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Lizeth Rosas 8th Grade

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THE ATTORNEY GENERAL

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

An index to the full text of these documents is available from
the Attorney General's Internet site <http://www.oag.state.tx.us>.

Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

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

Requests for Opinions

RQ-1192-GA

Requestor:

The Honorable Royce West

Chair, Committee on Jurisprudence

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: School district exemption from the municipal drainage charge under Chapter 552, Subchapter C, of the Local Government Code (RQ-1192-GA)

Briefs requested by April 15, 2014

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

TRD-201401466

Katherine Cary

General Counsel

Office of the Attorney General

Filed: April 2, 2014



TEXAS



Cara Thompson
11th Grade

PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 10. DEPARTMENT OF INFORMATION RESOURCES

CHAPTER 206. STATE WEBSITES

The Department of Information Resources (department) proposes amendments to 1 TAC Chapter 206, §206.54 and §206.74, concerning posting certain information on state websites as directed by the legislature. The amendments are necessary as the result of passage of House Bill 12 (83R), effective as of September 1, 2013, which added §659.0201, Texas Government Code, concerning a state agency or institution of higher education posting of information related to the entity's use of grants, gifts, or donations as a salary supplement, and §659.026, concerning the posting of information regarding staff compensation. The amendments are also necessary due to passage of House Bill 16 (83R), effective as of September 1, 2013, which added §2102.015, Texas Government Code, concerning the publication of state agency and institution of higher education audit plans and annual reports on the Internet. Finally, the amendments are necessary in response to the passage of House Bill 1487 (83R), effective September 1, 2013, which added §403.0245, Texas Government Code, concerning the posting of information describing the purpose of state grants greater than \$25,000 awarded by the state agency or institution of higher education.

The department proposes amendments to Chapter 206, §206.54 and §206.74 to document existing legislative requirements and address statutory change resulting from the passage of House Bill 12 (83R), House Bill 16 (83R), and House Bill 1487 (83R).

For state agencies, §206.54 is amended by adding subsection (e) listing the information required to be posted on the agency's Internet website. Section 206.54(e)(1) specifies the posting of information describing the purpose of state grants greater than \$25,000 that are awarded by the agency as required by Texas Government Code, §403.0245. Section 206.54(e)(2) specifies the posting of information related to the agency's use of grants, gifts, or donations as a salary supplement as required in Texas Government Code, §659.0201. Section 206.54(e)(3) specifies the posting of information related to the agency's staff compensation as required in Texas Government Code, §659.026. Finally, §206.54(e)(4) specifies the posting of information related to the state agencies audit plans and annual reports as required in Texas Government Code, §2102.015.

For institutions of higher education, §206.74 is amended by adding subsection (e) listing the information required to be posted on the institution's Internet website. Section 206.74(e)(1) specifies the posting of information describing the purpose

of state grants greater than \$25,000 that are awarded by the institution as required by Texas Government Code, §403.0245. Section 206.74(e)(2) specifies the posting of information related to the institution's use of grants, gifts, or donations as a salary supplement as required in Texas Government Code, §659.0201. Section 206.74(e)(3) specifies the posting of information related to the institution's staff compensation as required in Texas Government Code, §659.026. Finally, §206.74(e)(4) specifies the posting of information related to the institutions of higher education audit plans and annual reports as required in Texas Government Code, §2102.015.

Janet Gilmore, Director of Digital Government, Department of Information Resources, has determined that during the first five-year period following the amendment of §206.54 and §206.74, there will be no fiscal impact on state agencies, institutions of higher education or local governments resulting from compliance with such changes to the rules.

Ms. Gilmore has further determined that for each year of the first five years following these amendments to §206.54 and §206.74, there are no anticipated economic costs to persons or small businesses resulting from the compliance with such changes to the rules.

Ms. Gilmore has also determined that for each year of the first five years the amendments are in effect, the anticipated public benefit results from more effective use of public and financial resources through the enforcement and administration of rules concerning the state websites.

Written comments on the proposed amendments may be submitted to Martin Zelinsky, General Counsel, 300 West 15th Street, Suite 1300, Austin, Texas 78701 or to martin.zelinsky@dir.texas.gov. Comments will be accepted for 30 days after publication in the *Texas Register*.

SUBCHAPTER B. STATE AGENCY WEBSITES

1 TAC §206.54

The amended rule is proposed pursuant to §2054.052(a), Texas Government Code, which authorizes the department to adopt rules as necessary to implement its responsibilities under Chapter 2054, Texas Government Code.

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

§206.54. Indexing.

(a) All new or changed documents on a state agency website that meet the criteria of a "state publication" as defined by the Texas State Library and Archives Commission must include the meta tags required by 13 TAC §3.4, when technically feasible.

(b) The home page of a state agency website must incorporate TRAIL meta data and must include links to the following State of Texas resources:

- (1) State electronic Internet portal, Texas.gov
- (2) Texas Homeland Security website
- (3) TRAIL, statewide search website
- (4) State Auditor's Office Fraud, Waste, or Abuse Hotline, and agency fraud policy, if applicable

(c) The home page or site policies page of a state agency website must include links to the following agency resources:

- (1) Agency linking notice
- (2) Agency privacy notice
- (3) Contact information
- (4) Agency policy and procedures relating to Open Records/Public Information Act
- (5) Compact with Texans
- (6) Agency electronic and information resources accessibility
 - (A) Policy
 - (B) Coordinator contact information

(d) Key public entry points must include links to the following agency resources:

- (1) Home page
- (2) Site policies page or contact information
- (3) Site policies page or linking notice
- (4) Site policies page or privacy notice
- (5) Agency electronic and information resources accessibility
 - (A) Policy
 - (B) Coordinator contact information

(e) A state agency must post on the agency's Internet website:

(1) For agency-awarded state grants in an amount greater than \$25,000, the purposes for which the grant was awarded, as specified in Texas Government Code, §403.0245.

(2) Agency information regarding accepted gifts, grants, donations or other consideration for any salary supplement for an agency employee, as specified in Texas Government Code, §659.0201.

(3) Agency information regarding staff compensation, as specified in Texas Government Code, §659.026.

(4) The agency's approved internal audit plan and agency annual report, including any required updates, as specified in Texas Government Code, §2102.015.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 28, 2014.

TRD-201401413

Martin H. Zelinsky

General Counsel

Department of Information Resources

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 475-4700

◆ ◆ ◆

SUBCHAPTER C. INSTITUTION OF HIGHER EDUCATION WEBSITES

1 TAC §206.74

The amended rule is proposed pursuant to §2054.052(a), Texas Government Code, which authorizes the department to adopt rules as necessary to implement its responsibilities under Chapter 2054, Texas Government Code.

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

§206.74. *Indexing.*

(a) All new or changed documents on an institution of higher education website that meet the criteria of a "state publication" as defined by the Texas State Library and Archives Commission must include the meta tags required by 13 TAC §3.4, when technically feasible.

(b) The home page of an institution of higher education website must incorporate TRAIL meta data and must include links to the following State of Texas resources:

- (1) State electronic Internet portal, Texas.gov
- (2) Texas Homeland Security website
- (3) TRAIL, statewide search website
- (4) State Auditor's Office Fraud, Waste, or Abuse Hotline, and agency fraud policy, if applicable

(c) The home page or site policies page of an institution of higher education website must include links to the following institution of higher education resources:

- (1) Institution of higher education linking notice
- (2) Institution of higher education privacy notice
- (3) Contact information
- (4) Institution of higher education policy and procedures relating to Open Records/Public Information Act
- (5) Compact with Texans
- (6) Institution of higher education electronic and information resources accessibility
 - (A) Policy
 - (B) Coordinator contact information

(d) Key public entry points must include links to the following institution of higher education resources:

- (1) Home page
- (2) Site policies page or contact information
- (3) Site policies page or linking notice
- (4) Site policies page or privacy notice
- (5) Institution of higher education electronic and information resources accessibility
 - (A) Policy
 - (B) Coordinator contact information

(e) An institution of higher education must post on the institution's Internet website:

(1) For institution-awarded state grants in an amount greater than \$25,000, the purposes for which the grant was awarded, as specified in Texas Government Code, §403.0245.

(2) Institution information regarding accepted gifts, grants, donations or other consideration for any salary supplement for an institution employee, as specified in Texas Government Code, §659.0201.

(3) Institution information regarding staff compensation, as specified in Texas Government Code, §659.026.

(4) The institution's approved internal audit plan and agency annual report, including any required updates, as specified in Texas Government Code, §2102.015.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 28, 2014.

TRD-201401414

Martin H. Zelinsky

General Counsel

Department of Information Resources

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 475-4700



PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 5. PHYSICIAN AND PHYSICIAN ASSISTANT SERVICES

1 TAC §354.1060, §354.1062

The Texas Health and Human Services Commission (HHSC) proposes to amend §354.1060, concerning Definitions, and §354.1062, concerning Authorized Physician Services.

Background and Justification

HHSC proposes to amend §354.1060 and §354.1062 to comply with the federal Medicaid statute by clarifying the timeframes related to when a physician may bill for services performed by a substitute physician. A substitute physician provides services in place of another physician under either a reciprocal or locum tenens arrangement.

In addition, the proposed amendments clarify that the timeframe may be extended over a longer continuous period for the locum tenens arrangement when the billing physician is absent or unavailable due to active duty as a member of a reserve component of the U.S. Armed Forces.

Section-by-Section Summary

Proposed §354.1060(3)(A) updates the allowable continuous period of coverage for a reciprocal arrangement from 60 days to 14 days.

Proposed §354.1060(3)(B) updates the maximum number of days for a locum tenens arrangement from 60 days to 90 days.

Proposed §354.1062(e)(3) corrects outdated references.

Proposed §354.1062(e)(4)(A) adds new language to authorize a reciprocal arrangement under which a substitute physician sees patients in the billing physician's practice. The billing physician may bill for services furnished by the substitute physician during a period not to exceed 14 continuous days. Services furnished by the substitute physician after the 14th day must be billed under the substitute physician's own Medicaid provider number.

Proposed §354.1062(e)(4)(B) adds new language to authorize a locum tenens arrangement when the substitute physician sees patients in the billing physician's practice for services furnished by the substitute physician during a period not to exceed 90 continuous days. When the billing physician is absent or unavailable due to active duty as a member of a reserve component of the Armed Forces, the billing physician may bill for the services of a substitute physician for a longer continuous period.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for each year of the first five years that the amendments will be in effect, there will be no fiscal impact to local governments or the state government related to enforcing or administering the amendments.

Ms. Rymal anticipates that, for each year of the first five years that the amendments will be in effect, there will not be an economic cost to persons who are required to comply with the amendments.

HHSC has determined that the amendments will not affect a local economy. For each year of the first five years that the amendments will be in effect, there is no anticipated effect on local employment in each geographic area affected by the amendments.

Small and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no adverse economic effect on small or micro-businesses as a result of enforcing or administering these amendments, as the changes proposed do not change policy or practice.

Public Benefit

Chris Traylor, Chief Deputy Commissioner, has determined that for each year of the first five years the sections are in effect, the public will benefit from the adoption of the amendments to the rules. The anticipated public benefit of enforcing the proposed amended rules is enhanced administrative efficiency.

Regulatory Analysis

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

Takings Impact Assessment

HHSC had determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist

in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Texas Government Code.

Public Comment

Written comments on the proposed amendments to the rules may be submitted to Vivian LaFuente, Policy Analyst, Medicaid/CHIP Division, Texas Health and Human Services Commission, P.O. Box 13247, H390, Austin, Texas 78711; by fax to (512) 730-7472; or by e-mail to Vivian.LaFuente@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The amendments are proposed under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and the Texas Human Resources Code §32.021 and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed amendments affect the Texas Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§354.1060. Definitions.

The following words and terms shall have the following meaning when used in this division unless the context clearly indicates otherwise.

(1) Direct supervision--The supervising physician must be in the same office, building, or facility when and where the service is provided and must be immediately available to furnish assistance and direction.

(2) Personal supervision--The supervising physician must be physically present in the room when and where the service is being provided.

(3) Substitute physician--A physician who provides services in place of another physician under either a reciprocal or locum tenens arrangement. These arrangements must comply with Medicaid policy, billing, reporting, and documentation requirements.

(A) Reciprocal arrangements--[Arrangements] of a substitute physician covering for the billing physician on an occasional basis when the billing physician is unavailable to provide services, and limited to a continuous period of coverage that is no longer than 14 [60] days. Reciprocal arrangements do not have to be in writing.

(B) Locum tenens arrangements--[Arrangements] of a substitute physician assuming the practice of a billing physician for a temporary period of no longer than 90 [60] days when the billing physician is absent for reasons such as illness, pregnancy, vacation, continuing medical education, or active duty in the U.S. Armed Forces. When the reason is due to active duty in the Armed Forces, the temporary period may extend over a longer continuous period during all of which the billing physician has been called or ordered to active duty as a member of a reserve component of the Armed Forces. Locum tenens arrangements must be in writing.

§354.1062. Authorized Physician Services.

(a) This rule specifies the conditions under which a physician may bill Texas Medicaid for covered services. Such conditions include compliance with this rule as well as compliance with all applicable federal and state laws, rules, regulations and policies relating to covered services.

(b) Physician services. A physician may bill for reasonable and medically necessary services that are within the scope of practice of medicine or osteopathy as defined by state law. Eligible physician services include those performed by the physician and those medical acts delegated by the physician to qualified and properly trained persons acting under the physician's supervision. Delegation and supervision of medical services must be consistent with this chapter and the rules and laws of the Texas Medical Board, and supervision of the delegated medical act must be appropriately documented in the patient's chart. A physician shall not bill the Texas Medicaid program for services if that billing would result in duplicate payment for the same services.

(c) Physician supervising other physicians. A physician supervising other physicians may bill when the supervision and services are performed in the context of an accredited graduate medical education program. Facilities and professional practices do not qualify for reimbursement for services provided by resident physicians in an outpatient setting unless the facility or professional practice is owned by, or affiliated with, an accredited graduate medical education program.

(1) For all services billed to the Medicaid program, the supervision must be medically appropriate, as described in this rule, and provided to a resident physician performing a Medicaid-covered service. The supervision must be either personal or direct. To qualify for reimbursement, the medical record must clearly establish:

(A) The nature of the supervisory role of the billing physician in the delivery of the services provided by the resident physician; and

(B) That the supervision complies with the definition of supervision applicable to the covered service, as defined in §354.1060 of this title (relating to Definitions).

