new Chapter 35.

FINAL REGULATORY IMPACT ANALYSIS

Staff has reviewed the proposed rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rules are not major environmental rules because their primary intent is to consolidate already existing emergency and temporary order rules under one chapter. In addition, the applicability requirements do not apply because the commission is expressly granted authority by TWC, 5.501.The rules also concern procedural requirements of the agency, such as delegation of the authority to issue such orders by the commission to the executive director, and are a result of the commission's continuing regulatory reform effort.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to implement the statutory provisions of TWC, §13.412 and §13.4132, and TWC, Chapter 5, Subchapter L, concerning emergency and temporary orders relating to utilities. The rules also consolidate agency procedural rules and make certain processes consistent among different agency programs. The rules substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they only establish a new procedural mechanism for these types of orders.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program, nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the rules are not subject to the CMP.

HEARING AND COMMENTERS

A public hearing regarding the proposed rules was held in Austin on August 3, 1998, and the public comment period also closed on August 3, 1998. No oral or written comments were received on these proposed rules.

Subchapter A. General Provisions

30 TAC §291.10, §291.13

STATUTORY AUTHORITY

The repeals are adopted under TWC, §§5.103, 5.105, 5.501, 11.148, and 13.041. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of TWC, Chapter 5, Subchapter L. Section 11.148 establishes the commission's authority to suspend permit conditions relating to beneficial inflows to affected bays and estuaries. Section 13.041 establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13. Section 26.011 establishes the commission's authority over water quality in the state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 1998.

TRD-9817759
Margaret Hoffman
Director, Environmental Law Division

Texas Natural Resource Conservation Commission
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Proposal publication date: July 3, 1998
For further information, please call: (512) 239-1966

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30 TAC §291.11

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §§5.103, 5.105, 5.501, 13.041, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 13.041 establishes the commission's authority to adopt rules to exercise its jurisdiction over Texas Water Code, Chapter 13.

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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-1966

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Subchapter B. Rates, Rate-Making, and Rate/Tariff Changes

30 TAC §291.21

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §§5.103, 5.105, 5.501, 13.041, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 13.041 establishes the commission's authority to adopt rules to exercise its jurisdiction over Texas Water Code, Chapter 13.

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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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Proposal publication date: July 3, 1998
For further information, please call: (512) 239-1966

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Subchapter J. Enforcement, Supervision, and Receivership

30 TAC §291.142, §291.143

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §§5.103, 5.105, 5.501, 13.041, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 13.041 establishes the commission's authority to adopt rules to exercise its jurisdiction over Texas Water Code, Chapter 13.

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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-1966

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Chapter 297. Water Rights, Substantive

The Texas Natural Resource Conservation Commission (commission) adopts the repeal of §297.57 and new §297.57, concerning emergency suspension of permit conditions. The new section is adopted with changes to the proposed text as published in the July 3, 1998, issue of the *Texas Register* (23 TexReg 6926). The repeal is adopted without changes and will not be republished. This action implements Senate Bill (SB) 1876, 75th Legislature, 1997, and continues the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

In addition to this action, the commission is concurrently adopting the consolidation of agency emergency and temporary order provisions under a new Chapter 35, concerning Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions. The commission is also concurrently adopting amendments to emergency and temporary order provisions in 30 TAC §§116.410, 291.14, 291.22, 291.142, 291.143, 305.21, 305.29, 305.31, 305.535, 321.80, 321.132, 321.134, 321.152, 321.158, 321.219, 321.232, 321.239, 321.258, and 334.83, and the repeal of the following rules relating to emergency and temporary orders: 30 TAC §§116.411-116.418, 291.10, 291.13, 305.22-305.28, 305.30, and 305.32. The commission also adopts new 30 TAC §305.30. These changes are concurrently published in this edition of the *Texas Register*.

XPLANATION OF ADOPTED RULES

SB 1876 consolidated various statutory provisions governing emergency and temporary orders under new Texas Water Code (TWC), Chapter 5, Subchapter L. The new statute expressly authorizes the commission to issue temporary or emergency mandatory, permissive, or prohibitory orders, and issue temporary permits or suspend permit conditions by temporary or emergency order. It allows the commission to issue emergency orders with or without notice. Additionally, it authorizes the commission to delegate authority to the executive director to receive applications and issue emergency orders and authorize representatives to act on his or her behalf. Finally, general application, term, and hearing requirements that are be applicable to all affected programs are included. The statute will allow the commission or the executive director to act expeditiously to address unforeseen circumstances. TWC, §5.506, as added by SB 1876, concerns the emergency suspension of a permit condition relating to beneficial inflows to affected bays and estuaries and instream uses.

The adopted repeal provides for moving existing requirements from §297.57, concerning Emergency Suspension of Permit Conditions, into the new Chapter 35. These provisions may be found in proposed Chapter 35, Subchapter D, concerning Emergency Suspension of Beneficial Inflows. There are no substantive changes to the requirements as they currently exist.

The new §297.57 simply references the commission's authority under TWC, §5.506, and the new Chapter 35. The section also allows the executive director to act, as authorized by TWC, 5.501. The commission modified the proposal to correct the reference to Chapter 35. The proposal referenced §35.51. It would have read §35.101.

FINAL REGULATORY IMPACT ANALYSIS

Staff has reviewed the proposed rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rules are not major environmental rules because their primary intent is to consolidate already existing emergency and temporary order rules under one chapter. In addition, the applicability requirements do not apply because the commission is expressly granted authority by TWC, 5.501.The rules also concern procedural requirements of the agency, such as delegation of the authority to issue such orders by the commission to the executive director, and are a result of the commission's continuing regulatory reform effort.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to implement the statutory provisions of TWC, Chapter 5, Subchapter L. The rules consolidate agency procedural rules and make certain processes consistent among different agency programs. The rules substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they only establish a new procedural mechanism for these types of orders.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and found that the adoption is a rulemaking identified in the Coastal Coordination Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will, therefore, require that applicable goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission has prepared a consistency determination for the rules under 31 TAC §505.22, and found that the rules are consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the rules include the administrative policies and the policies for specific activities related to: construction and operation or solid waste treatment, storage, and disposal facilities; discharge of municipal and industrial wastewater to coastal areas; nonpoint source water pollution; and appropriations of water. Promulgation and enforcement of these rules is consistent with the applicable CMP goals and policies because the rules will establish clear and consistent requirements governing the issuance of emergency and temporary orders, as authorized by TWC, Chapter 5, Subchapter L. Under the authority granted by statute, the commission may issue emergency or temporary orders to address unforeseen circumstances, such as drought conditions or potential catastrophes. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because they will allow the commission to take steps to mitigate emergency or potential emergency situations, which will result in environmental benefits for the entire state, including coastal areas.

HEARING AND COMMENTERS

A public hearing regarding the proposed rules was held in Austin on August 3, 1998, and the public comment period also closed on August 3, 1998. No oral or written comments were received on the proposed rules.

Subchapter E. Issuance and Conditions of Water Rights or Certificate of Adjudication

30 TAC §297.57

STATUTORY AUTHORITY

The repeal is adopted under TWC, §§5.103, 5.105, 5.501, 11.148, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of TWC, Chapter 5, Subchapter L. Section 11.148 establishes the commission's authority to suspend permit conditions relating to beneficial inflows to affected bays and estuaries.

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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Margaret Hoffman
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STATUTORY AUTHORITY

The new section is adopted under Texas Water Code, §§5.103, 5.105, 5.501, 11.148, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 11.148 establishes the commission's authority to suspend permit conditions relating to beneficial inflows to affected bays and estuaries. Section 26.011 establishes the commission's authority over water quality in the state.

§297.57 Emergency Suspension of Permit Conditions.

The commission or executive director may review and act, under Texas Water Code, §5.506 and §11.148, and under §35.101 of this title (relating to Emergency Suspension of Permit Conditions Relating to Beneficial Inflows to Affected Bays and Estuaries and Instream Uses) on a petition by a water right holder for the temporary suspension of conditions in the water right relating to beneficial inflows to bays and estuaries and instream uses during an emergency.

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 305. Consolidated Permits

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§305.21, 305.29, 305.31, and 305.535, concerning emergency and temporary orders. The commission also adopts the repeal of §§305.22-305.28, 305.30, and 305.32, concerning emergency orders. Finally, the commission adopts new §305.30, concerning emergency actions. The amendments, repeals, and new section are adopted without changes to the proposed text as published in the July 3, 1998, issue of the *Texas Register* (23 TexReg 6928) and will not be republished. This action implements Senate Bill (SB) 1876, 75th Legislature, 1997, and continues the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

In addition to these amendments and repeals, the commission is concurrently adopting the consolidation of agency emergency and temporary order provisions under a new Chapter 35, concerning Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions. The commission is also concurrently adopting amendments to emergency and temporary order provisions in 30 TAC §§116.410, 291.14, 291.22, 291.142, 291.143, 321.80, 321.132, 321.134, 321.152, 321.158, 321.219, 321.232, 321.239, 321.258, and 334.83, and the repeal of the following rules relating to emergency and temporary orders: 30 TAC §§116.411- 116.418, 291.10, 291.13, and 297.57. The commission is also adopting new 30 TAC §297.57. These changes are concurrently published in this edition of the *Texas Register.*

EXPLANATION OF ADOPTED RULES

SB 1876 consolidated various statutory provisions governing emergency and temporary orders under new Texas Water Code (TWC), Chapter 5, Subchapter L. The new statute expressly authorizes the commission to issue temporary or emergency mandatory, permissive, or prohibitory orders and issue temporary permits or suspend permit conditions by temporary or emergency order. It allows the commission to issue emergency orders with or without notice. Additionally, it authorizes the commission to delegate authority to the executive director to receive applications and issue emergency orders and authorize representatives to act on his or her behalf. Finally, general application, term, and hearing requirements that are applicable to all affected programs are included. The statute will allow the commission or the executive director to act expeditiously to address unforeseen circumstances. TWC, §5.509, as added by SB 1876, concerns temporary or emergency orders relating to the discharge of waste or pollutants. TWC, §5.512, concerns emergency orders relating to solid waste management. TWC §5.516, concerns emergency orders issued under Health and Safety Code, §401.056, concerning Emergency Orders.

The adopted amendment to §305.21, concerning Emergency Orders and Temporary Orders Authorized, provides reference to the commission's authority under TWC, §5.509, and the new Chapter 35. The amendment also makes conforming changes.

The adopted repeals of §305.22, concerning Application for Orders or Authorizations to Discharge; §305.23, concerning Emergency Orders; and §305.25, concerning Executive Director Authorizations to Discharge, delete provisions that have been moved to Chapter 35, Subchapter F, concerning Water Quality Emergency and Temporary Orders.

The adopted repeals of §305.24, concerning Notice; §305.26, concerning Hearings for Temporary Orders, Executive Director Authorizations and Emergency Orders; §305.27, concerning Application Fees; and §305.28, concerning Renewals of Emergency and Temporary Orders, delete provisions that are addressed in Chapter 35, Subchapter C, concerning General Provisions.

The adopted amendments to §305.29, concerning Emergency Orders for Solid Waste Activities, provide reference to the commission's authority under TWC, §5.512, and the new Chapter 35, and makes conforming changes. The amendments also delete provisions that have been moved to Chapter 35, Subchapter G, concerning Solid Waste and Uranium By-product Emergency Orders.

The adopted new §305.30, concerning Emergency Actions Concerning Hazardous Waste, provides reference to the commission's authority under TWC, §5.512, and the new Chapter

35 and contains conforming changes. The repeal of §305.30, concerning Emergency Actions Concerning Hazardous Waste, deletes provisions that have been moved to Chapter 35, Subchapter G.

The adopted amendments to §305.31, concerning Emergency Orders Relating to Radioactive Substances and §305.32, concerning Emergency Impoundment of Radioactive Material, provide reference to the commission's authority under TWC, §5.512, and the new Chapter 35 and make conforming changes. The amendments also delete provisions that have been moved to Chapter 35, Subchapter H, concerning Radioactive Substances and Materials Emergency Orders.

The adopted amendments to §305.535, concerning Bypasses from TPDES Permitted Facilities, make conforming changes to reflect the new Chapter 35. The section is also amended to grant to the commission the authority to determine if the required conditions for authorizing a bypass are met. The executive director has that authority in the rules as they previously existed.