(2) Personal supervision is required during the key portions of all major surgeries and the key portions of all other physician services billed to the Medicaid program if the immediate supervision, participation, or intervention of the supervising physician is medically prudent in order to assure the health and safety of the patient. Physician services that require personal supervision may include invasive procedures and evaluation and management services that require complex medical decision making. Situations that require personal supervision include those in which:

(A) The clinical condition of the patient is unstable or will likely become unstable during, or as a result of, the planned medical intervention; or

(B) The planned medical intervention, even under optimal conditions, will result in medically reasonable risk for significant morbidity or death following the service or procedure; or

(C) Deviation from expected technique at the time the procedure or service is performed presents a medically reasonable, causally-related, foreseeable risk to the patient's life or health.

(3) For surgical services, the supervising surgeon is responsible for pre-operative, operative, and post-operative care provided to the patient and billed to the Medicaid program. The supervising surgeon, however, may delegate the pre- and post-operative care to a resident if appropriate direct supervision, as defined in §354.1060 of this title, is provided.

(4) For all services that do not require personal supervision and are billed to the Medicaid program, the supervising physician must provide direct supervision. The supervising physician may not provide direct supervision for an activity at the same time as providing personal supervision for another activity, with the following exceptions.

(A) The supervising physician in the outpatient setting may provide personal and direct supervision concurrently for residents providing evaluation and management services; and

(B) A supervising surgeon or supervising anesthesiologist may be involved in two concurrent anesthesia cases with residents. The supervising surgeon or supervising anesthesiologist must be present during all key portions of the procedure if the immediate supervision, participation, or intervention of the supervising physician is medically prudent in order to assure the health and safety of the patient.

(5) Supervision in the outpatient setting. A face-to-face encounter between the physician providing direct supervision and the patient is not required in the outpatient setting in the context of a graduate medical education program. All other requirements for personal or direct supervision in this division must be met for the services to qualify for reimbursement. The supervising physician must document that he/she:

(A) Reviewed the patient's history and physical examination;

(B) Confirmed or revised the patient's diagnosis;

(C) Determined the course of treatment to be followed;

(D) Assured that any needed supervision of interns or residents was provided; and

(E) Confirmed that the documentation in the medical record comports with the level of service billed.

(6) Supervision in the inpatient setting. A physician who supervises other physicians in an inpatient setting must comply with documentation requirements of paragraph (5)(A) - (E) of this subsection and must document that he or she has completed a:

(A) Personal examination of the patient not later than 36 hours after the patient's admission and before the patient's discharge and, as necessary, based on the patient's condition; and

(B) Face-to-face encounter with the patient on the same day as any billed services provided by the resident physician.

(d) Services provided by a physician assistant or advanced practice nurse. If the services are provided by a physician assistant or advanced practice nurse, practicing within the scope of their license and consistent with this chapter and with the rules and laws of the Texas Medical Board and Texas Nursing Board, as applicable, the physician services are covered. Services provided by a certified registered nurse anesthetist must be billed as described in §354.1301 of this title (relating to Certified Registered Nurse Anesthetists' Services).

(e) Substitute physician. A physician may bill for the services of a substitute physician who sees patients in the billing physician's practice under either a reciprocal or locum tenens arrangement. To qualify for reimbursement, the billing physician and substitute physician must comply with the following requirements:

(1) The substitute physician's name and address must be documented on the claim.

(2) The substitute physician must be licensed to practice in the state of Texas.

(3) Consistent with the requirements of §371.1605 [§371.1615] and §371.1705 [§371.1677] of this title (relating to Provider Responsibility and Mandatory Exclusion [the Obligation of All Health Care Providers Regarding Exclusion], respectively), the substitute physician must be enrolled in Medicaid and not be on the Medicaid or Title XX provider exclusion list.

(4) The time period for which a physician may bill for the services of a substitute physician is limited to the following situations:

(A) Reciprocal Arrangements. When the substitute physician sees patients in the billing physician's practice under a reciprocal arrangement, the billing physician may bill for services furnished by the substitute physician during a period that does not exceed 14 continuous days. [When the billing physician is absent or unavailable for reasons other than active duty as a member of a reserve component of the U.S. Armed Forces, services provided by a substitute physician after the 60th day must be provided by and billed under the substitute physician's own Medicaid provider number.]

(B) Locum Tenens Arrangements. When the substitute physician sees patients in the billing physician's practice under a locum tenens arrangement, the billing physician may bill for services furnished by the substitute physician during a period that does not exceed 90 continuous days. Except as provided in clause (iii) of this subparagraph, services furnished by the substitute physician after the 90th day must be billed under the substitute physician's own Medicaid provider number.

(i) When the billing physician is absent for more than 90 days, the billing physician may bill for services furnished by a different substitute physician for each consecutive continuous 90 day period.

(ii) The billing physician may only bill for services furnished by a substitute physician on a temporary basis. Except as provided in clause (iii) of this subparagraph, the billing physician may not bill for services furnished by a substitute physician to address long-term vacancies in a physician practice.

(iii) [(B)] When the billing physician is absent or unavailable due to active duty as a member of a reserve component of the U.S. Armed Forces, the billing physician may bill for the services of a substitute physician for [a period of 60 days or] a longer continuous period during all of which the billing physician has been called or ordered to active duty as a member of a reserve component of the Armed Forces. Medicaid may reimburse the billing physician for services provided by the substitute physician until the billing physician is no longer on active duty as a member of a reserve component of the Armed Forces.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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TRD-201401427

Jack Stick

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 424-6900



CHAPTER 355. REIMBURSEMENT RATES

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.7001, concerning Reimbursement Methodology for Telemedicine, Telehealth, and Home Telemonitoring Services, and §355.8085, concerning Reimbursement Methodology for Physicians and Other Practitioners; and proposes the repeal of §355.8081, concerning Reimbursement Methodology for Laboratory and X-ray Services, Radiation Ther-

apy, Physical Therapists' Services, Physician Services, Podiatry Services, Chiropractic Services, Optometric Services, Ambulance Services, Dentists' Services, Psychologists' Services, Licensed Psychological Associates' Services, Provisionally Licensed Psychologists' Services, Maternity Clinic Services, and Tuberculosis Clinic Services.

Background and Justification

The proposed amendments and repeal will update the Medicaid reimbursement methodology to more accurately reflect the reimbursement methodology for physicians and other practitioners, correct references, and delete redundant language.

HHSC proposes to add the repealed language from §355.8081 to §355.8085, resulting in the placement of all language relating to reimbursement methodologies for physicians and other practitioners in one rule section.

In addition to adding the providers listed in §355.8081 to the eligible providers listed in §355.8085, HHSC proposes the addition of occupational and speech therapists to reflect current practice. Further, the proposal adds a reimbursement methodology for physician-administered vaccines to reflect current practice and clarifies existing language indicating that HHSC will adjust the reimbursement methodology related to temporarily enhanced reimbursement for certain providers in compliance with federal legislation enacted in the Patient Protection and Affordable Care Act, based on final direction from the Centers for Medicare and Medicaid Services.

Section-by-Section Summary

§355.7001 Reimbursement Methodology for Telemedicine, Telehealth, and Home Telemonitoring Services

Proposed §355.7001(c)(2) is amended so that a reference to §355.8081 is replaced with a reference to §355.8085.

§355.8081 Reimbursement Methodology for Laboratory and X-ray Services, Radiation Therapy, Physical Therapists' Services, Physician Services, Podiatry Services, Chiropractic Services, Optometric Services, Ambulance Services, Dentists' Services, Psychologists' Services, Licensed Psychological Associates' Services, Provisionally Licensed Psychologists' Services, Maternity Clinic Services, and Tuberculosis Clinic Services

This rule is being repealed with all language being moved to §355.8085.

§355.8085 Reimbursement Methodology for Physicians and Other Practitioners

Proposed §355.8085(a) describes the subject of the section and the broad requirements HHSC follows regarding this reimbursement methodology.

Proposed §355.8085(b) describes the types of providers eligible for reimbursement under the included methodology.

Proposed §355.8085(c) defines terms used in this section.

Proposed §355.8085(d) describes the method by which the payment amounts for eligible providers are calculated.

Proposed §355.8085(e) describes the reimbursement methodology for physician-administered drugs, vaccines, and biologicals.

Proposed §355.8085(f) describes the reimbursement for services provided under the supervision of a licensed psychologist.

Proposed §355.8085(g) provides the Texas Administrative Code citations for certain providers not specifically included in this section.

Proposed §355.8085(h) provides for temporary enhanced reimbursement for certain providers.

Proposed §355.8085(i) describes methodology for determining payment rates for providers reimbursed at a percentage of the rate paid to a physician.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the amendments and repeal are in effect, there will be no fiscal impact to state or local governments due to enforcement or administration of the proposed amendments and repeal. There will be no fiscal impact because the proposed amendments and repeal merely clarify rule language to reflect current practice.

Ms. Rymal has also determined there are no anticipated economic costs to persons who are required to comply with the amendments.

HHSC has determined there is no anticipated negative effect on local employment in geographic areas affected by the amendments.

Small and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendments and repeal because they are clarifying rule language to reflect current practice. Providers will not be required to alter their business practices as a result of the amendments and repeal.

Public Benefit

Pam McDonald, Director of Rate Analysis, has determined that for each of the first five years the amendments and repeal are in effect, the expected public benefit is increased public understanding of the way in which the Health and Human Services Commission determines reimbursement for vaccines and other physician administered drugs.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Dan Huggins, Director of Acute Care, Rate Analysis Department,

Texas Health and Human Services Commission, P.O. Box 85200, MC-H400, Austin, Texas 78708-5200; by fax to (512) 491-1998; or by e-mail to Dan.Huggins@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

SUBCHAPTER G. ADVANCED TELECOMMUNICATIONS SERVICES AND OTHER COMMUNITY-BASED SERVICES

1 TAC §355.7001

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The amendment affects the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.7001. Reimbursement Methodology for Telemedicine, Telehealth, and Home Telemonitoring Services.

(a) Eligible providers performing telemedicine medical, telehealth, or home telemonitoring services are defined in §354.1430 of this title (relating to Definitions), §354.1432 of this title (relating to Telemedicine and Telehealth Benefits and Limitations), and §354.1434 of this title (relating to Home Telemonitoring Benefits and Limitations).

(b) The Health and Human Services Commission (HHSC) reimburses eligible distant site professionals providing telemedicine medical services as follows:

(1) Physicians are reimbursed for their Medicaid telemedicine medical services in the same manner as their other professional services in accordance with §355.8085 of this title (relating to Reimbursement Methodology for Physicians and Other Practitioners).

(2) Physician assistants are reimbursed for their Medicaid telemedicine medical services in the same manner as their other professional services in accordance with §355.8093 of this title (relating to Physician Assistants).

(3) Advanced practice registered nurses are reimbursed for their Medicaid telemedicine medical services in the same manner as their other professional services in accordance with §355.8281 of this title (relating to Reimbursement Methodology).

(4) Certified nurse midwives are reimbursed for their Medicaid telemedicine medical services in the same manner as their other professional services in accordance with §355.8161 of this title (relating to Reimbursement Methodology for Midwife Services).

(c) HHSC reimburses eligible distant site professionals providing telehealth services as follows:

(1) Licensed professional counselors (including licensed marriage and family therapists) and licensed clinical social workers (including Comprehensive Care Program social workers) are reimbursed for their Medicaid telehealth services in the same manner as their other professional services in accordance with §355.8091 of this

title (relating to Reimbursement to Licensed Professional Counselors, Licensed Master Social Worker-Advanced Clinical Practitioners, and Licensed Marriage and Family Therapists).

(2) Licensed psychologists (including licensed psychological associates) and psychology groups are reimbursed for their Medicaid telehealth services in the same manner as their other professional services in accordance with ~~§355.8085~~ [§355.8081] of this title (relating to Reimbursement Methodology for Physicians and Other Practitioners [Reimbursement Methodology for Laboratory and X-ray Services, Radiation Therapy, Physical Therapists' Services, Physician Services, Podiatry Services, Chiropractic Services, Optometric Services, Ambulance Services, Dentists' Services, Psychologists' Services, Licensed Psychological Associates' Services, Provisionally Licensed Psychologists' Services, Maternity Clinic Services, and Tuberculosis Clinic Services]).

(3) Durable medical equipment suppliers are reimbursed for their Medicaid telehealth services in the same manner as their other professional services in accordance with §355.8021 of this title (relating to Reimbursement Methodology for Home Health Services and Durable Medical Equipment, Prosthetics, Orthotics and Supplies).

(d) Telemedicine and telehealth patient site locations, as defined in §354.1430 and §354.1432 of this title, are reimbursed a facility fee determined by HHSC.

(e) HHSC reimburses eligible providers performing home telemonitoring services in the same manner as their other professional services described in §355.8021 of this title.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Jack Stick

Chief Counsel

Texas Health and Human Services Commission

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For further information, please call: (512) 424-6900



SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 5. GENERAL ADMINISTRATION

1 TAC §355.8081

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Health and Human Services Commission or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

Statutory Authority

The repeal is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges,

and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The repeal affects the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.8081. Reimbursement Methodology for Laboratory and X-ray Services, Radiation Therapy, Physical Therapists' Services, Physician Services, Podiatry Services, Chiropractic Services, Optometric Services, Ambulance Services, Dentists' Services, Psychologists' Services, Licensed Psychological Associates' Services, Provisionally Licensed Psychologists' Services, Maternity Clinic Services, and Tuberculosis Clinic Services.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Jack Stick

Chief Counsel

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1 TAC §355.8085

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The amendment affects the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.8085. Reimbursement Methodology for Physicians and Other Practitioners.

(a) Introduction. This section describes the Texas Medicaid reimbursement methodology that the Health and Human Services Commission (HHSC) uses to calculate payment for covered services provided by physicians and other practitioners. The reimbursement methodology facilitates a prospective payment system that is based on HHSC's determination of the adequacy of access to care.

(1) There is no geographical or specialty reimbursement differential for individual services.

(2) HHSC reviews the fees for individual services at least every two years based upon either:

(A) historical payments, with adjustments, to ensure adequate access to appropriate health care services; or

(B) actual resources required by an economically efficient provider to provide each individual service.

(3) The fees for individual services and adjustments to the fees must be made within available funding.

(b) Eligibility. Eligible providers include:

(1) Providers of Laboratory and X-ray Services;

(2) Providers of Radiation Therapy;

(3) Physical, Occupational, and Speech Therapists;

(4) Physicians;

(5) Podiatrists;

(6) Chiropractors;

(7) Optometrists;

(8) Dentists;

(9) Psychologists;

(10) Licensed Psychological Associates;

(11) Provisionally Licensed Psychologists;

(12) Maternity clinics; and

(13) Tuberculosis clinics.

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

(1) Access-based fees (ABF)--Fees for individual services, where HHSC deems necessary, to account for deficiencies relating to the adequacy of access to health care services.

(2) Biological--A substance that is made from a living organism or its products and is used in the prevention, diagnosis, or treatment of cancer and other diseases.