FINAL REGULATORY IMPACT ANALYSIS

Staff has reviewed the proposed rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rules are not major environmental rules because their primary intent is to consolidate already existing emergency and temporary order rules under one chapter. In addition, the applicability requirements do not apply because the commission is expressly granted authority by TWC, 5.501. The rules also concern procedural requirements of the agency, such as delegation of the authority to issue such orders by the commission to the executive director, and are a result of the commission's continuing regulatory reform effort.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to implement the statutory provisions of TWC, Chapter 5, Subchapter L. The rules also consolidate agency procedural rules and make certain processes consistent among different agency programs. The rules substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they only establish a new procedural mechanism for these types of orders.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the adopted rulemaking and found that the adoption is a rulemaking identified in the Coastal Coordination Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will, therefore, require that applicable goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission has prepared a consistency determination for the rules under 31 TAC §505.22, and found that the adopted rules are consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the adopted rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the adopted rules include the administrative policies and the policies for specific activities related to: construction and operation or solid waste treatment, storage, and disposal facilities; discharge of municipal and industrial wastewater to coastal areas; nonpoint source water pollution; and appropriations of water. Promulgation and enforcement of these rules is consistent with the applicable CMP goals and policies because the rules will establish clear and consistent requirements governing the issuance of emergency and temporary orders, as authorized by TWC, Chapter 5, Subchapter L. Under the authority granted by statute, the commission may issue emergency or temporary orders to address unforeseen circumstances, such as drought conditions or potential catastrophes. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because they will allow the commission to take steps to mitigate emergency or potential emergency situations, which will result in environmental benefits for the entire state, including coastal areas.

HEARING AND COMMENTERS

A public hearing regarding the proposed rules was held in Austin on August 3, 1998, and the public comment period also closed on August 3, 1998. No oral or written comments were received on the proposed rules.

Subchapter B. Emergency Orders, Temporary Orders, and Executive Director Authorizations

30 TAC §§305.21, 305.29, 305.30, 305.31

STATUTORY AUTHORITY

The amendments and new section are adopted under TWC, §§5.103, 5.105, 5.501, and 26.011 and Texas Health and Safety Code, §§361.011, 361.017, 361.024, 401.011, 401.051, 401.056, and 401.412. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of TWC, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state. Section 361.011 establishes the commission's jurisdiction over municipal solid waste. Section 361.017 establishes the commission's jurisdiction over industrial hazardous waste. Section 361.024 establishes the commission's authority to establish rules for the control of solid waste. Section 401.011 establishes the commission's authority over radioactive substances. Section 401.051 establishes the commission's authority to adopt rules for the control of radiation. Section 401.056 establishes the commission's authority to issue emergency orders concerning radiation. Section 401.412 establishes the commission's authority concerning licenses for radioactive substance disposal.

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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Margaret Hoffman
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30 TAC §§305.22–305.28, 305.30, 305.32

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §§5.103, 5.105, 5.501, and 26.011 and Texas Health and Safety Code, §§361.011, 361.017, 361.024, 401.011, 401.051, and 401.412. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state. Section 361.011 establishes the commission's jurisdiction over municipal solid waste. Section 361.017 establishes the commission's jurisdiction over industrial hazardous waste. Section 361.024 establishes the commission's authority to establish rules for the control of solid waste. Section 401.011 establishes the commission's authority over radioactive substances. Section 401.051 establishes the commission's authority to adopt rules for the control of radiation. Section 401.056 establishes the commission's authority to issue emergency orders concerning radiation. Section 401.412 establishes the commission's authority concerning licenses for radioactive substance disposal.

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 O. Additional Conditions and Procedures for Wastewater Discharge Permits and Sewage Sludge Permits

30 TAC §305.535

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §§5.103, 5.105, 5.501, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Chapter 321. Control of Certain Activities by Rules

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§321.80, 321.132, 321.134, 321.152, 321.158, 321.219, 321.232, 321.239, and 321.258, concerning emergency and temporary orders. The amendments are adopted without changes to the proposed text as published in the July 3, 1998, issue of the *Texas Register* (23 TexReg 6932) and will not be republished. This action implements Senate Bill (SB) 1876, 75th Legislature, 1997, and continues the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

In addition to these amendments, the commission is concurrently adopting consolidated agency emergency and temporary order provisions under a new Chapter 35, concerning Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions. The commission is also concurrently adopting amendments to emergency and temporary order provisions in 30 TAC §§116.410, 291.14, 291.22, 291.142, 291.143, 305.21, 305.29, 305.31, 305.535, and 334.83, and the repeal of the following rules relating to emergency and temporary orders: 30 TAC §§116.411-116.418, 291.10, 291.13, 297.57, 305.22-305.28, 305.30, and 305.32. The commission is also adopting new 30 TAC §297.57 and §305.30. These changes are concurrently published in this edition of the *Texas Register*.

SB 1876 consolidated various statutory provisions governing emergency and temporary orders under new Texas Water Code (TWC), Chapter 5, Subchapter L. The new statute expressly authorizes the commission to issue temporary or emergency mandatory, permissive, or prohibitory orders, and issue temporary permits or suspend permit conditions by temporary or emergency order. It allows the commission to issue emergency orders with or without notice. Additionally, it authorizes the commission to delegate authority to the executive director to receive applications and issue emergency orders and authorize representatives to act on his or her behalf. Finally, general application, term, and hearing requirements that are be applicable to all affected programs are included. The statute will allow the

commission or the executive director to act expeditiously to address unforeseen circumstances.

The adopted amendments make nonsubstantive changes to make cross-references to the new Chapter 35, as well as to Chapter 70, concerning Enforcement. The commission also adopts nonsubstantive changes to terminology for regulatory reform purposes.

FINAL REGULATORY IMPACT ANALYSIS

Staff has reviewed the proposed rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rules are not major environmental rules because their primary intent is to consolidate already existing emergency and temporary order rules under one chapter. In addition, the applicability requirements do not apply because the commission is expressly granted authority by TWC, 5.501. The rules also concern procedural requirements of the agency, such as delegation of the authority to issue such orders by the commission to the executive director, and are a result of the commission's continuing regulatory reform effort.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to implement the statutory provisions of TWC, Chapter 5, Subchapter L. The rules also consolidate agency procedural rules and make certain processes consistent among different agency programs. The rules will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they only establish a new procedural mechanism for these types of orders.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and found that the adoption is a rulemaking identified in the Coastal Coordination Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will, therefore, require that applicable goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission has prepared a consistency determination for the rules under 31 TAC §505.22, and found that the rules are consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the rules include the administrative policies and the policies for specific activities related to: construction and operation or solid waste treatment, storage, and disposal facilities; discharge of municipal and industrial wastewater to coastal areas; nonpoint source water pollution; and appropriations of water. Promulgation and enforcement of these rules is consistent with the applicable CMP goals and policies because the rules will establish clear and consistent requirements governing the issuance of emergency and temporary orders, as authorized by TWC, Chapter 5, Subchapter L. Under the authority granted by statute, the commission may issue emergency or temporary orders to address unforeseen circumstances, such as drought conditions or potential catastrophes. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because they will allow the commission to take steps to mitigate emergency or potential emergency situations, which will result in environmental benefits for the entire state, including coastal areas.