(3) Conversion factor--The dollar amount by which the sum of the three cost component relative value units (RVUs) is multiplied to obtain a reimbursement fee for each individual service.

(4) Drug--Any substance, that is used to prevent, diagnose, treat or relieve symptoms of a disease or abnormal condition.

(5) HHSC--The Health or Human Services Commission or its designee.

(6) Relative value units (RVUs)--The relative value assigned to each of the three individual components that comprise the cost of providing individual Medicaid services. The three cost components of each reimbursement fee are intended to reflect the work, overhead, and professional liability expense required to provide each individual service.

(7) Resource-based fees (RBF)--Fees for individual services based upon HHSC's determination of the resources that an economically efficient provider requires to provide individual services.

(8) Vaccine--An immunogen, the administration of which is intended to stimulate the immune system to result in the prevention, amelioration or therapy of any disease or infection.

(d) Calculating the payment amounts. Subject to qualifications, limitations, and exclusions as provided in this chapter, payment to eligible providers must not exceed the lesser of the provider's billed amount or the amount derived from the methodology described in this section. The fee schedule that results from the reimbursement methodology may be composed of both the access-based fees (ABFs) and the resource-based fees (RBFs).

(1) Access-based fee (ABF) methodology allows the state to:

(A) reimburse for procedure codes not covered by Medicare;

(B) account for inadequate reimbursement rates for particularly difficult procedures;

(C) encourage participation in the Medicaid program by physicians and other practitioners; and

(D) set reimbursement to allow eligible Medicaid population to receive adequate health care services in an appropriate setting.

(2) An RBF is calculated using the following formula: $RBF = (total\ RVU * CF)$, where RBF = Resource-Based Fee, total RVU = the sum of the three Relative Value Units that comprise the cost of providing individual Medicaid services, and CF = Conversion Factor.

(A) Except as otherwise specified, HHSC bases the RVUs that are employed in the Texas Medicaid reimbursement methodology upon the RVUs of the individual services as specified in the Medicare Fee Schedule. HHSC reviews any changes to, or revisions of, the various Medicare RVUs and, if applicable, adopts the changes as part of the reimbursement methodology within available funding.

(B) HHSC may develop and apply multiple conversion factors for various classes of service, such as obstetrics, pediatrics, general surgeries, and/or primary care services.

(C) If funding is available and adjustments are made to the conversion factor(s), the adjustments may be based upon inflation, access, or both.

(i) To account for general inflation, HHSC adjusts the conversion factor by the forecasted rate of change of a specific inflation factor appropriate to physician or other professional services, the Personal Consumption Expenditures (PCE) chain-type price index, or some percentage thereof. To inflate the conversion factor for the prospective period, HHSC uses the lowest feasible inflation factor forecast that is consistent with the forecasts of nationally recognized sources available to HHSC at the time of preparation of the conversion factor(s).

(ii) Adjustments to the conversion factor may also be made to ensure adequacy of access as described in paragraph (1) of this subsection.

(e) Reimbursement for physician-administered drugs, vaccines, and biologicals. In determining the reimbursement methodology for physician-administered drugs, vaccines, and biologicals, HHSC may consider information such as costs, utilization, data sufficiency, and public input. Reimbursement for physician-administered drugs, vaccines, and biologicals are based on the lesser of the billed amount, a percentage of the Medicare rate, or one of the following methodologies:

(1) If the drug or biological is considered a new drug or biological (that is, approved for marketing by the Food and Drug Administration within 12 months of implementation as a benefit of Texas Medicaid), it may be reimbursed at an amount equal to 89.5 percent of average wholesale price (AWP).

(2) If the drug or biological does not meet the definition of a new drug or biological, it may be reimbursed at an amount equal to 85 percent of AWP.

(3) Vaccines may be reimbursed at an amount equal to 89.5 percent of AWP.

(4) Infusion drugs furnished through an item of implanted Durable Medical Equipment may be reimbursed at an amount equal to 89.5 percent of AWP.

(5) Drugs, other than vaccines and infusion drugs, may be reimbursed at an amount equal to 106 percent of the average sales price (ASP).

(6) HHSC may use other data sources to determine Medicaid fees for physician-administered drugs, vaccines, and biologicals when HHSC determines that the above methodologies are unreasonable or insufficient.

(f) Reimbursement for services provided under the supervision of a licensed psychologist. Reimbursement for services provided under the supervision of a licensed psychologist by a licensed psychological associate (LPA) or a provisionally licensed psychologist (PLP) is reimbursed to the licensed psychologist at 70 percent of the fee paid to the licensed psychologist for the same service.

(g) Reimbursement for certain other providers. The descriptions for reimbursement of certain other providers are described in sections of this chapter.

(1) Reimbursement for physician assistants is described in §355.8093 of this title (relating to Physician Assistants).

(2) Reimbursement for nurse practitioners and clinical nurse specialists is described in §355.8281 of this title (relating to Reimbursement Methodology).

(3) Reimbursement for services provided under Early and Periodic Screening, Diagnosis and Treatment (EPSDT) is described in §355.8441 of this title (relating to Reimbursement Methodologies for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services).

(4) Reimbursement for Licensed Professional Counselors, Licensed Master Social Worker-Advanced Clinical Practitioners, and Licensed Marriage and Family Therapists is described in §355.8091 of this title (relating to Reimbursement to Licensed Professional Counselors, Licensed Master Social Worker-Advanced Clinical Practitioners, and Licensed Marriage and Family Therapists).

(h) Temporary enhanced reimbursement for certain specialists. Notwithstanding any contrary provisions, a physician specializing in family medicine, general internal medicine, or pediatric medicine, who meets the self-attestation criteria, will receive enhanced payments for certain evaluation and management services and vaccine administration services performed from January 1, 2013, through December 31, 2014, in compliance with federal legislation enacted by the Patient Protection and Affordable Care Act.

(i) When determining payment rates for providers reimbursed at a percentage of the rate paid to a physician (M.D. or D.O.) for the evaluation and management services and vaccine administration services impacted by subsection (e) of this section, the base rate to which the percentage is applied is the applicable rate in effect on December 31, 2012. Provider types with rates governed by this subsection include physician assistants, certified nurse midwives, nurse practitioners, and clinical nurse specialists, as outlined in §§355.8093, 355.8161, and 355.8281 of this title (relating to Physician Assistants; Reimbursement Methodology for Midwife Services; and Reimbursement Methodology). These provider types are eligible for the applicable percentage of the enhanced payment described in subsection (h) of this section when billing under the direct supervision of an eligible provider as specified in subsection (h) of this section.

[Reimbursement for physicians and other practitioners.]

[(1) Introduction. This section describes the Texas Medicaid reimbursement methodology (TMRM) that the Health and Human Services Commission (HHSC) uses to calculate payment for covered services provided by physicians and other practitioners. The TMRM facilitates a prospective payment system that is based on HHSC's determination of the adequacy of access to care.]

[(A) There is no geographical or specialty reimbursement differential for individual services.]

[(B) HHSC reviews the fees for individual services at least every two years based upon either:]

[(i) historical payments, with adjustments, to ensure adequate access to appropriate health care services; or]

[(ii) actual resources required by an economically efficient provider to provide each individual service.]

[(C) The fees for individual services and adjustments to the fees must be made within available funding.]

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

[(A) Access-based reimbursement fees (ABRF)—Fees for individual services based upon historical payments adjusted, where HHSC deems necessary, to account for deficiencies relating to the adequacy of access to health care services as defined in subparagraph (B) of this paragraph.]

[(B) Adequacy of access—Measures of adequacy of access to health care services include the following determinations:]

[(i) adequate participation in the Medicaid program by physicians and other practitioners; and]

[(ii) the ability of the eligible Medicaid population to receive adequate health care services in an appropriate setting.]

[(C) Conversion factor—The dollar amount by which the sum of the three cost component relative value units (RVUs) is multiplied to obtain a reimbursement fee for each individual service. The initial value of the conversion factor is \$26.873 for fiscal years 1992 and 1993. HHSC reviews the conversion factor at the beginning of each state fiscal year biennium, with any adjustments made within available funding and based on the adjustments described in subparagraph (D) of this paragraph or such other percentage approved by HHSC. HHSC may develop and apply multiple conversion factors for various classes of service, such as obstetrics, pediatrics, general surgeries, and/or primary care services.]

[(D) Conversion factor adjustments—If funding is available and adjustments are made to the conversion factor(s), the adjustments may include inflation and/or access-based adjustments.]

[(i) Inflation adjustment—To account for general inflation, HHSC adjusts the conversion factor by the forecasted rate of change of a specific inflation factor appropriate to physician or other professional services covered by the TMRM, the Personal Consumption Expenditures (PCE) chain-type price index, or some percentage thereof. To inflate the conversion factor for the prospective period, HHSC uses the lowest feasible inflation factor forecast that is consistent with the forecasts of nationally recognized sources available to HHSC at the time of preparation of the conversion factor(s).]

[(ii) Access-based adjustment—Adjustments to the conversion factor may also be made to ensure adequacy of access as defined in subparagraph (B) of this paragraph.]

[(E) HHSC—The Health and Human Services Commission or its designee.]

[(F) Physician-administered drugs or biologicals—]

[(i) HHSC reimburses fees for physician-administered drugs or biologicals based on one of the following:]

[(i) Equal to 89.5 percent of average wholesale price (AWP) if the drug or biological is considered a new drug or biological (that is, approved for marketing by the Food and Drug Administration within 12 months of implementation as a benefit of Texas Medicaid); or]

[(ii) Equal to 85 percent of AWP if the drug or biological does not meet the definition of a new drug or biological.]

[(iii) Fees for biologicals and infusion drugs furnished through an item of implanted durable medical equipment (DME) equal to 89.5 percent of AWP.]

[(iii) Fees for physician-administered drugs other than biologicals and infusion drugs furnished through an item of implanted DME equal to 106 percent of the average sales price (ASP).]

[(iv) HHSC may use other data sources to determine Medicaid fees for drugs or biologicals when HHSC determines that AWP or ASP calculations are unreasonable or insufficient.]

[(G) Relative value units (RVUs)—The relative value assigned to each of the three individual components that comprise the cost of providing individual Medicaid services. The three cost components of each reimbursement fee are intended to reflect the work, overhead, and professional liability expense required to provide each individual service. Except as otherwise specified, HHSC bases the RVUs that are employed in the TMRM upon the RVUs of the individual services as specified in the Medicare Fee Schedule. HHSC reviews any changes to or revisions of the various Medicare RVUs and, if applicable, adopts adopt the changes as part of the TMRM, within available funding.]

[(H) Resource-based reimbursement fees (RBRF)—Fees for individual services based upon HHSC's determination of the resources that an economically efficient provider requires to provide individual services. An RBRF is defined mathematically using the following formula: $RBRF = (\text{total RVU} \times CF)$, where RBRF = Resource-Based Reimbursement Fee for Service; total RVU = Relative Value Unit, and CF = Conversion Factor.]

[(3) Calculating the payment amounts. The fee schedule that results from the TMRM must be composed of two separate components:]

[(A) the access-based reimbursement fees; and]

[(B) the resource-based reimbursement fees. HHSC multiplies the RVU by the conversion factor to produce a reimbursement fee for each individual service.]

[(4) Temporary enhanced reimbursement for certain specialists. Notwithstanding any contrary provisions, a physician specializing in family medicine, general internal medicine, or pediatric medicine and who meets the self-attestation criteria will receive enhanced payments for certain evaluation and management services and vaccine administration services performed from January 1, 2013, through December 31, 2014, in compliance with federal legislation enacted by the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010.]

[(5) Temporary enhanced reimbursement base rate and eligible provider types. When determining payment rates for providers re-

imbursed at a percentage of the rate paid to a physician (M.D. or D.O.) for the evaluation and management services and vaccine administration services impacted by paragraph (4) of this section; the base rate to which the percentage is applied is the applicable rate in effect on December 31, 2012. Provider types with rates governed by this paragraph include physician assistants, certified nurse midwives, nurse practitioners, and clinical nurse specialists, as outlined in §§355.8093, 355.8161, and 355.8281 of this chapter (relating to Physician Assistants; Reimbursement Methodology for Midwife Services; and Reimbursement Methodology). These provider types are eligible for the applicable percentage of the enhanced payment described in paragraph (4) of this section when billing under the direct supervision of a provider who is eligible to receive enhanced payments under paragraph (4) of this section.]

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 31, 2014.

TRD-201401430

Jack Stick

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 424-6900



DIVISION 11. TEXAS HEALTHCARE TRANSFORMATION AND QUALITY IMPROVEMENT PROGRAM REIMBURSEMENT

1 TAC §§355.8201 - 355.8203

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.8201, concerning Waiver Payments to Hospitals, §355.8202, concerning Waiver Payments for Physician Services, and §355.8203, concerning Waiver Payments to Other Performers.

Background and Justification

In 2011, the Centers for Medicare and Medicaid Services (CMS) approved the Texas Healthcare Transformation and Quality Improvement Program §1115(a) Medicaid demonstration waiver. Sections 355.8201 and 355.8202 were adopted effective June 13, 2013, while §355.8203 was adopted effective August 16, 2013. Payments under these sections are made subject to approval by CMS of relevant protocols that are described in the waiver.

HHSC proposes to amend these rules as follows.

Definition of a Clinic

Current rule language in §355.8201(g)(3)(A) describes other eligible costs that may be included in the calculation of a hospital's annual maximum uncompensated-care payment amount as including uncompensated-care related to clinic services provided to Medicaid-eligible and uninsured patients but does not define the term "clinic". HHSC proposes to amend §355.8201 to define a "clinic" as "an outpatient health care facility, other than an Ambulatory Surgical Center or Hospital Ambulatory Surgical Center, that is owned and operated by a hospital but has a nine-digit Texas Provider Identifier (TPI) that is different from the hospital's nine-digit TPI."

Definition of Mid-Level Professional

CMS has approved the inclusion of uncompensated costs associated with mid-level professionals on the physician group practice UC application beginning with demonstration year two (DY2). Current rule language does not define the term "mid-level professional." HHSC proposes to amend §355.8201 and §355.8202 to define mid-level professionals as Certified Registered Nurse Anesthetists, Nurse Practitioners, Physician Assistants, Dentists, Certified Nurse Midwives, Clinical Social Workers, Clinical Psychologists, and Optometrists.

Deadlines for Submission of Certifications and Affiliation Agreements

Language at §355.8201(c)(1)(B)(iii) and §355.8202(c)(3) describes deadlines for submission of certifications and affiliation agreements that must be met in order for a provider to receive a UC payment. HHSC proposes to amend this language to indicate that required certifications and affiliation agreements are due to the HHSC Rate Analysis Department (RAD) by the earlier of the date the provider submits their UC application or thirty days before the projected deadline for completing the IGT for the first payment under the certification and affiliation agreements.