HEARING AND COMMENTERS

A public hearing regarding the proposed rules was held in Austin on August 3, 1998, and the public comment period also closed on August 3, 1998. No oral or written comments were received on these proposed rules.

Subchapter E. Surface Coal Mining, Preparation, and Reclamation Activities

30 TAC §321.80

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §§5.103, 5.105, 5.501, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter H. Discharge to Surface Waters From Treatment of Petroleum Substance Contaminated Waters

30 TAC §321.132, §321.134

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §§5.103, 5.105, 5.501, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L.

Section 26.011 establishes the commission's authority over water quality in the state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter J. Discharges to Surface Waters From Ready-Mixed Concrete Plants and/or Concrete Products Plants or Associated Facilities

30 TAC §321.152, §321.158

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §§5.103, 5.105, 5.501, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter L. Discharges to Surface Waters From Motor Vehicles Cleaning Facilities

30 TAC §321.219

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §§5.103, 5.105, 5.501, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter M. Discharges to Surface Waters From Petroleum Bulk Stations and Terminals

30 TAC §321.232, §321.239

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §§5.103, 5.105, 5.501, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Subchapter N. Handling of Wastes From Commercial Facilities Engaged in Livestock Trailer Cleaning

30 TAC §321.258

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §§5.103, 5.105, 5.501, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 26.011

EXPLANATION OF ADOPTED RULES

The adopted sections establish procedures for resolving vendor protests relating to purchasing issues and adopt by reference the rule of the Texas General Services Commission (GSC) in 1 TAC §113.5(b), concerning bid opening and tabulation. This rulemaking is required by Texas Government Code, §2155.076 and §2156.005, which require state agencies to establish protest procedures and adopt GSC rules regarding bid opening and tabulation. Concurrently, the commission continues the review of 30 TAC Chapter 11, §11.1, concerning Historically Underutilized Business Program, in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997, as proposed in the Rules Review Section of the August 14, 1998, issue of the *Texas Register* (23 TexReg 8507). This action is concurrently published in the Rules Review Section of this edition of the *Texas Register.*

These new sections establish a consistent procedure for vendors and the agency to follow in the event a vendor is aggrieved in connection with the solicitation, evaluation, or award of a contract. The rules also establish consistent bid opening and tabulation procedures for the agency to follow. The inclusion of both protest procedures and bid opening and tabulation requirements in commission rules will clarify the bid process for the public and agency staff to follow.

Specifically, §11.2 sets forth the procedure to be followed by a vendor who is aggrieved in connection with a solicitation, evaluation, or award of a contract. The aggrieved person will have ten days to file a protest with the Procurements and Contracts Section once he or she knows, or should have known, of the action which is protested. Copies of the protest are to be sent to all interested persons. The protest will be reviewed by the Procurements and Contracts Manager (Manager) or his designee and a determination will be made. The aggrieved person may, within ten days after receiving the Manager's determination, request reconsideration by the executive director or his designee. The executive director may issue a determination. Documents related to the solicitation, evaluation, and award of a contract must be retained by the commission for four years. In §11.2(a) and (f), the term "Purchasing Section" is amended to "Procurements and Contracts Section" to reflect a recent internal reorganization. The Purchasing Section was combined with the Contracts Section to form the Procurements and Contracts Section. Similarly, in §11.2(a), the term "Purchasing Manager" is also amended to "Procurements and Contracts Manager" to reflect this internal reorganization.

Section 11.2(g)(2), which provides for the executive director, in his own discretion, to refer the request for reconsideration to the commission, is deleted. Also §11.2(h), which provides for procedures for requests that have been referred to the commission, is deleted. The remaining subsections are renumbered to reflect these changes. With these revisions, the executive director maintains the authority to review and make a final determination on requests for reconsideration. The revisions incorporate the commission's unanimous vote for this change at the November 19, 1998, commission open meeting, and do not require republication because these changes affect no other subject or person than those previously given notice.

Section 11.3 adopts the GSC rule regarding bid opening and tabulation. The rule states that bid openings conducted by the commission will be open to the public. Bid opening dates may be changed if bidders are properly notified in advance, and if a bid opening is canceled, all bids will be returned to bidders. Bid tabulation files are available for public inspection during regular working hours of the commission. Commission employees are not required to give bid tabulation information by telephone.

FINAL REGULATORY IMPACT ANALYSIS

The staff has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code (the Code), §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined by the Code. There is not a specific intent of the protest procedures and bid rules adopted by reference to protect the environment or reduce risks to human health from environmental exposure. The rules are related solely to procedures on state purchasing of goods and services, not the environment. Furthermore, these rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The specific purpose of the rules is to adopt the GSC rules regarding bid opening and tabulation and to establish protest procedures which must be consistent with GSC rules. The adoption of these rules will not burden private real property. Therefore, this rulemaking does not constitute a taking of private real property.

COASTAL MANAGEMENT PLAN

The commission has reviewed the rulemaking and found that it is not a rulemaking governing air pollutant emissions, on-site sewage disposal systems, or underground storage tanks (Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2)), nor is it a rulemaking governing or authorizing actions listed in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rulemaking is not subject to the Coastal Management Plan.

HEARING AND COMMENTERS

The comment period for the proposed rules closed on September 14, 1998. No comments were received regarding the proposed new sections.

STATUTORY AUTHORITY

The new sections are adopted under Texas Government Code, §2155.076, which requires state agencies to adopt protest procedures for resolving vendor protests relating to purchasing issues, and Texas Government Code, §2156.005, which requires state agencies making purchases to adopt GSC rules related to bid opening and tabulation. In addition, the new rules are adopted under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006; and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission. The adoption is also consistent with the authority granted to the commission to enter into contracts under Texas Water Code, §5.229.

§11.2. Protest Procedures for Vendors.

(a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation, evaluation, or award of a contract may formally protest to the Procurements and Contracts Manager or his designee (hereafter Manager) of the commission. Such protests must be in writing and received in the Procurements and Contracts Section within ten working days after such aggrieved person knows, or should have known, of the occurrence of the action which is protested. Formal protests must conform to the requirements of this subsection and subsection (c) of this section, and shall be resolved in accordance with the procedure set forth in subsections (d) and (e) of this section. Copies of the protest must be mailed or delivered by the protesting person to the project manager, if any, and other interested persons. For the purposes of this section, "interested persons" means all vendors who have submitted bids or proposals for the contract involved.

(b) In the event of a timely protest or appeal under this section, the state shall not proceed further with the solicitation or with the award of the contract unless the Manager makes a written determination that the award of a contract without delay is necessary to protect substantial interests of the state.

(c) A formal protest must be sworn and notarized and contain:

(1) a specific identification of the statutory or regulatory provision(s) that the action complained of is alleged to have violated;

(2) a specific description of each act alleged to have violated the statutory or regulatory provision(s) identified in paragraph (1) of this subsection;

(3) a precise statement of the relevant facts;

(4) an identification of the issue or issues to be resolved;

(5) argument and authorities in support of the protest; and

(6) a statement that copies of the protest have been mailed or delivered to other identifiable interested persons.

(d) The Manager may settle and resolve the dispute concerning the solicitation or award of a contract by mutual agreement with the protesting person. The Manager may solicit written responses to the protest from other interested persons.

(e) If the protest is not resolved by mutual agreement, the Manager will issue a written determination on the protest.

(1) If the Manager determines that no violation of rules or statutes has occurred, he or she shall inform the protesting person and other interested persons by letter which sets forth the reasons for the determination.

(2) If the Manager determines that a violation of the rules or statutes has occurred in a case where a contract has not been awarded, he or she shall inform the protesting person and other interested persons by letter that sets forth the reasons for the determination and the appropriate remedial action.

(3) If the Manager determines that a violation of the rules or statutes has occurred in a case where a contract has been awarded, he or she shall inform the protesting person and other interested persons by letter which sets forth the reasons for the determination, which may include ordering the contract void.

(f) After the Manager's determination has been made, the aggrieved person or interested persons may request reconsideration of the Manager's determination to be made by the executive director or his designee. Such request must be in writing and must be received in the Procurements and Contracts Section no later than ten working days after the date of the Manager's determination, which shall be calculated from the date the Manager's letter is hand-delivered, delivered by a nationally recognized courier service, or mailed by certified or registered mail. The request shall be limited to review of the Manager's determination. Copies of the request must be mailed or delivered by the aggrieved person to other interested persons. The request must contain an affidavit that such copies have been provided.

(g) The executive director shall either issue a final determination on the protest within 15 days after receipt of the aggrieved person's request for reconsideration.

(h) Unless good cause for delay is shown or the Manager or executive director determines that a protest or appeal raises issues significant to procurement practices or procedures, a protest or appeal that is not filed timely will not be considered.

(i) A decision issued in response to a request for reconsideration, either by the commission, or in writing by the executive director, shall be the final administrative action of the commission.

(j) In the event of a protest, all documents collected by the commission as part of a solicitation, evaluation, and/or award of a contract shall be retained by the commission for a period of four years to include the current fiscal year and three additional fiscal years.

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 November 23, 1998.

TRD-9817906
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: December 13, 1998
Proposal publication date: August 14, 1998
For further information, please call: (512) 239-1966

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Chapter 33. Consolidated Permit Processing

The Texas Natural Resource Conservation Commission (commission) adopts new §§33.1, 33.3, 33.11, 33.13, 33.15, 33.17, 33.19, 33.21, 33.23, 33.25, 33.27, 33.29, 33.31, 33.41, 33.43, 33.45, 33.47, 33.49, and 33.51, concerning consolidated permit processing. Sections 33.1, 33.11, 33.19, 33.21, 33.25, and 33.29 are adopted with changes to the proposed text as published in the July 17, 1998, issue of the *Texas Register* (23 TexReg 7347). Sections 33.3, 33.13, 33.15, 33.17, 33.23, 33.27, 33.31, 33.41, 33.43, 33.45, 33.47, 33.49, and 33.51 are adopted without changes and will not be republished.

This action is part of the commission's implementation of House Bill (HB) 1228, 75th Legislature, 1997, which granted the commission authority to conduct consolidated permit processing and issue consolidated permits. In addition, the commission is concurrently adopting conforming amendments and other changes to 30 TAC Chapter 39, concerning Public Notice. This adoption is published in this edition of the *Texas Register.*

EXPLANATION OF ADOPTED RULES

HB 1228 created a new Texas Water Code (TWC), Chapter 5, Subchapter J. The new statute creates a process for an

stablishes the commission's authority over water quality in the state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 20, 1998.

TRD-9817773
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: December 10, 1998
Proposal publication date: July 3, 1998
For further information, please call: (512) 239-1966

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Chapter 334. Underground and Aboveground Storage Tanks

Subchapter D. Release Reporting and Corrective Action

30 TAC §334.83

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §334.83, concerning emergency orders. The amendment is adopted without changes to the proposed text as published in the July 3, 1998, issue of the *Texas Register* (23 TexReg 6937) and will not be republished. This action implements Senate Bill (SB) 1876, 75th Legislature, 1997, and continues the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

In addition to this action, the commission is concurrently adopting consolidated agency emergency and temporary order provisions under a new Chapter 35, concerning Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions. The commission is also concurrently adopting amendments to emergency and temporary order provisions in 30 TAC §§116.410, 291.14, 291.22, 291.142, 291.143, 305.21, 305.29, 305.31, 305.535, 321.80, 321.132, 321.134, 321.152, 321.158, 321.219, 321.232, 321.239, and 321.258, and the repeal of the following rules relating to emergency and temporary orders: 30 TAC §§116.411- 116.418, 291.10, 291.13, 297.57, 305.22-305.28, 305.30, and 305.32. The commission is also adopting new 30 TAC §297.57 and §305.30. These changes are concurrently published in this edition of the *Texas Register*.

EXPLANATION OF ADOPTED RULE

SB 1876 consolidated various statutory provisions governing emergency and temporary orders under new Texas Water Code (TWC), Chapter 5, Subchapter L. The new statute expressly authorizes the commission to issue temporary or emergency mandatory, permissive, or prohibitory orders, and issue temporary permits or suspend permit conditions by temporary or emergency order. It allows the commission to issue emergency orders with or without notice. Additionally, it authorizes the commission to delegate authority to the executive director to receive applications and issue emergency orders and authorize representatives to act on his or her behalf. Finally, general application, term, and hearing requirements that are be applicable to all affected programs are included. The statute will allow the commission or the executive director to act expeditiously to address unforeseen circumstances. TWC, §5.510, as added by SB 1876, provides for emergency and temporary orders for underground or aboveground storage tanks.

The amendment to §334.83, concerning Emergency Orders, provides reference to the commission's authority under TWC, §5.510, and the new Chapter 35. The amendment also makes a conforming change and deletes provisions that have been moved to proposed Chapter 35, Subchapter I, concerning Storage Tank Emergency Orders.