Amendments to Allow Hospitals to Request Adjustments to Increase their Interim HSLs

HHSC proposes to amend §355.8201(g) to allow hospitals to request adjustments to increase their interim HSLs for purposes of calculating UC payments and to amend §355.8201(i) to require an additional reconciliation for hospitals submitting such requests.

On February 8, 2013, HHSC had published a proposed rule amendment to eliminate the ability of hospitals to request such increases. No comments were received from stakeholders regarding the proposal during the 30-day comment period and the amendment was adopted effective June 13, 2013. HHSC distributed DY2 UC applications to hospitals for completion in late January 2014. Instructions for the application indicated that hospitals could not request any changes to increase their HSLs and the worksheet cells for capturing changes to the HSL from the data year to the demonstration year were locked so that they could only accept negative numbers (i.e., reductions to the HSL). Upon receipt of the DY2 UC tool, stakeholders indicated to HHSC that they had not understood that the rule amendment would prevent them from submitting increases to their interim HSLs as part of their UC applications and requested that the amendment be repealed. Stakeholders argued that allowing for such adjustments would have the beneficial effect of making UC payments more closely track actual UC costs for the demonstration year since, without the ability to make such adjustments, UC payments would be calculated using cost and revenue data from a data period two years prior to the demonstration year.

HHSC had proposed the February 8, 2013, amendment out of concern that it would be unable to verify the accuracy of requests to increase a hospital's HSL without significantly delaying UC payments to all UC hospitals and that existing reconciliation requirements did not provide adequate protections against manipulation of UC payments by submission of inaccurate requests for adjustment.

Existing reconciliation requirements do not include a true redistribution of UC funds based on audited UC costs but rather are limited to recoupment of payments in excess of actual costs.

Since available UC pool funds are significantly below total UC costs for Texas Medicaid-enrolled hospitals, few hospitals will ever be paid in excess of their actual costs. As a result, under existing reconciliation rules, a hospital could increase its UC payment through the submission of adjustments to increase its interim HSL and be allowed to retain its increased UC payment even if those adjustments were later shown to be inaccurate, as long as its total payments remained below its actual costs.

The proposed amendment to §355.8201(g) will address stakeholder requests by allowing hospitals to submit adjustments to increase their interim HSLs for purposes of calculating UC payments while the proposed amendment to §355.8201(i) will address HHSC concerns about the adequacy of the reconciliation process to protect against manipulation of UC payments by submission of inaccurate requests for such adjustments. HHSC proposes to amend §355.8201(i) by adding paragraph (4) which requires an additional reconciliation for hospitals that submitted requests to increase their interim HSLs. This additional reconciliation will compare the hospital's final HSL based on actual costs and revenues for the demonstration year to the hospital's adjusted interim HSL for the demonstration year. If the final HSL is less than the adjusted interim HSL, HHSC will recalculate the hospital's UC payment for the demonstration year substituting the final HSL for the adjusted interim HSL with no other changes to the data used in the original calculation of the hospital's UC payment and will recoup any payment received by the hospital that is greater than the recalculated UC payment. Recouped funds may be redistributed to other hospitals that received payments less than their actual costs.

Calculation of Advance UC payments when a Partial-Year UC Application was used to determine the Preceding Demonstration Year's UC Payment

Sections 355.8201 and 355.8202 allow for HHSC to make advance UC payments in demonstration years in which UC payments will be delayed pending data submission or for other reasons. The amount of each provider's advance payment is calculated as a percentage of the annual maximum UC payment amount calculated by HHSC for the preceding demonstration year. For providers that were newly enrolled in Medicaid during the preceding demonstration year, the annual maximum UC payment amount for that year was calculated using partial year data. HHSC proposes to amend §355.8201 and §355.8202 to indicate that if a partial year UC application was used to determine the preceding demonstration year's payments, data from that application may be annualized for use in computation of an advance payment amount.

Clarify How a Governmental Entity Must Submit its Intergovernmental Transfers in Certain Situations

Sections 355.8201 and 355.8202 include provisions for determining UC payments when a governmental entity transfers less than the maximum IGT amount required to fund UC payments for its owned and affiliated providers. Governmental entities are allowed to notify HHSC of the share of their IGT to be allocated to each provider it owns or is affiliated with. HHSC proposes to amend these sections to require that, in such situations, the governmental entity also provide the IGT for each entity it owns or affiliates with in a separate IGT transaction.

Compilation of References to DSRIP in a Single Rule Section

Current language throughout both §355.8201 and §355.8202 refers to DSRIP. HHSC proposes to compile all references to

DSRIP in §355.8203. As a result, such references are proposed to be deleted from §355.8201 and §355.8202.

Clarify the Payment Methodology for DSRIP

Section 355.8203(h) is updated to clarify DSRIP payment methodology. There is no IGT preference for types of DSRIP payments made to performers. In other words, an IGT entity has an obligation for a set amount of funds comprised of regular DSRIP payments, carry-forward payments, previous DSRIP shortfall, and other forms of DSRIP payment. HHSC will apply the IGT to all of these obligations equally without giving preference to any one type. A performer continues to have the authority to change affiliated IGT entities for any type of DSRIP payment but must inform HHSC of a change no later than the last day of a reporting period.

In addition, the proposed amendments eliminate references to obsolete transition payments where appropriate, clarify eligibility requirements, and make other changes to conform the rule to CMS approved waiver protocols.

Section-by-Section Summary

Proposed §355.8201 Waiver Payments to Hospitals

The proposal revises the title of §355.8201 to specify that the rule relates to reimbursement for uncompensated-care hospital services.

Proposed amendment to §355.8201(b)(1) replaces the term "private hospitals" with the term "privately-operated hospitals."

Proposed §355.8201(b)(5) adds a definition for the term clinic.

Proposed §355.8201(b)(14) adds a definition for mid-level professional.

Proposed §355.8201(b)(19) adds a definition for uncompensated-care application.

Proposed amendment to §355.8201(c)(1)(B)(iii) clarifies submission requirements for affiliation agreements and certifications.

Proposed amendment to §355.8201(c)(2)(A) clarifies that for a hospital to be eligible to receive UC payments, it must submit a UC application for the demonstration year in question.

Proposed amendment to §355.8201(c)(2)(D) clarifies that for a hospital to be eligible to receive UC payments, it must have submitted, and be eligible to receive payment for, a Medicaid fee-for-service or managed-care inpatient or outpatient claim for payment during the demonstration year. Current language omits the terms "fee-for-service" and "managed care."

The proposed amendments to §355.8201(c)(3), §355.8201(e)(2), §355.8201(f)(1), §355.8201(h), and §355.8201(i)(2)(B)(ii) delete references and language pertaining to DSRIP.

Proposed amendment to §355.8201(g)(1)(B)(ii) indicates that HHSC will determine a new hospital's data period.

Proposed §355.8201(g)(4) is modified to delete clause (iii) and to add subparagraphs (C) and (D). These changes will allow hospitals to request adjustments to increase their interim HSLs, require that hospitals that submit such requests be subject to an additional reconciliation as described in new §355.8201(i)(4), and indicate that no adjustments to the interim HSL will be considered for purposes of Medicaid disproportionate share hospital payment calculations.

The proposed amendments to §355.8201(g)(5)(B)(i), §355.8201(g)(5)(D)(iii)(l)(-a-), §355.8201(g)(7)(A)(ii), and §355.8201(g)(7)(B)(ii) delete references and language related to transition payments.

Proposed amendment to §355.8201(g)(7)(D) indicates that a hospital that did not submit an acceptable uncompensated-care application for the preceding demonstration year is not eligible for an advance payment.

Proposed new §355.8201(g)(7)(E) specifies that, if a partial year uncompensated-care application was used to determine the preceding demonstration year's payments, data from that application may be annualized for use in computation of an advance payment amount.

Proposed renumbered §355.8201(h)(2)(B)(i) adds a requirement that, when a governmental entity transfers less than the maximum IGT amount required to fund UC payments for its owned and affiliated providers and notifies HHSC of the share of its IGT to be allocated to each provider it owns or is affiliated with, the governmental entity must also provide the IGT for each entity it owns or affiliates with in a separate IGT transaction.

Proposed new §355.8201(i)(4) describes the additional reconciliation process to be applied to hospitals that requested adjustments to increase their interim HSLs under amended §355.8201(g)(4).

The proposed rule includes other technical corrections, numbering revisions, and non-substantive changes to make the rule more understandable.

Proposed §355.8202 Waiver Payments for Physician Services

The proposal revises the title of §355.8202 to specify that the rule relates to waiver payments to physician group practices for uncompensated-care.

Proposed §355.8202(b)(8) adds a definition for mid-level professional.

Proposed §355.8202(b)(13) adds a definition for uncompensated-care physician application.

Proposed §355.8202(c)(3) is modified to clarify submission requirements for certifications.

Proposed new §355.8202(c)(4) indicates that to be eligible to receive a UC payment an acceptable UC application for the correct demonstration year must be submitted.

Proposed renumbered §355.8202(c)(5) clarifies that for a physician group practice to be eligible to receive UC payments, it must have submitted and be eligible to receive payment for, a Medicaid fee-for-service or managed-care claim for payment during the demonstration year. Current language omits the terms "fee-for-service" and "managed care."

The proposed amendments to §355.8202(c)(5), §355.8202(e)(2), §355.8202(h), and §355.8202(i)(2)(B)(ii) delete references and language related to DSRIP.

Proposed §355.8202(g) is modified throughout to standardize language pertaining to the uncompensated-care physician application.

Proposed amendment to §355.8202(g)(4)(B)(i) and §355.8202(g)(5)(A)(ii) and (B)(ii) delete references and language related to transition payments.

Proposed new §355.8202(g)(5)(E) specifies that, if a partial year UC application was used to determine the preceding demonstration year's payments, data from that application may be annualized for use in computation of an advance payment amount.

Proposed renumbered §355.8202(h)(2)(B)(i) adds a requirement that, when a governmental entity transfers less than the maximum IGT amount required to fund UC payments for its owned and affiliated providers and notifies HHSC of the share of its IGT to be allocated to each provider it owns or is affiliated with, the governmental entity must also provide the IGT for each entity it owns or affiliates with in a separate IGT transaction.

The proposed rule includes other technical corrections, numbering revisions, and non-substantive changes to make the rule more understandable.

Proposed §355.8203 Waiver Payments to Other Performers

The proposal revises the title of §355.8203 to specify the rule is related to delivery system reform incentive payments.

Proposed amendment to §355.8203(b)(7) removes language made extraneous by modifications to §355.8201 and §355.8202.

Proposed amendment to §355.8203(c) elaborates on DSRIP eligibility requirements, including affiliation documentation submission requirements.

Proposed amendment to §355.8203(e) clarifies the criteria required to receive DSRIP payments as well as determining payment frequency.

Proposed amendment to §355.8203(h)(2) clarifies the methodology to be used when determining payment amounts and limits for DSRIP including how payment amounts are determined when a governmental entity does not transfer the required inter-governmental transfer amount for each performing provider that it owns or is affiliated with.

Proposed amendment to §355.8203(h)(3) clarifies that the final payment opportunity extends to no later than the demonstration year following the demonstration year in which a milestone is listed in the approved RHP plan.

The proposed rule includes other technical corrections, numbering revisions, and non-substantive changes to make the rule more understandable.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the proposed amendments are in effect, there are no anticipated fiscal implications for state or local governments. There are no anticipated economic costs to persons who are required to comply with the proposed amendments. There is no anticipated adverse impact on local employment or local economies.

Small Business and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no adverse impact on small businesses or micro businesses to comply with the proposal. The proposal has the potential to change payments only for hospitals participating in waiver payments. None of these hospitals is classified as small businesses or micro-businesses.

Public Benefit

Pam McDonald, Director of Rate Analysis, has determined that for each of the first five years the amended rules are in effect,

the anticipated public benefit expected as a result of enforcing the rules will be the transformation of the current delivery of care and payment systems in Texas to one that is more coordinated, efficient, and delivers a higher quality of care. Further, the public will benefit from a plan for investments in system transformation that is driven by the needs of local hospitals, communities, and populations. Finally, hospital UC payments will more closely track actual UC costs for the demonstration year.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Hearing

The Medical Care Advisory Committee (MCAC) meeting on May 8, 2014, will function as a public hearing to receive public comment on this proposed amendment. The MCAC meeting will be held in the John H. Winters Building Public Hearing Room at 701 West 51st Street, Austin, Texas. Entry is through Security at the main entrance of the building, which faces 51st Street. Persons requiring American with Disabilities Act (ADA) accommodation or auxiliary aids or services should contact the External Relations Division by calling (512) 487-3300 at least 72 hours prior to the hearing so appropriate arrangements can be made.

Public Comment

Written comments on the proposal may be submitted to Pam McDonald in the Rate Analysis Department, Texas Health and Human Services Commission, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200, by fax to (512) 491-1436, or by e-mail to pam.mcdonald@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The amendments are proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The amendments affect Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§355.8201. Waiver Payments to Hospitals for Uncompensated Care.

(a) Introduction. Texas Healthcare Transformation and Quality Improvement Program §1115(a) Medicaid demonstration waiver payments are available under this section for eligible hospitals described in subsection (c) of this section. Waiver payments to hospitals must be in compliance with the Centers for Medicare and Medicaid Services approved waiver Program Funding and Mechanics Protocol, HHSC waiver instructions and this section.

(b) Definitions.

(1) Affiliation agreement--An agreement, entered into between one or more privately-operated [private] hospitals and a governmental entity that does not conflict with federal or state law. HHSC does not prescribe the form of the agreement.

(2) Aggregate limit--The amount of funds approved by the Centers for Medicare and Medicaid Services for uncompensated-care payments for the demonstration year.

(3) Anchor--The governmental entity identified by HHSC as having primary administrative responsibilities on behalf of a Regional Healthcare Partnership (RHP).

(4) Centers for Medicare and Medicaid Services (CMS)--The federal agency within the United States Department of Health and Human Services responsible for overseeing and directing Medicare and Medicaid, or its successor.

(5) Clinic--An outpatient health care facility, other than an Ambulatory Surgical Center or Hospital Ambulatory Surgical Center, that is owned and operated by a hospital but has a nine-digit Texas Provider Identifier (TPI) that is different from the hospital's nine-digit TPI.

(6) [(5)] Data year--A 12-month period that is described in §355.8066 of this title (relating to [the] Hospital-Specific Limit Methodology) and from which HHSC will compile cost and payment data to determine uncompensated-care payment amounts. This period corresponds to the Disproportionate Share Hospital data year.

(7) [(6)] Delivery System Reform Incentive Payments (DSRIP)--Payments related to the development or implementation of a program of activity that supports a hospital's efforts to enhance access to health care, the quality of care, and the health of patients and families it serves. These payments are not considered patient-care revenue and are not offset against the hospital's costs when calculating the hospital-specific limit as described in §355.8066 of this title.