FINAL REGULATORY IMPACT ANALYSIS

Staff has reviewed the proposed rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rules are not major environmental rules because their primary intent is to consolidate already existing emergency and temporary order rules under one chapter. In addition, the applicability requirements do not apply because the commission is expressly granted authority by TWC, 5.501. The rules also concern procedural requirements of the agency, such as delegation of the authority to issue such orders by the commission to the executive director, and are a result of the commission's continuing regulatory reform effort.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for this rule under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this rule is to implement the statutory provisions of TWC, Chapter 5, Subchapter L. The rule also consolidates agency procedural rules and makes certain processes consistent among different agency programs. The rule substantially advances these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they only establish a new procedural mechanism for these types of orders.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and found that the adoption is a rulemaking identified in the Coastal Coordination Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will, therefore, require that applicable goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission has prepared a consistency determination for the rule under 31 TAC §505.22, and found that the rule is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the rule is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the rule include the administrative policies and the policies for specific activities related to: construction and operation or solid waste

treatment, storage, and disposal facilities; discharge of municipal and industrial wastewater to coastal areas; nonpoint source water pollution; and appropriations of water. Promulgation and enforcement of the rule is consistent with the applicable CMP goals and policies because the rule will establish clear and consistent requirements governing the issuance of emergency and temporary orders, as authorized by TWC, Chapter 5, Subchapter L. Under the authority granted by statute, the commission may issue emergency or temporary orders to address unforeseen circumstances, such as drought conditions or potential catastrophes. Promulgation and enforcement of the rule will not violate or exceed any standards identified in the applicable CMP goals and policies because it will allow the commission to take steps to mitigate emergency or potential emergency situations, which will result in environmental benefits for the entire state, including coastal areas.

HEARING AND COMMENTERS

A public hearing regarding the proposed rules was held in Austin on August 3, 1998, and the public comment period also closed on August 3, 1998. No oral or written comments were received on these proposed rules.

STATUTORY AUTHORITY

The amendment is adopted under TWC, §§5.103, 5.105, 5.501, 26.351, and 26.354. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of TWC, Chapter 5, Subchapter L. Section 26.351 establishes the commission's authority concerning corrective action. Section 26.354 establishes the commission's authority to issue emergency orders concerning petroleum storage tanks.

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 November 20, 1998.

TRD-9817774
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: December 10, 1998
Proposal publication date: July 3, 1998
For further information, please call: (512) 239-1966

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part I. General Land Office

Chapter 15. Coastal Area Planning

Subchapter A. Management of the Beach/Dune System

31 TAC §15.11

The General Land Office adopts an amendment to §15.11(a)(12), concerning certification of local government dune protection and beach access plan (plans). The amendment is being adopted to certify the Nueces County Palms at Waters Edge master plan. The General Land Office adopts this amendment to §15.11(a)(12) with no changes to the proposed text of the rule as published in the October 30, 1998, issue of the *Texas Register* (23 TexReg 11084). The text will not be republished.

On December 27, 1996, the Nueces County Commissioners Court adopted by order the Palms at Waters Edge master plan, which is an amendment to the county's dune protection plan. In the amendment to §15.11(a)(12), the General Land Office certifies that the dune protection portion of the Palms at Waters Edge master plan is consistent with state law.

The adopted amendment to certify the Nueces County Palms at Waters Edge master plan is subject to the Texas Coastal Management Program (CMP), §505.11(a)(1)(J), (relating to Actions and Rules Subject to the Coastal Management Program), and must be consistent with the applicable CMP goals and policies under §501.14(k), (relating to Construction in the Beach/Dune System). The General Land Office has reviewed this action for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The action is consistent with the General Land Office's beach/dune regulations which the Council determined to be consistent with the CMP. Consequently, the General Land Office has determined that the action is consistent with the applicable CMP goals and policies.

No comments were received regarding the adoption of this amendment.

The General Land Office has prepared a takings impact assessment for the adoption of this amendment and has determined that adoption of this amendment will not result in a taking of private real property. To receive a copy of the takings impact assessment, please send a written request to Ms. Carol Milner, Texas Register Liaison, General Land Office, 1700 North Congress Avenue, Room 626, Austin, Texas 78707-1495, facsimile number (512) 463-6311.

The amendment is adopted under Texas Natural Resources Code, §§63.121, 61.011, and §61.015(b), which provides the General Land Office with the authority to: identify and protect critical dune areas; preserve and enhance the public's right to use and have access to and from Texas' public beaches; protect the public easement from erosion and reduction caused by development or other activities on adjacent land; and other minimum measures needed to mitigate for any adverse effect on public access and dune areas.

The amendment is also adopted pursuant to Texas Natural Resources Code, §33.601, which provides the General Land Office with the authority to adopt rules on erosion, and Texas Water Code, §16.321, which provides the General Land Office with the authority to adopt rules on coastal flood protection.

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 November 16, 1998.

TRD-9817615
Garry Mauro
Commissioner General Land Office

General Land Office
Effective date: December 6, 1998
Proposal publication date: October 30, 1998
For further information, please call: (512) 305-9129

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Part X. Texas Water Development Board

Chapter 360. Designation of River and Coastal Basins

31 TAC §360.1-360.3

The Texas Water Development Board (board) adopts new §§360.1-360.3, comprising new 31 TAC Chapter 360, concerning designation of river basins and coastal basins without changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register* (23 TexReg 9951) and will not be republished. The new sections delineate the boundaries of Texas' river basins and coastal basins, as required by Texas Water Code §16.051(c), by adopting by reference digital files stored on CD-Rom of maps on file with the board on which the boundary lines are drawn.

Sections 360.1-360.2 describe the scope of the new chapter as the delineation of river and coastal basins, and provide definitions to the term "quad maps" as U.S. Geological Service quadrilateral maps of a specified scale. Section 360.3 delineates the 15 river basins and eight coastal basins by adopting by reference digital files stored on CD-Rom of the U.S. Geological Service quad maps on which the boundary lines of the basins are drawn. These digital files may be viewed or copies obtained at the board's office.

The river basin boundaries were delineated using quad maps to first determine the direction of sheet flow and stream flow for a watershed. The watersheds were connected such that all stream flow originating in the connecting watersheds that is discharged through a single outlet at the state's boundary or into the Gulf of Mexico is designated as a river basin, the boundaries of which are outlined on the quad maps.

The coastal basins were delineated using quad maps to determine the direction of sheet flow and flow for each watershed. Those collective watersheds that discharge into a common tidal water area between the drainage of the river basins were designated as the coastal basins.