(8) [(7)] Demonstration year--The 12-month period beginning October 1 for which the payments calculated under this section are made. This period corresponds to the Disproportionate Share Hospital program year.

(9) [(8)] Disproportionate Share Hospital (DSH)--A hospital participating in the Texas Medicaid program that serves a disproportionate share of low-income patients and is eligible for additional reimbursement from the DSH fund.

(10) [(9)] Governmental entity--A state agency or a political subdivision of the state. A governmental entity includes a hospital authority, hospital district, city, county, or state entity.

(11) [(10)] HHSC--The Texas Health and Human Services Commission or its designee.

(12) [(11)] Institution for mental diseases (IMD)--A hospital that is primarily engaged in providing psychiatric diagnosis, treatment, or care of individuals with mental illness.

(13) [(12)] Intergovernmental transfer (IGT)--A transfer of public funds from a governmental entity to HHSC.

(14) Mid-Level Professional--Medical practitioners which include only these professions: Certified Registered Nurse Anesthetists, Nurse Practitioners, Physician Assistants, Dentists, Certified Nurse Midwives, Clinical Social Workers, Clinical Psychologists, and Optometrists.

(15) [(13)] Public funds--Funds derived from taxes, assessments, levies, investments, and other public revenues within the sole and unrestricted control of a governmental entity. Public funds do not include gifts, grants, trusts, or donations, the use of which is conditioned on supplying a benefit solely to the donor or grantor of the funds.

(16) [(14)] Regional Healthcare Partnership (RHP)--A collaboration of interested participants that work collectively to develop and submit to the state a regional plan for health care delivery system reform. Regional Healthcare Partnerships will support coordinated, efficient delivery of quality care and a plan for investments in system transformation that is driven by the needs of local hospitals, communities, and populations.

(17) [(15)] RHP plan--A multi-year plan within which participants propose their portion of waiver funding and DSRIP projects.

(18) [(16)] Transition payment--Payments available only during the first demonstration year to hospitals that previously participated in a supplemental payment program under the Texas Medicaid State Plan. For a hospital participating in the 2012 DSH program, the maximum amount a hospital may receive in transition payments is the lesser of:

(A) the hospital's 2012 DSH room; or

(B) the amount the hospital received in supplemental payments for claims adjudicated between October 1, 2010, and September 30, 2011.

(19) Uncompensated-care application--A form prescribed by HHSC to identify uncompensated costs for Medicaid-enrolled providers.

(20) [(17)] Uncompensated-care payments--Payments intended to defray the uncompensated costs of services that meet the definition of "medical assistance" contained in §1905(a) of the Social Security Act that are provided by the hospital to Medicaid eligible or uninsured individuals.

(21) [(18)] Uninsured patient--An individual who has no health insurance or other source of third-party coverage for services, as defined by CMS.

(22) [(19)] Waiver--The Texas Healthcare Transformation and Quality Improvement Program Medicaid demonstration waiver under §1115 of the Social Security Act.

(c) Eligibility. A hospital that meets the requirements described in this subsection may receive payments under this section. A hospital must notify HHSC Rate Analysis in writing within 30 days of changes in ownership, operation, or affiliation that may affect the hospital's continued eligibility for payments under this section.

(1) Generally. To be eligible for any payment under this section:

(A) a hospital must have a source of public funding for the non-federal share of waiver payments; and

(B) if it is a hospital not operated by a governmental entity, it must have filed with HHSC an affiliation agreement and the documents described in clauses (i) and (ii) of this subparagraph.

(i) The hospital must certify on a form prescribed by HHSC:

(I) that it is a privately-operated hospital;

(II) that no part of any payment to the hospital under this section will be returned or reimbursed to a governmental entity with which the hospital affiliates; and

(III) that no part of any payment under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the hospital's receipt of the supplemental funds.

(ii) The governmental entity that is party to the affiliation agreement must certify on a form prescribed by HHSC:

(I) that the governmental entity has not received and has no agreement to receive any portion of the payments made to any hospital that is party to the agreement;

(II) that the governmental entity has not entered into a contingent fee arrangement related to the governmental entity's participation in the waiver program;

(III) that the governmental entity adopted the conditions described in the certification form prescribed by or otherwise approved by HHSC pursuant to a vote of the governmental entity's governing body in a public meeting preceded by public notice published in accordance with the governmental entity's usual and customary practices or the Texas Open Meetings Act, as applicable; and

(IV) that all affiliation agreements, consulting agreements, or legal services agreements executed by the governmental entity related to its participation in this waiver payment program are available for public inspection upon request.

(iii) Submission requirements

(I) Initial submissions. The parties must initially submit the affiliation agreements and certifications described in this subsection to the HHSC Rate Analysis Department on the earlier of the following occurrences after the documents are executed:

~~[(a) The date the RHP Plan is submitted for the RHP in which the hospital is participating;]~~

~~[(b) For new affiliations created after the RHP Plan is submitted, the date the RHP Plan modification is submitted, if required; or]~~

~~(-a) [(c)] The date the hospital submits the uncompensated-care application that is further described in paragraph (2) of this subsection; or[-]~~

~~(-b) Thirty days before the projected deadline for completing the IGT for the first payment under the affiliation agreement. The projected deadline for completing the IGT is posted on HHSC Rate Analysis' website for each payment under this section.~~

(II) Subsequent submissions. The parties must submit revised documentation as follows:

(-a) When the nature of the affiliation changes or parties to the agreement are added or removed, the parties must submit the revised affiliation agreement and related hospital and governmental entity certifications.

(-b) When there are changes in ownership, operation, or provider identifiers, the hospital must submit a revised hospital certification.

(-c) The parties must submit the revised documentation thirty days before the projected deadline for completing the IGT for the first payment under the revised affiliation agreement. The projected deadline for completing the IGT is posted on HHSC Rate

Analysis' website for each payment under this section [before HHSC calculates the next payment to the hospital under this section].

(III) A hospital that submits new or revised documentation under subclause (I) or (II) of this clause must notify the Anchor of the RHP in which the hospital participates.

(IV) [(III)] The certification forms must not be modified except for those changes approved by HHSC prior to submission.

(-a-) Within 10 business days of HHSC Rate Analysis receiving a request for approval of proposed modifications, HHSC will approve, reject, or suggest changes to the proposed certification forms.

(-b-) A request for HHSC approval of proposed modifications to the certification forms will not delay the submission deadlines established in this clause.

(V) [(IV)] A hospital that fails to submit the required documentation in compliance with this subparagraph will not receive a payment under this section.

(2) Uncompensated-care payments. For a hospital to be eligible to receive uncompensated-care payments, in addition to the requirements in paragraph (1) of this subsection, the hospital must:

(A) submit to HHSC an uncompensated-care application for the demonstration year, as is more fully described in subsection (g)(1) of this section, by the deadline specified by HHSC;

(B) submit to HHSC documentation of:

(i) its participation in an RHP; or

(ii) approval from CMS of its eligibility for uncompensated-care payments without participation in an RHP;

(C) be actively enrolled as a Medicaid provider in the State of Texas at the beginning of the demonstration year; and

(D) have submitted, and be eligible to receive payment for, a Medicaid fee-for-service or managed-care inpatient or outpatient claim for payment during the demonstration year.

~~[(3) DSRIP payments. For a hospital to be eligible to receive DSRIP payments, in addition to the requirements in paragraph (1) of this subsection, the hospital:]~~

~~[(A) must submit to HHSC documentation of completion of at least one metric or outcome measure identified in the approved RHP plan; and]~~

~~[(B) must be enrolled as a Medicaid provider in the State of Texas.]~~

(d) Source of funding. The non-federal share of funding for payments under this section is limited to timely receipt by HHSC of public funds from a governmental entity.

(e) Payment frequency. HHSC will distribute waiver payments as follows and on a schedule to be determined by HHSC:

(1) Uncompensated-care [Uncompensated care] payments will be distributed at least quarterly after the uncompensated-care application is processed.

~~[(2) DSRIP payments will be distributed at least annually, not to exceed two payments per provider per year.]~~

~~[(A) for payments attributable to the first demonstration year, upon HHSC review and approval of the RHP plan; and]~~

~~[(B) for payments attributable to subsequent demonstration years, upon achievement of RHP plan metrics or outcome measures as reviewed and approved by CMS and HHSC.]~~

~~(2) [(3)] The payment schedule or frequency may be modified as specified by CMS or HHSC.~~

(f) Funding limitations.

(1) Payments made under this section are limited by the maximum aggregate amount of funds approved by CMS for uncompensated-care [uncompensated care and DSRIP] payments for each year that the waiver is in effect. If payments for uncompensated-care [uncompensated care] attributable to a demonstration year are expected to exceed the aggregate amount of funds approved by CMS for that demonstration year, HHSC will reduce payments as described in subsection (g)(5) of this section.

(2) Payments made under this section are limited by the availability of funds identified in subsection (d) of this section. If sufficient funds are not available for all payments for which a hospital is eligible, HHSC will reduce payments as described in subsection ~~(h)(2)~~ [(i)(2)] of this section.

(g) Uncompensated-care payment amount.

(1) Application.

(A) Cost and payment data reported by the hospital in the uncompensated-care application is used to:

(i) calculate the annual maximum uncompensated-care payment amount for the applicable demonstration year, as described in paragraph (2) of this subsection; and

(ii) reconcile the actual uncompensated-care costs reported by the hospital for the data year with uncompensated-care waiver payments, if any, made to the hospital for the same period. The reconciliation process is more fully described in subsection (i) [(j)] of this section.

(B) Unless otherwise instructed in the application, the hospital must base the cost and payment data reported in the application on its applicable as-filed CMS 2552 Cost Report(s) [Report] For Electronic Filing Of Hospitals [or reports] corresponding to the data year and must comply with the application instructions or other guidance issued by HHSC.

(i) When the application requests data or information outside of the as-filed cost report(s) [report], the hospital must provide all requested documentation to support the reported data or information.

(ii) For a new hospital, the cost and payment data period may differ from the data year, resulting in the eligible uncompensated costs based only on services provided after the hospital's Medicaid enrollment date. HHSC will determine the data period in such situations.

(C) If a hospital withdraws from participation in an RHP, the hospital must submit an uncompensated-care application reporting its actual costs and payments for any period during which the hospital received uncompensated-care payments. The application will be used for the purpose described in paragraph (1)(A)(ii) of this subsection. If a hospital fails to submit the application reporting its actual costs, HHSC will recoup the full amount of uncompensated-care payments to the hospital for the period at issue.

(2) Calculation. A hospital's annual maximum uncompensated-care payment amount is the sum of the following components:

(A) The interim hospital specific limit, calculated as described in §355.8066 of this title, except that an IMD may not report cost and payment data in the uncompensated-care application for services provided during the data year to Medicaid-eligible and uninsured patients ages 21 through 64, less any payments to be made under the DSH program for the same demonstration year, calculated as described in §355.8065 of this title (relating to Disproportionate Share Hospital [(DSH)] Reimbursement Methodology);

(B) Other eligible costs for the data year, as described in paragraph (3) of this subsection; and

(C) Cost and payment adjustments, if any, as described in paragraph (4) of this subsection.

(D) In no case can the sum of payments made to a hospital for a demonstration year for DSH and uncompensated-care payments, less the payments described in paragraph (3) of this subsection, exceed a hospital's specific limit as determined in §355.8066 of this title.

(3) Other eligible costs.

(A) In addition to cost and payment data that is used to calculate the hospital-specific limit, as described in §355.8066 of this title, a hospital may also claim reimbursement under this section for uncompensated-care [uncompensated care], as specified in the uncompensated-care application, that is related to the following services provided to Medicaid-eligible and uninsured patients:

(i) direct patient-care services of physicians and mid-level professionals;

(ii) pharmacy services; and

(iii) clinics.

(B) The payment under this section for the costs described in subparagraph (A) of this paragraph are not considered inpatient or outpatient Medicaid payments for the purpose of the DSH audit described in §355.8065 of this title.

(4) Adjustments. When submitting the uncompensated-care application, hospitals may request that cost and payment data from the data year be adjusted to reflect increases or decreases in costs resulting from changes in operations or circumstances.

(A) A hospital:

(i) may request that costs not reflected on the as-filed cost report, but which would be incurred for the demonstration year, be included when calculating payment amounts;

(ii) may request that costs reflected on the as-filed cost report, but which would not be incurred for the demonstration year, be excluded when calculating payment amounts. [; and]

~~(iii) may not request any changes to increase its interim hospital specific limit.~~

(B) Documentation supporting the request must accompany the application. HHSC will deny a request if it cannot verify that costs not reflected on the as-filed cost report will be incurred for the demonstration year.

(C) In addition to being subject to the reconciliation described in subsection (i)(1) of this section which applies to all UC payments for all hospitals, UC payments for hospitals that submitted a request as described in subparagraph (A)(i) of this paragraph that impacted the interim hospital-specific limit described in paragraph (2)(A) of this subsection will be subject to the reconciliation described in subsection (i)(2) of this section.

(D) Notwithstanding the availability of adjustments impacting the interim hospital-specific limit described in this paragraph, no adjustments to the interim hospital-specific limit will be considered for purposes of Medicaid DSH payment calculations described in §355.8065 of this title.

(5) Reduction to stay within aggregate limits. Prior to processing uncompensated-care payments for any payment period within a waiver demonstration year, HHSC will determine if such a payment would cause total uncompensated-care payments for the demonstration year to exceed the aggregate limit and will reduce the maximum uncompensated-care payment amounts providers are eligible to receive for that period as required to remain within the aggregate limit.

(A) Unless otherwise specified in this paragraph, calculations in this paragraph will include data points pertaining to the following provider types: hospitals, as described in this section; physician group practices, as described in §355.8202 of this title (relating to Waiver Payments to Physician Group Practices for Uncompensated-Care [for Physician Services]); eligible governmental ambulance providers, as described in §355.8600 of this title (relating to Reimbursement Methodology for Ambulance Services), and eligible publicly owned dental providers, as described in §355.8441 of this title (relating to Reimbursement Methodologies for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services). For ambulance and dental providers, estimated data points may be used if actual data is not available at the time calculations are performed.

(B) HHSC will calculate the following data points:

(i) For each provider, prior period payments to equal prior period uncompensated-care [and transition] payments for the demonstration year.

(ii) For each provider, a maximum uncompensated-care payment for the payment period to equal the sum of:

(I) the portion of the annual maximum uncompensated-care payment amount calculated for that provider (as described in this section and the sections referenced in subparagraph (A) of this paragraph) that is attributable to the payment period; and

(II) the difference, if any, between the portions of the annual maximum uncompensated-care payment amounts attributable to prior periods and the prior period payments calculated in clause (i) of this subparagraph.