There were a number of exceptions from the above criteria that were recognized in the delineation of the river basins. The board has maintained delineations of the river basin and coastal basin boundaries for a long period. While minor changes are proposed on the maps to correct technical inaccuracies of the boundaries, the board proposes not to change the basic underlying rationales and historical basis for the actual division of the state into various river and coastal basins. This rests on the reliance of the state's existing water rights permitting system on these boundaries, and because Senate Bill 1, 75th Texas Legislature (1997), prohibits the redrawing of boundaries in an attempt to circumvent the requirements for obtaining an interbasin transfer permit from the Texas Natural Resource Conservation Commission. The exceptions from the standard criteria used in delineating river basins boundaries are as follows. The watersheds that delineate the San Antonio basin were kept as a separate river basin called the San Antonio River Basin rather than combining with the Guadalupe River Basin (into which they flow). This is consistent with the manner in which these basins have been designated historically by the board. The Neches River Basin and Sabine River basin are proposed to be designated as separate river basins even though they join in Sabine lake before entering the Neches Channel and subsequently the Gulf of Mexico. This also is consistent with the manner in which these basins have been designated historically. The Cypress or Twelve Bayou Basin has been designated as a separate river basin called the Cypress Creek Basin, even though it discharges into Caddo Lake, which crosses the state line, rather than itself discharging through a single outlet at the state line. Were the lake not over the state line, the basin would discharge at the state line. This again is consistent with the historical designation of this basin. The watersheds of James Bayou, Black Bayou, Cross Bayou and Paw Paw Bayou are proposed as part of the Cypress Creek Basin, again consistent with the historical designation of this basin. These watersheds flow into Twelve Mile Bayou in Louisiana, into which the Cypress River also flows. Even though these watersheds have their own outlets at the state line, they are part of the basin into which the Cypress flows, and thus are appropriately combined with the Cypress Basin. This is consistent with historical designation of these watersheds. The watersheds of Palo Duro Creek, Coldwater Creek, and Wolf Creek are designated as part of the Canadian River Basin, even though they flow into the North Canadian River, which connects back to the Canadian River in Oklahoma rather than in Texas. Thus, although the watersheds have their own outlets at the state line, they are part of the larger Canadian River Basin and are so designated. This again is consistent with the historical designation of this basin.

No comments were received on the proposed new sections.

The new sections are adopted under the authority of the Texas Water Code, §6.101, which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and §16.051(c), which requires the board to define and designate river basins and watersheds by rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 1998.

TRD-9817739
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 9, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 463-7981

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Chapter 363. Financial Assistance Programs

Subchapter F. Storage Acquisition and State Participation

Division 1. Storage Acquisition and State Participation

31 TAC §§363.602-363.610

The Texas Water Development Board (board) adopts the repeal of §§363.602-363.610 and new §§363.602-363.612, concerning Storage Acquisition and State Participation without changes to the proposed text as published in the October 16, 1998 issue of the *Texas Register* (23 TexReg 10618) and will not be republished.

New §363.602 and §363.604 are adopted to add definitions and establish criteria pursuant to which the board will make statutory findings required in order to provide financial assistance for proposed projects from the State Participation Account of the Texas Water Development Fund to eligible political subdivisions. The repeal of existing sections is necessary to readopt the sections as new §363.603 and §§363.605-363.612 to be numbered consistent with the new sections.

Section 16.135 of the Water Code provides that before the board can use funds from the state participation account to acquire a facility or interest in a facility, the board must find that it is reasonable to expect that the state will recover its investment in the facility; the cost of the facility exceeds the current financing capabilities of the area involved, and the optimum regional development of the facility cannot be reasonably financed by local interests without state participation; the public interest will be served by acquisition of the facility; and the facility to be constructed or reconstructed contemplates the optimum regional development which is reasonably required under all existing circumstances of the site. The board is adopting these rules to identify the criteria by which it will be making these findings. By adopting section 363.602, the board is adopting definitions for the terms excess capacity, facility, alternate facility and existing needs which are used in the rules being adopted. Excess capacity, in the context of the productive capabilities of a water or wastewater facility, is defined as the difference between the capacity of the proposed facility for the foreseeable needs of the area and the existing needs of the area. This definition is provided because section 363.604(1) requires an assessment of the ability of the applicant to purchase that portion of the facility that the board is requested to finance with state participation funds. Facility is defined as a regional facility for which the financial assistance is being requested. Alternate facility is defined as a facility that would have to be eventually constructed if the application for financial assistance was not approved. This term is necessary in the context of the determination that the board is required to make in 363.604(3) and is used to compare the cost of the alternate facility with the cost of the facility to assess the financing capabilities of local interests. Existing needs are defined as the maximum capacity for service to the area served by the facility based on existing population and including ten years of growth because the experience of the board has been that responsible service providers should and do manage water or wastewater systems and their associated rates so that service will be reasonably provided for their current service population and a minimum of ten years growth without assistance from the state and because of the necessity of fixing some known time period for the purpose of calculating the debt service obligations associated with the debt incurred by the state to make the state participation funds available.

Section 363.604 contains new provisions identifying the criteria for determining if the applicant has provided sufficient information for the board to provide state participation financial assistance pursuant to the findings required by the Texas Water Code. Section 363.604(1) provides that the board will find that the state can reasonably expect to recover its investment in the facility if the service charges and revenue income currently being generated by the applicant, together with any rate increases currently proposed by the applicant, multiplied by the customer base including reasonably anticipated growth as estimated by the applicant will be sufficient to purchase the interest in the facility that is to be acquired by the board. The ability of the applicant to purchase the board's interest is based on the future or projected service population because the board interprets the statute to mean that the state participation account should be used to anticipate and address reasonable growth of the applicant's customer base within the applicant's current service area. Further, the board has elected to look at only the rates or proposed rates of the applicant because the applicant is in the best position to set the rates that are appropriate for the customers served by the applicant.

Section 363.604(2) allows the board to determine that the cost of the facility exceeds the current financing capabilities of the area to be served by the facility based on the existing rates and other sources of revenues generated from the customer base existing at the end of the construction of the project. The board adopts this determination based on the justification that the revenue sources available from the customer base at the end of construction is all that is reasonably available from the applicant and that it is not reasonable to expect that the customers can afford any greater rates other than would be adopted over the ten year period for which the applicant is already expected to provide.