(iii) The cumulative [Cumulative] maximum payment amount to equal the sum of prior period payments from clause (i) of this subparagraph and the maximum uncompensated-care payment for the payment period from clause (ii) of this subparagraph.

(iv) A statewide total maximum uncompensated-care payment for the demonstration year to equal the sum of all providers' annual maximum uncompensated-care payment amounts for the demonstration year.

(v) A statewide ratio calculated as the statewide aggregate limit divided by the statewide total maximum uncompensated-care payment amount for the demonstration year from clause (iii) of this subparagraph.

(C) If the cumulative maximum payment amount from subparagraph (B)(iii) of this paragraph is less than the aggregate limit, each provider is eligible to receive their maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph without any reduction to remain within the aggregate limit.

(D) If the cumulative maximum payment amount from subparagraph (B)(iii) of this paragraph is more than the aggregate limit,

HHSC will calculate a revised maximum uncompensated-care payment for the payment period for each provider as follows:

(i) HHSC will calculate a capped payment amount equal to the product of the provider's annual maximum uncompensated-care payment amount for the demonstration year and the statewide ratio calculated in subparagraph (B)(v) of this paragraph.

(ii) If the payment period is not the final payment period for the demonstration year, the revised maximum uncompensated-care payment for the payment period equals the lesser of:

(I) the maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph; or

(II) the difference between the capped payment amount from clause (i) of this subparagraph and the prior period payments from subparagraph (B)(i) of this paragraph.

(iii) If the payment period is the final payment period for the demonstration year:

(I) HHSC will calculate an IGT-supported maximum uncompensated-care payment for the payment period equal to the amount of the maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph that is supported by an IGT commitment.

(-a-) For hospitals and physician group practices, HHSC will obtain from each RHP anchor a current breakdown of IGT commitments from all governmental entities, including governmental entities outside of the RHP, that will be providing IGTs for uncompensated-care [or transition] payments for each hospital and physician group practice within the RHP that is eligible for such payments for the payment period.

(-b-) Ambulance and dental providers will be assumed to have commitments for 100 percent of the non-federal share of their payments. The non-federal share for ambulance providers is provided through certified public expenditures (CPEs); for ambulance providers, references to IGTs in this subsection should be read as references to CPEs.

(II) HHSC will calculate an IGT-supported maximum uncompensated-care payment for the demonstration year to equal the IGT-supported maximum uncompensated-care payment for the payment period from subclause (I) of this clause plus the provider's prior period payments from subparagraph (B)(i) of this paragraph.

(III) For providers with an IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause that is less than or equal to their capped payment amount from clause (i) of this subparagraph, the provider's revised maximum uncompensated-care payment for the payment period equals the IGT-supported maximum uncompensated-care payment amount for the payment period from subclause (I) of this clause. For these providers, the difference between their capped payment amount from clause (i) of this subparagraph and their IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause is their unfunded cap room.

(IV) HHSC will sum all unfunded cap room from subclause (III) of this clause to determine the statewide total unfunded cap room.

(V) For providers with an IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause that is greater than their capped payment amount from clause (i) of this subparagraph, the provider's re-

vised maximum uncompensated-care payment amount for the payment period is calculated as follows:

(-a-) For each provider, HHSC will calculate an overage amount to equal the difference between the IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause and their capped payment amount for the demonstration year from clause (i) of this subparagraph. Unfunded cap room from subclause (IV) of this clause will be distributed to these providers based on each provider's overage as a percentage of the statewide overage.

(-b-) For each provider, the provider's revised maximum uncompensated-care payment amount for the payment period is equal to the sum of its capped payment amount from clause (i) of this subparagraph and its portion of unfunded cap room from item (-a-) of this subclause less its prior period payments from subparagraph (B)(i) of this paragraph.

(E) Once reductions to ensure that uncompensated-care expenditures do not exceed the aggregate limit for the demonstration year are calculated, HHSC will not re-calculate the resulting payments for any provider for the demonstration year, including if the IGT commitments upon which the reduction calculations were based are different than actual IGT amounts.

(6) Prohibition on duplication of costs. Eligible uncompensated-care costs cannot be reported on multiple uncompensated-care applications, including uncompensated-care applications for other programs. Reporting on multiple uncompensated-care applications is duplication of costs.

(7) Advance payments.

(A) In a demonstration year in which uncompensated-care payments will be delayed pending data submission or for other reasons, HHSC may make advance payments to hospitals that meet the eligibility requirements described in subsection (c)(2) of this section and [;]

~~[(#)]~~ submitted an acceptable uncompensated-care application for the preceding demonstration year from which HHSC calculated an annual maximum uncompensated-care payment amount for that year. [; or]

~~[(ii)]~~ did not submit an acceptable uncompensated-care application for the preceding demonstration year but was eligible to receive transition payments for that year.]

(B) The amount of the advance payments will be a percentage, to be determined by HHSC, of [the following amounts:]

~~[(#)]~~ [for hospitals described in subparagraph (A)(i) of this paragraph,] the annual maximum uncompensated-care payment amount calculated by HHSC for the preceding demonstration year. [;]

~~[(ii)]~~ for hospitals described in subparagraph (A)(ii) of this paragraph, the amount of transition payments received by the hospital in the preceding demonstration year.]

(C) Advance payments are considered to be prior period payments as described in paragraph (5)(B)(i) of this subsection.

(D) A hospital that did not [was not eligible to receive a transition payment in the preceding demonstration year or] submit an acceptable uncompensated-care application for the preceding demonstration year is not eligible for an advance payment.

(E) If a partial year uncompensated-care application was used to determine the preceding demonstration year's payments, data from that application may be annualized for use in computation of an advance payment amount.

~~{(h)}~~ ~~DSRIP maximum payment amounts. The approved RHP plan establishes the payment amount associated with a metric or outcome measure. DSRIP payments cannot exceed the amount established in the approved RHP Plan.~~

~~(h)~~ ~~{(i)}~~ Payment methodology.

(1) Notice. Prior to making any ~~[category of]~~ payment described in ~~subsection [subsections]~~ ~~(g)~~ ~~[or (h)]~~ of this section, HHSC will give notice of the following information:

(A) the payment amount for the payment period (based on whether the payment is made quarterly, semi-annually, or annually);

(B) the maximum IGT [intergovernmental transfer] amount necessary for a hospital to receive the amount described in subparagraph (A) of this paragraph; and

(C) the deadline for completing the IGT [intergovernmental transfer].

(2) Payment amount. The amount of the payment to a hospital will be determined based on the amount of funds transferred by the affiliated governmental entity or entities as follows:

(A) If the governmental entity transfers the maximum amount referenced in paragraph (1) of this subsection, the hospital will receive the full payment amount calculated for that payment period.

(B) If a governmental entity does not transfer the maximum amount referenced in paragraph (1) of this subsection, HHSC will determine the payment amount to each hospital owned by or affiliated with that governmental entity as follows:

~~{(i)}~~ For uncompensated-care payments as described in ~~subsection (g) of this section.~~

~~(i)~~ ~~{(i)}~~ At the time the transfer is made, the governmental entity notifies HHSC, on a form prescribed by HHSC, of the share of the IGT [intergovernmental transfer] to be allocated to each hospital owned by or affiliated with that entity and provides the non-federal share of uncompensated-care payments for each entity with which it affiliates in a separate IGT transaction; or

~~(ii)~~ ~~{(ii)}~~ In the absence of the notification described in clause (i) of this subparagraph ~~[subclause (i) of this clause]~~, each hospital owned by or affiliated with the governmental entity will receive a portion of its payment amount for that period, based on the hospital's percentage of the total payment amounts for all hospitals owned by or affiliated with that governmental entity.

~~{(ii)}~~ For DSRIP payments described in ~~subsection (h) of this section~~, each hospital owned by or affiliated with the governmental entity that has completed a metric or outcome measure will receive a portion of the value associated with that measure (as specified in the RHP plan) that is proportionate to the total value of all metrics or outcome measures that are completed for that period by all providers owned by or affiliated with that governmental entity.

(C) For a hospital that is affiliated with multiple governmental entities, in the event those governmental entities transfer more than the maximum IGT [intergovernmental transfer] amount that can be provided for that hospital, HHSC will calculate the amount of IGT [intergovernmental transfer] funds necessary to fund the hospital to its payment limit and refund the remaining amount to the governmental entities identified by HHSC.

(3) Final payment opportunity. Within payments described in this section, a governmental entity that does not transfer the maximum IGT [intergovernmental transfer] amount described in paragraph (1) of this subsection during a demonstration year will be allowed to

fund the remaining payments at the time of the final payment ~~[from that category]~~ for that demonstration year. The IGT [intergovernmental transfer] will be applied in the following order:

(A) To the final payment ~~[from that category]~~ up to the maximum amount;

(B) To remaining balances ~~[from that category]~~ for prior payment periods in the demonstration year.

~~(i)~~ ~~{(i)}~~ Reconciliation. Beginning in the third demonstration year, data on the uncompensated-care application will be used to reconcile actual costs incurred by the hospital for the data year with uncompensated-care payments, if any, made to the hospital for the same period:

(1) If a hospital received payments in excess of its actual costs, the overpaid amount will be recouped from the hospital, as described in ~~subsection (j) [(k)]~~ of this section.

(2) If a hospital received payments less than its actual costs, and if HHSC has available waiver funding for the data year in which the costs were accrued, the hospital may receive reimbursement for some or all of those actual documented unreimbursed costs.

(3) Transition payments are not subject to reconciliation under this subsection.

(4) If a hospital submitted a request as described in ~~subsection (g)(4)(A)(i) of this section~~ that impacted its interim hospital-specific limit, that hospital will be subject to an additional reconciliation as follows:

(A) HHSC will compare the hospital's adjusted interim hospital-specific limit from ~~subsection (g)(4)(A)(i) of this section~~ for the demonstration year to its final hospital-specific limit as described in §355.8066(c)(2) of this title for the demonstration year.

(B) If the final hospital-specific limit is less than the adjusted interim hospital-specific limit, HHSC will recalculate the hospital's UC payment for the demonstration year substituting the final hospital-specific limit for the adjusted interim hospital-specific limit with no other changes to the data used in the original calculation of the hospital's UC payment other than any necessary reductions to the original IGT amount and will recoup any payment received by the hospital that is greater than the recalculated UC payment. Recouped funds may be redistributed to other hospitals that received payments less than their actual costs.

~~(j)~~ ~~{(k)}~~ Recoupment.

(1) In the event of an overpayment identified by HHSC or a disallowance by CMS of federal financial participation related to a hospital's receipt or use of payments under this section, HHSC may recoup an amount equivalent to the amount of the overpayment or disallowance. The non-federal share of any funds recouped from the hospital will be returned to the entity that owns or is affiliated with the hospital.

(2) Payments under this section may be subject to adjustment for payments made in error, including, without limitation, adjustments under §371.1711 of this title (relating to Recoupment of Overpayments and Debts), 42 CFR Part 455, and Chapter 403, Texas Government Code. HHSC may recoup an amount equivalent to any such adjustment.

(3) HHSC may recoup from any current or future Medicaid payments as follows:

(A) HHSC will recoup from the hospital against which any overpayment was made or disallowance was directed.

(B) If, within 30 days of the hospital's receipt of HHSC's written notice of recoupment, the hospital has not paid the full amount of the recoupment or entered into a written agreement with HHSC to do so, HHSC may withhold any or all future Medicaid payments from the hospital until HHSC has recovered an amount equal to the amount overpaid or disallowed.

(k) [(H)] Penalty for failure to complete Category 4 reporting requirements for Regional Healthcare Partnerships. Hospitals must comply with all Category 4 reporting requirements set out in Chapter 354 of this title, Subchapter D (relating to Texas Healthcare Transformation and Quality Improvement Program). If a hospital fails to complete required Category 4 reporting measures by the last quarter of a demonstration year:

(1) the hospital will forfeit its uncompensated-care payments for that quarter; or

(2) the hospital may request from HHSC a six-month extension from the end of the demonstration year to report any outstanding Category 4 measures.

(A) The fourth-quarter payment will be made upon completion of the outstanding required Category 4 measure reports within the six-month period.

(B) A hospital may receive only one six-month extension to complete required Category 4 reporting for each demonstration year.

§355.8202. Waiver Payments to Physician Group Practices for Uncompensated Care [for Physician Services].

(a) Introduction. Payments are available under this section for an eligible physician group practice described in subsection (c) of this section. Waiver payments to an eligible physician group practice must be in compliance with the Centers for Medicare and Medicaid Services approved waiver Program Funding and Mechanics Protocol, HHSC waiver instructions, and this section.

(b) Definitions.

(1) Aggregate limit--The amount of funds approved by the Centers for Medicare and Medicaid Services for uncompensated-care payments for the demonstration year.

(2) Centers for Medicare and Medicaid Services (CMS)--The federal agency within the United States Department of Health and Human Services responsible for overseeing and directing Medicare and Medicaid, or its successor.

(3) Demonstration year--The 12-month period beginning October 1 for which the payments calculated under this section are made. This period corresponds to the Disproportionate Share Hospital program year.

(4) Delivery System Reform Incentive Payments (DSRIP) [DSRIP]--Payments related to the development or implementation of a program of activity that supports efforts to enhance access to health care, the quality of care, and the health of patients and families it serves.

(5) Governmental entity--A state agency or a political subdivision of the state. A governmental entity includes a hospital authority, hospital district, city, county, or state entity.

(6) HHSC--The Texas Health and Human Services Commission or its designee.

(7) Intergovernmental transfer (IGT)--A transfer of public funds from a governmental entity to HHSC.

(8) Mid-Level Professional--Medical practitioners which include only these professions: Certified Registered Nurse Anes-

thetists, Nurse Practitioners, Physician Assistants, Dentists, Certified Nurse Midwives, Clinical Social Workers, Clinical Psychologists, and Optometrists.

(9) [(8)] Public funds--Funds derived from taxes, assessments, levies, investments, and other public revenues within the sole and unrestricted control of a governmental entity. Public funds do not include gifts, grants, trusts, or donations, the use of which is conditioned on supplying a benefit solely to the donor or grantor of the funds.

(10) [(9)] Regional Healthcare Partnership (RHP)--A collaboration of interested participants that work collectively to develop and submit to the state a regional plan for health care delivery system reform. Regional Healthcare Partnerships will support coordinated, efficient delivery of quality care and a plan for investments in system transformation that is driven by the needs of local hospitals, communities, and populations.

(11) [(10)] RHP plan--A multi-year plan within which participants propose their portion of waiver funding and DSRIP projects.

(12) [(11)] Transition payment--Payments available only during the first demonstration year.

(13) Uncompensated-care physician application--A form prescribed by HHSC to identify uncompensated costs for Medicaid-enrolled providers.

(14) [(12)] Uncompensated-care payments--Payments available after the first demonstration year and calculated as described in subsection (g) of this section. Uncompensated-care payments are intended to defray the uncompensated costs of services that meet the definition of "medical assistance" contained in §1905(a) of the Social Security Act that are provided by the physician group practice to Medicaid eligible or uninsured individuals.

(15) [(13)] Uninsured patient--An individual who has no health insurance or other source of third-party coverage for services, as defined by CMS.

(16) [(14)] Waiver--The Texas Healthcare Transformation and Quality Improvement Program Medicaid demonstration waiver under §1115 of the Social Security Act.

(c) Eligibility. A physician group practice is eligible to receive payments under this section if:

(1) it is enrolled as a Medicaid provider in the State of Texas at the beginning of the demonstration year;

(2) it has a source of IGT as the non-federal share of the payments;

(3) for a private physician group practice only, it has met the submission requirements set forth in §355.8201(c)(1)(B)(iii) of this title (relating to Waiver Payments to Hospitals for Uncompensated Care), only insofar as that clause relates to certifications, and it files documents with HHSC by the date specified by HHSC, certifying that:

(A) all funds transferred to HHSC as the non-federal share of the waiver payments are public funds; and

(B) no part of any payment received by the physician group practice under this section will be returned to the governmental entity that transferred to HHSC the non-federal share of the waiver payments;

(4) it has submitted to HHSC an acceptable uncompensated-care physician application for the demonstration year by the deadline specified by HHSC; and

(5) ~~[(4)] [for uncompensated-care payments, in addition to the requirements described in paragraphs (1) - (3) of this subsection,] it has submitted, and is eligible to receive payment for, a Medicaid fee-for-service or managed-care claim for payment during the demonstration year and either:~~

(A) it received a supplemental payment under the Texas Medicaid State Plan for claims adjudicated in one or more months between October 1, 2010, and September 30, 2011; or

(B) it is the successor in a contract to a physician group practice that received a supplemental payment under the Texas Medicaid State Plan for claims adjudicated in one or more months between October 1, 2010, and September 30, 2011.~~]; and]~~

~~[(5) for DSRIP payments, in addition to the requirements described in paragraphs (1) - (3) of this subsection, it submits to HHSC documentation of completion of at least one metric or outcome measure identified in the approved RHP plan.]~~

(6) A physician group practice that fails to submit the required documentation in compliance with this subsection will not receive a payment under this section.

(d) Source of funding.

(1) The non-federal share of funding for payments under this section is limited to and obtained through an IGT from the governmental entity that owns or is affiliated with the physician group practice receiving the payment.

(2) An IGT that is not received by the date specified by HHSC may not be accepted.

(e) Payment frequency. HHSC will distribute waiver payments as follows and on a schedule to be determined by HHSC:

(1) Uncompensated-care payments will be distributed at least quarterly after the uncompensated-care~~[-]~~ physician application is processed.

~~[(2) DSRIP will be distributed at least annually, not to exceed two payments per physician group practice, upon achievement of RHP plan metrics as reviewed and approved by CMS and HHSC.]~~

(2) ~~[(3)]~~ The payment schedule or frequency may be modified as specified by CMS or HHSC.

(f) Funding limitations.

(1) Payments made under this section are limited by the maximum aggregate amount of federal funds approved by CMS for uncompensated-care payment to providers for each demonstration year. If payments for uncompensated-care ~~[uncompensated care]~~ attributable to a demonstration year are expected to exceed the aggregate amount of funds approved by CMS for that demonstration year, HHSC will reduce payments as described in subsection (g)(4) of this section.

(2) Payments made under this section are limited by the availability of funds identified in subsection (d) of this section. If sufficient funds are not available for all payments for which a physician group practice is eligible, HHSC will reduce payments as described in subsection (h)(2) ~~[(1)(2)]~~ of this section.

(g) Uncompensated-care payment amount.

(1) Uncompensated-care physician application ~~[Application]~~. Payments to eligible physician group practices are based on cost and payment data reported by the physician group practice on an application form prescribed by HHSC.

(A) Cost and payment data reported by the physician group practice in the uncompensated-care physician application is used to:

(i) calculate the annual maximum uncompensated-care payment amount for the applicable demonstration year, as described in paragraph (2) of this subsection; and

(ii) reconcile the actual uncompensated-care costs reported by the physician group practice for a prior period with uncompensated-care waiver payments, if any, made to the practice for the same period. The reconciliation process is more fully described in subsection (j) of this section.

(B) Unless otherwise instructed in the uncompensated-care physician application:

(i) the cost and payment data reported in the uncompensated-care physician application must be consistent with Medicare cost-reporting principles and must comply with the application instructions or other guidance issued by HHSC, and the physician group practice must maintain sufficient documentation to support the reported data or information; and

(ii) the costs associated with an episode of care where a physician group practice is paid under contract must be reduced by any revenues associated with that episode of care prior to inclusion in the uncompensated-care physician application.

(C) If a physician group practice withdraws from participation in the waiver, the practice must submit an uncompensated-care application reporting its actual costs and payments for any period during which the practice received uncompensated-care payments. The uncompensated-care physician application will be used for the purpose described in subparagraph (A)(ii) of this paragraph. If a practice fails to submit the application reporting its actual costs, HHSC will recoup the full amount of uncompensated-care payments to the practice for the period at issue.

(2) Calculation. A physician group practice's annual maximum uncompensated-care payment amount is the sum of the following components:

(A) Its unreimbursed uninsured costs and Medicaid shortfall, as reported on the uncompensated-care physician application; and

(B) Cost and payment adjustments, if any, as described in paragraph (3) of this subsection.

(3) Adjustments. When submitting the uncompensated-care physician application, physician group practices may request that cost and payment data from the reporting period be adjusted to reflect increases or decreases in costs resulting from changes in operations or circumstances.

(A) A physician group practice may request that:

(i) Costs not reflected on the financial documents supporting the application, but which would be incurred for the demonstration year, be included when calculating payment amounts; or

(ii) Costs reflected on the financial documents supporting the application, but which would not be incurred for the demonstration year, be excluded when calculating payment amounts.

(B) Documentation supporting the request must accompany the application. HHSC will deny a request if it cannot verify that costs not reflected on the financial documents supporting the application will be incurred for the demonstration year.

(4) Reduction to stay within aggregate limits. Prior to processing uncompensated-care payments for any payment period within a waiver demonstration year, HHSC will determine if such a payment would cause total uncompensated-care payments for the demonstration year to exceed the aggregate limit and will reduce the maximum uncompensated-care payment amounts providers are eligible to receive for that period as required to remain within the aggregate limit.

(A) Unless otherwise specified in this paragraph, calculations in this paragraph will include data points pertaining to the following provider types: physician group practices, as described in this section; hospitals, as described in §355.8201 of this title (relating to Waiver Payments to Hospitals for Uncompensated Care); eligible governmental ambulance providers, as described in §355.8600 of this title (relating to Reimbursement Methodology for Ambulance Services), and eligible publicly owned dental providers, as described in §355.8441 of this title (relating to Reimbursement Methodologies for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services). For ambulance and dental providers, estimated data points may be used if actual data is not available at the time calculations are performed.

(B) HHSC will calculate the following data points:

(i) For each provider, prior period payments to equal prior period uncompensated-care [~~and transition payments~~] for the demonstration year.

(ii) For each provider, a maximum uncompensated-care payment for the payment period to equal the sum of:

(I) the portion of the annual maximum uncompensated-care payment amount calculated for that provider (as described in this section and the sections referenced in subparagraph (A) of this paragraph) that is attributable to the payment period; and

(II) the difference, if any, between the portions of the annual maximum uncompensated-care payment amounts attributable to prior periods and the prior period payments calculated in clause (i) of this subparagraph.

(iii) The cumulative [~~Cumulative~~] maximum payment amount to equal the sum of prior period payments from clause (i) of this subparagraph and the maximum uncompensated-care payment for the payment period from clause (ii) of this subparagraph.

(iv) A statewide total maximum uncompensated-care payment for the demonstration year to equal the sum of all providers' annual maximum uncompensated-care payment amounts for the demonstration year.

(v) A statewide ratio calculated as the statewide aggregate limit divided by the statewide total maximum uncompensated-care payment amount for the demonstration year from clause (iii) of this subparagraph.

(C) If the cumulative maximum payment amount from subparagraph (B)(iii) of this paragraph is less than the aggregate limit, each provider is eligible to receive their maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph without any reduction to remain within the aggregate limit.

(D) If the cumulative maximum payment amount from subparagraph (B)(iii) of this paragraph is more than the aggregate limit, HHSC will calculate a revised maximum uncompensated-care payment for the payment period for each provider as follows:

(i) HHSC will calculate a capped payment amount equal the product of the provider's annual maximum uncompensated-

care payment amount for the demonstration year and the statewide ratio calculated in subparagraph (B)(v) of this paragraph.

(ii) If the payment period is not the final payment period for the demonstration year, the revised maximum uncompensated-care payment for the payment period equals the lesser of:

(I) the maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph; or

(II) the difference between the capped payment amount from clause (i) of this subparagraph and the prior period payments from subparagraph (B)(i) of this paragraph.

(iii) If the payment period is the final payment period for the demonstration year:

(I) HHSC will calculate an IGT-supported maximum uncompensated-care payment for the payment period equal to the amount of the maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph that is supported by an IGT commitment.

(-a-) For hospitals and physician group practices, HHSC will obtain from each RHP anchor a current breakdown of IGT commitments from all governmental entities, including governmental entities outside of the RHP that will be providing IGTs for uncompensated-care or transition payments for each hospital and physician group practice within the RHP that is eligible for such payments for the payment period.

(-b-) Ambulance and dental providers will be assumed to have commitments for 100 percent of the non-federal share of their payments. The non-federal share for ambulance providers is provided through certified public expenditures (CPEs); for ambulance providers, references to IGTs in this subsection should be read as references to CPEs.

(II) HHSC will calculate an IGT-supported maximum uncompensated-care payment for the demonstration year to equal the IGT-supported maximum uncompensated-care payment for the payment period from subclause (I) of this clause plus the provider's prior period payments from subparagraph (B)(i) of this paragraph.

(III) For providers with an IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause that is less than or equal to their capped payment amount from clause (i) of this subparagraph, the provider's revised maximum uncompensated-care payment for the payment period equals the IGT-supported maximum uncompensated-care payment amount for the payment period from subclause (I) of this clause. For these providers, the difference between their capped payment amount from clause (i) of this subparagraph and their IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause is their unfunded cap room.

(IV) HHSC will sum all unfunded cap room from subclause (III) of this clause to determine the statewide total unfunded cap room.

(V) For providers with an IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause that is greater than their capped payment amount from clause (i) of this subparagraph, the provider's revised maximum uncompensated-care payment amount for the payment period is calculated as follows:

(-a-) For each provider, HHSC will calculate an overage amount to equal the difference between the IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause and their capped payment

amount for the demonstration year from clause (i) of this subparagraph. Unfunded cap room from subclause (IV) of this clause will be distributed to these providers based on each provider's overage as a percentage of the statewide overage.

(-b-) For each provider, the provider's revised maximum uncompensated-care payment amount for the payment period is equal to the sum of its capped payment amount from clause (i) of this subparagraph and its portion of unfunded cap room from item (-a-) of this subclause less its prior period payments from subparagraph (B)(i) of this paragraph.

(E) Once reductions to ensure that uncompensated-care expenditures do not exceed the aggregate limit for the demonstration year are calculated, HHSC will not re-calculate the resulting payments for any provider for the demonstration year, including if the IGT commitments upon which the reduction calculations were based are different than actual IGT amounts.

(5) Advance payments.

(A) In a demonstration year in which uncompensated-care payments will be delayed pending data submission or for other reasons, HHSC may make advance payments to physician group practices that meet the eligibility requirements described in subsection (c)(4) of this section and:

~~[(i)]~~ submitted an acceptable uncompensated-care physician application for the preceding demonstration year from which HHSC calculated an annual maximum uncompensated-care payment amount for that year.;

~~[(ii)]~~ did not submit an acceptable uncompensated-care application for the preceding demonstration year but was eligible to receive transition payments for that year.;

(B) The amount of the advance payments will be a percentage, to be determined by HHSC, of [the following amounts]:

~~[(i)]~~ [for physician group practices described in subparagraph (A)(i) of this paragraph,] the annual maximum uncompensated-care payment amount calculated by HHSC for the preceding demonstration year.;

~~[(ii)]~~ for physician group practices described in subparagraph (A)(ii) of this paragraph, the amount of transition payments received by the physician group practice in the preceding demonstration year.;

(C) Advance payments are considered to be prior period payments as described in paragraph (4)(B)(i) of this subsection.

(D) A physician group practice that did [was] not [eligible to receive a transition payment in the preceding demonstration year or] submit an acceptable uncompensated-care physician application for the preceding demonstration year is not eligible for an advance payment.

(E) If a partial year uncompensated-care physician application was used to determine the preceding demonstration year's payments, data from that application may be annualized for use in computation of an advance payment amount.

(6) Prohibition on duplication of costs. Eligible uncompensated-care costs cannot be reported on multiple uncompensated-care applications, including uncompensated-care applications for other programs. Reporting on multiple uncompensated-care applications is duplication of costs.

~~[(h)]~~ DSRIP maximum payment amounts. The approved RHP plan establishes the payment amount associated with a metric or out-

come measure. DSRIP payments cannot exceed the amount established in the approved RHP plan.;

~~[(h)]~~ [(i)] Payment methodology.

(1) Prior to making any [category of] payment described in subsection (g) [or (h)] of this section, HHSC will give notice of the following information:

(A) the payment amount for the payment period (based on whether the payment is made quarterly, semi-annually, or annually);

(B) the maximum IGT amount necessary for a physician group practice to receive the amount described in subparagraph (A) of this paragraph; and

(C) the deadline for completing the IGT.

(2) The amount of the payment to the physician group practice under paragraph (1) of this subsection will be determined based on the amount of funds transferred by the affiliated governmental entity or entities as described as follows:

(A) If a governmental entity transfers the maximum amount of funds described in paragraph (1)(B) of this subsection, the physician group practice will receive the maximum allowable payment amount for that period.

(B) If a governmental entity does not transfer the maximum amount referenced in paragraph (1)(B) of this subsection, HHSC will determine the payment amount to each physician group practice owned by or affiliated with that governmental entity as follows:

~~[(i)]~~ For uncompensated-care payments described in subsection (g) of this section.;

~~[(i)]~~ [(H)] At the time the transfer is made, the governmental entity notifies [may notify] HHSC, on a form prescribed by HHSC, of the share of the IGT [intergovernmental transfer] to be allocated to each physician group practice owned by or affiliated with that entity and provides the non-federal share of uncompensated-care payments for each entity with which it affiliates in a separate IGT transaction; or

~~[(ii)]~~ [(H)] In the absence of the notification described in clause (i) of this subparagraph [subclause (I) of this clause] each physician group practice owned by or affiliated with the governmental entity will receive a portion of its payment amount for that period, based on the physician group practice's percentage of the total payment amounts for all physician group practices owned by or affiliated with that governmental entity.