Section 363.604(3) allows the board to determine that the optimal regional development cannot be financed by the local interests based on the determination that cost to construct the alternate facility could not be paid for by the reasonably anticipated revenue of the customers to be served by the facility. The board should use the same basis for rates and future population growth as in section 363.604(1) for the same reasons identified for that paragraph and to maintain consistency. The board then would determine the ability of the "local interests" to "reasonably" finance the optimal regional development of the facility without State Participation by calculating the inability of the local interests to bear the additional cost of constructing the optimal development capacity without State Participation. The board finds that the methodology allows it to determine if the statutory intent of implementing costs savings through economies of scale would be effectuated.

The board is adopting section 363.604(4), which uses the economies of scale analysis to establish whether the public interest is served, because the board finds providing financial assistance to a project so that it is constructed to its optimum size when local interests could not financially afford construction to the optimum size is a major underlying goal and that cost reduction achieved through economies of scale with state participation promotes that goal. Finally, the board is adopting section 363.604(5) which assesses the design capabilities of the facility in comparison to the projected growth for the area to insure that the facility contemplates optimum regional development. The board finds that this analysis is the only method available to determine that the facility would address optimum regional development.

No comments were received on the proposed repeals and new sections.

he repeals are adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 19, 1998.

TRD-9817738
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 9, 1998
Proposal publication date: October 16, 1998
For further information, please call: (512) 463-7981

♦ ♦ ♦

31 TAC §§363.602-363.12

The new sections are adopted under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

ed with the Office of the Secretary of State on November 19, 1998.

TRD-9817737
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 9, 1998
Proposal publication date: October 16, 1998
For further information, please call: (512) 463-7981

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TITLE 34. PUBLIC FINANCE

Part I. Comptroller of Public Accounts

Chapter 3. Tax Administration

Subchapter F. Motor Vehicle Sales Tax

34 TAC §3.70

The Comptroller of Public Accounts adopts an amendment to §3.70, concerning motor vehicle leases and sales, without changes to the proposed text as published in the August 7, 1998, issue of the *Texas Register* (23 TexReg 8026).

Senate Bill 862, 75th Legislature, 1997, amends the Tax Code, §152.001(2)(C), to exclude from the definition of retail sale a motor vehicle purchased by a franchised dealer that is leased and then immediately sold to a lessor with the lease contract. hanges made by prior legislation, effective September 1, 997, concerning exempt leased interstate vehicles are also addressed. Other changes are made for clarity of long standing administration.

No comments were received regarding adoption of the amendment.

This amendment is adopted under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements the Tax Code, §152.001 and §152.089.

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 November 19, 1998.

TRD-9817716
Martin Cherry
Chief, General Law
Comptroller of Public Accounts
Effective date: December 9, 1998
Proposal publication date: August 7, 1998
For further information, please call: (512) 463–4062

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34 TAC §3.74

The Comptroller of Public Accounts adopts a new §3.74, concerning seller responsibility, without changes to the proposed text as published in the August 7, 1998, issue of the Texas Register (23 TexReg 8026).

Senate Bill 862, 75th Legislature, 1997, amends the Tax Code, §152.001 and §152.0411, effective September 1, 1997, defining a taxable retail sale and addressing when motor vehicle dealers are required to collect motor vehicle sales tax. Changes made to seller requirements during previous legislative sessions, such as filing returns, tax collection, and documentation of tax exempt sales, are also included.

No comments were received regarding adoption of the new section.

This new section is adopted under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The new section implements the Tax Code, §152.001 and §152.0411.

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 November 19, 1998.

TRD-9817717
Martin Cherry
Chief, General Law
Comptroller of Public Accounts
Effective date: December 9, 1998
Proposal publication date: August 7, 1998
For further information, please call: (512) 463–4062

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part I. Texas Department of Public Safety

Chapter 23. Vehicle Inspection

Subchapter E. Certification of Inspectors

37 TAC §23.61

The Texas Department of Public Safety adopts an amendment to §23.61, concerning Certification of Inspectors, without changes to the proposed text as published in the September 25, 1998, issue of the *Texas Register* (23 TexReg 9707) and will not be republished.

The justification for this section will be more efficient administration of the Motor Vehicle Inspection Program.

Language concerning large vehicles is deleted in subsection (a). Amendment to subsection (b) changes the passing grade from 75 to 80, replaces the word trooper with technician and deletes proof of present fitness. Language reference VI-13a is deleted from subsection (m). Subsection (p) deletes paragraph (2) and renumbers paragraph (3). Subsection (q) is deleted in its entirety.

No comments were received regarding adoption of the amendment.

The amendment is adopted pursuant to Texas Transportation Code, Chapter 548, §548.002, which provides the Texas Department of Public Safety with the authority to adopt rules necessary for the administration of this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 17, 1998.

TRD-9817644
Dudley M. Thomas
Director
Texas Department of Public Safety
Effective date: December 7, 1998
Proposal publication date: September 25, 1998
For further information, please call: (512) 424-2890

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 79. Legal Services

Subchapter S. Contracting Ethics

40 TAC §79.1803

The Texas Department of Human Services (DHS) adopts the repeal of §79.1803; amendments to §79.1802, §79.1804, and §79.1805; and new §79.1803 without changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register* (23 TexReg 9966). The text will not be republished.

Justification for the sections is that the rules will be clearer and easier to understand.

The repeal, amendments, and new section will function by making the application of the rules to relatives of former DHS employees consistent with the application of the rules to relatives of current DHS employees. The repeal, amendments, and new section also clarify that board members are subject to the rule prohibiting former DHS board members and employees from working on the same "particular matter" for DHS and for a contractor. They also clarify that the terms "current employee" and "former employee" include current and former officers of DHS, such as the commissioner. In addition, the adoption deletes the language that prohibits former board members and employees from representing persons before DHS on any matters in which the former board member or employee had substantial involvement or has substantial financial interest, because the provision is more appropriately dealt with by state law.

The department received no comments regarding the proposal.

The repeal is adopted under the Human Resources Code, Title 2, Chapter 22, which authorizes the department to administer public and medical assistance programs.

The repeal implements the Human Resources Code, §§22.001-22.030.

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 November 20, 1998.

TRD-9817848
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: January 1, 1999
Proposal publication date: October 2, 1998
For further information, please call: (512) 438-3765

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40 TAC §§79.1802-79.1805

The amendments and new section are adopted under the Human Resources Code, Title 2, Chapter 22, which authorizes the department to administer public and medical assistance programs.

The amendments and new section implement the Human Resources Code, §§22.001-22.030.

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 November 20, 1998.

TRD-9817849
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services


Name: Rigo Ortiz
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