~~[(ii)]~~ For DSRIP payments described in subsection (h) of this section, each physician group practice owned by or affiliated with the governmental entity that has completed a metric or outcome measure will receive a portion of the value associated with that measure (as specified in the RHP plan) that is proportionate to the total value of all metrics or outcome measures that are completed for that period by all providers owned by or affiliated with that governmental entity.;

(i) [(i)] Reconciliation. Beginning in the third year of the waiver, data on the uncompensated-care physician application will be used to reconcile actual costs incurred by the physician group practice for a prior period with uncompensated-care payments, if any, made to the physician group practice for the same period.

(1) If a physician group practice received payments in excess of its actual costs, the overpaid amount will be recouped from the physician group practice, as described in subsection (j) [(k)] of this section.

(2) If a physician group practice received payments less than its actual costs, and if HHSC has available waiver funding for the period in which the costs were accrued, the physician group practice may receive reimbursement for some or all of those actual documented unreimbursed costs.

(3) Transition payments are not subject to reconciliation under this subsection.

(j) ~~[(k)]~~ Recoupment.

(1) In the event of a disallowance by CMS of federal financial participation related to a physician group practice's receipt or use of payments under this section, HHSC may recoup an amount equivalent to the amount of the overpayment or disallowance. The non-federal share of any funds recouped from the physician group practice will be returned to the entity that owns or is affiliated with the physician group practice.

(2) Payments under this section may be subject to adjustment for payments made in error, including, without limitation, adjustments under §371.1711 of this title (relating to Recoupment of Overpayments and Debts), 42 CFR Part 455, and Chapter 403, Texas Government Code. HHSC may recoup an amount equivalent to any such adjustment.

(3) HHSC may recoup from any current or future Medicaid payments as follows:

(A) HHSC will recoup from the physician group practice against which any disallowance was directed or to which an overpayment was made.

(B) If, within 30 days of the physician group practice's receipt of HHSC's written notice of recoupment, the physician group practice has not paid the full amount of the recoupment or entered into a written agreement with HHSC to do so, HHSC may withhold any or all future Medicaid payments from the physician group practice until HHSC has recovered an amount equal to the amount overpaid or disallowed.

§355.8203. *Delivery System Reform Incentive Payments [Waiver Payments to Other Performers]*.

(a) Introduction. Texas Healthcare Transformation and Quality Improvement Program §1115(a) Medicaid demonstration waiver payments are available under this section for eligible performers described in subsection (c) of this section. Waiver payments to performers must be in compliance with the Centers for Medicare and Medicaid Services approved waiver Program Funding and Mechanics Protocol, HHSC waiver instructions and this section.

(b) Definitions.

(1) Centers for Medicare and Medicaid Services (CMS)--The federal agency within the United States Department of Health and Human Services responsible for overseeing and directing Medicare and Medicaid, or its successor.

(2) Delivery System Reform Incentive Payments (DSRIP)--Payments related to the development or implementation of a program of activity that supports a performer's efforts to enhance access to health care, the quality of care, and the health of patients and families it serves.

(3) Demonstration year--The 12-month period beginning October 1 for which the payments calculated under this section are made.

(4) Governmental entity--A state agency or a political subdivision of the state. A governmental entity includes a hospital authority, hospital district, city, county, or state entity.

(5) HHSC--The Texas Health and Human Services Commission or its designee.

(6) Intergovernmental transfer (IGT)--A transfer of public funds from a governmental entity to HHSC.

(7) Performer--A Medicaid provider that implements one or more DSRIP projects. ~~[For purposes of this section, "performer" does not include hospitals or physician practice groups as those terms are defined in §355.8201 of this division (relating to Waiver Payment to Hospitals) or §355.8202 of this division (relating to Waiver Payments for Physician Services).]~~

(8) Public funds--Funds derived from taxes, assessments, levies, investments, and other public revenues within the sole and unrestricted control of a governmental entity. Public funds do not include gifts, grants, trusts, or donations, the use of which is conditioned on supplying a benefit solely to the donor or grantor of the funds.

(9) Regional Healthcare Partnership (RHP)--A collaboration of interested participants that work collectively to develop and submit to the state a regional plan for health care delivery system reform. Regional Healthcare Partnerships will support coordinated, efficient delivery of quality care and a plan for investments in system transformation that is driven by the needs of local hospitals, communities, and populations.

(10) RHP plan--A multi-year plan within which participants propose their portion of waiver funding and DSRIP projects.

(11) Waiver--The Texas Healthcare Transformation and Quality Improvement Program Medicaid demonstration waiver under §1115 of the Social Security Act.

(c) Eligibility for DSRIP. For a performer to be eligible to receive DSRIP, the performer must:

(1) be actively enrolled as a Medicaid provider in the State of Texas; ~~and~~

(2) submit to HHSC documentation of completion of a milestone ~~[or quality measure]~~ identified in the approved RHP plan; ~~and~~[-]

(3) for a private performer only, complies with the eligibility requirements in §355.8201(c)(1)(B) of this title (relating to Waiver Payments to Hospitals for Uncompensated Care) or §355.8202(c)(3) of this title (relating to Waiver Payments to Physician Group Practices for Uncompensated Care), as applicable.

(d) Source of funding. The non-federal share of funding for payments under this section is limited to timely receipt by HHSC of public funds from a governmental entity.

(e) Payment frequency. DSRIP payments will be distributed at least annually, not to exceed two payments per performer per year, upon achievement of RHP plan milestones as reviewed and approved by CMS and HHSC. The payment schedule or frequency may be modified as specified by CMS or HHSC.

(f) Funding limitations. Payments made under this section are limited by the maximum aggregate amount of funds approved by CMS for DSRIP for each year that the waiver is in effect.

(g) DSRIP maximum payment amounts. The approved RHP plan establishes the payment amount associated with a particular milestone ~~[or quality measure]~~. DSRIP payments cannot exceed the amount reported in the RHP Plan.

(h) Payment methodology.

(1) Notice. Prior to making any DSRIP payments, HHSC will give notice of the following information:

(A) the maximum payment amount for the payment period;

(B) the maximum IGT [intergovernmental transfer] amount necessary for a performer to receive the amount described in subparagraph (A) of this paragraph; and

(C) the deadline for completing the IGT [intergovernmental transfer].

(2) Payment amount. The approved RHP plan establishes the payment amount associated with a milestone. DSRIP payments cannot exceed the amount established in the approved RHP plan. The amount of the payment to a performer will be determined based on the amount of funds transferred by a governmental entity as follows:

(A) If a governmental entity transfers the maximum amount referenced in paragraph (1) of this subsection on behalf of each performer owned by or affiliated with that governmental entity [a performer], each [that] performer owned by or affiliated with that governmental entity will receive the full payment amount calculated for that payment period.

(B) If a governmental entity does not transfer the maximum amount referenced in paragraph (1) of this subsection on behalf of each performer owned by or affiliated with that governmental entity [a performer], each performer owned by or affiliated with that governmental entity [that performer] will receive a portion of the value associated with that milestone or quality measure (as specified in the RHP plan) that is proportionate to the total value of all milestones [or quality measures] that are completed and eligible for payment for that period by all performers owned by or affiliated with that governmental entity [the performer].

(3) Final payment opportunity. If a performer does not receive a full DSRIP payment as a result of paragraph (2)(B) of this subsection, a governmental entity may provide the necessary IGT to make up the non-federal share of that shortfall until the last reporting period of the demonstration year following the demonstration year in which the applicable milestone is listed in the RHP plan. Any shortfall remains the obligation of the original governmental entity until that governmental entity informs HHSC that it will no longer agree to fund that obligation. [A governmental entity that does not transfer the maximum intergovernmental transfer amount described in paragraph (1) of this subsection during a demonstration year will be allowed to fund the remaining payments at the time of the final payment for that demonstration year. The intergovernmental transfer will be applied in the following order:]

(A) If the governmental entity will no longer fund the obligation, that governmental entity must inform HHSC no later than the last date of the reporting period for the applicable payment period. [First, to the final payment up to the maximum amount.]

(B) A performer may utilize any affiliated governmental entity to fund the shortfall but must inform HHSC of the identity of this governmental entity no later than the last date of a reporting period in order for that affiliated entity to fund the shortfall during the associated payment period. [Second, to remaining balances for prior payment periods in the demonstration year.]

(i) Recoupment.

(1) In the event of an overpayment identified by HHSC or a disallowance by CMS of federal financial participation related to a performer's receipt or use of payments under this section, HHSC may recoup an amount equivalent to the amount of the overpayment or dis-

allowance. The non-federal share of any funds recouped from the performer will be returned to the governmental entity that was the source of those funds.

(2) Payments under this section may be subject to adjustment for payments made in error, including, without limitation, adjustments under §371.1711 of this title (relating to Recoupment of Overpayments and Debts), 42 CFR Part 455, and Chapter 403, Texas Government Code. HHSC may recoup an amount equivalent to any such adjustment.

(3) HHSC may recoup from any current or future Medicaid payments as follows:

(A) HHSC will recoup from the performer against which any overpayment was made or disallowance was directed.

(B) If, within 30 days of the performer's receipt of HHSC's written notice of recoupment, the performer has not paid the full amount of the recoupment or entered into a written agreement with HHSC to do so, HHSC may withhold any or all future Medicaid payments from the performer until HHSC has recovered an amount equal to the amount overpaid or disallowed.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 31, 2014.

TRD-201401432

Jack Stick

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 424-6900

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.80

The Railroad Commission of Texas (Commission) proposes amendments to §3.80, relating to Commission Oil and Gas Forms, Applications, and Filing Requirements. The Commission proposes the amendments in order to reflect the policy adopted at its November 12, 2013, open meeting regarding forms required to be filed with the Commission. The policy requires the Commission to promulgate, abolish, or amend forms only upon the approval of a majority of Commissioners at a public meeting. The policy will allow the Commission to be flexible and efficient in making any needed form changes, while providing transparency in the form development process and an opportunity for public notice and discussion of any form changes. Where required by Texas law to promulgate, abolish, or amend a certain form through rulemaking procedures conducted under the Texas Administrative Procedure Act, the Commission will continue to do so. Otherwise, the Commission will consider staff's recommended form revisions in an open meeting. Staff will place the proposed form revisions on the Commission's website for public review and comment for a period of time proportionate to the subject and degree of change. After the period

of time for public review and staff consideration of any submitted comments has elapsed, the Commission will consider adoption of the form revisions in a second open meeting. Following the second open meeting, Oil and Gas Division staff will update the forms pages as necessary on the Commission's website.

The Commission proposes amendments in subsection (a) and subsection (e)(1) to delete Table 1 in subsection (a), entitled Railroad Commission Oil and Gas Division Forms, which lists the names of all Oil and Gas Division forms and their creation or revision dates, as well as three references to that Table. Table 1, while not legally required, was added to §3.80 in 2004 as part of a larger effort by the Commission at that time to standardize the process of adopting and amending Commission forms. With the adoption of the November 12, 2013, policy, the Commission will continue to make information regarding form revisions (as well as the forms, themselves) publicly available on the Commission's website.

Jeff Grymkoski, Budget Manager, Financial Services Division, has determined that for each year of the first five years that the proposed amendments will be in effect there will be no fiscal implications for state or local governments resulting from the enforcement of the proposed rule amendments.

Leslie Savage, Chief Geologist, Oil and Gas Division, has determined that for each year of the first five years that the proposed amendments will be in effect, the public benefit expected as a result of adopting the proposed amendments will be affording the public notice and opportunities for discussion of proposed new forms or proposed changes to existing forms, as well as final approval of such forms at an open meeting of the Commission. Further, there is no expected economic cost to persons required to comply with the rule, as the proposed amendments add no new requirements to existing regulations.

The Commission finds that the proposed amendments will not affect a local economy. Therefore, the Commission has not prepared a local employment impact statement pursuant to Texas Government Code, §2001.022.

Texas Government Code, §2006.002, relating to Adoption of Rules with Adverse Economic Effect, requires that as a part of the rulemaking process, a state agency prepare an Economic Impact Statement that assesses the potential impact of a proposed rule on small businesses and micro-businesses and a Regulatory Flexibility Analysis that considers alternative methods of achieving the purpose of the rule if the proposed rule will have an adverse economic effect on small businesses or micro-businesses. Ms. Savage has determined that the proposed amendments will not have an adverse economic effect on small businesses or micro-businesses because the amendments add no new requirements on small businesses or micro-businesses.

Ms. Savage has determined that the proposed amendments are not major environmental rules, as the proposed amendments do not meet the criteria set forth in Texas Government Code, §2001.0225(a). Accordingly, the Commission has not prepared the draft impact analysis or final regulatory analysis required under that section.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.php; or by electronic mail to rulescoordinator@rrc.state.tx.us. Comments should

refer to O&G Docket No. 20-0287605 and will be accepted until 12:00 p.m. (noon) on Monday, May 12, 2014, which is 31 days after publication in the *Texas Register*. The Commission finds that this comment period is reasonable because the proposal and an online comment form will be available on the Commission's website no later than the day after the open meeting at which the Commission approves publication of the proposal, giving interested persons more than two additional weeks to review and analyze the proposal and to draft and submit comments. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Ms. Cristina Self in the Office of General Counsel at (512) 463-2299. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.php.

The Commission proposes the amendments to §3.80 pursuant to Texas Natural Resources Code, §§81.051 and §81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells and persons owning or operating pipelines in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under Commission jurisdiction; and §91.142, which requires the Commission to obtain specified information from a person, firm, partnership, joint stock association, corporation, or other domestic or foreign organization operating wholly or partially in this state and acting as principal or agent for another for the purpose of performing operations which are within the jurisdiction of the Commission.

Statutory authority: Texas Natural Resources Code, §§81.051, 81.052, and 91.142.

Cross-reference to statute: Texas Natural Resources Code, §§81.051, 81.052, and 91.142.

Issued in Austin, Texas, on March 25, 2014.

§3.80. Commission Oil and Gas Forms, Applications, and Filing Requirements.

(a) Forms. Forms required to be filed at the Commission shall be those prescribed by the Commission [as listed in Table 1 of this subsection]. A complete set of all Commission forms [listed on Table 1] required to be filed at the Commission shall be kept by the Commission secretary and posted on the Commission's web site. Notice of any new or amended forms shall be issued by the Commission. For any required or discretionary filing, an organization may either file the prescribed form on paper or use any electronic filing process in accordance with subsections (e) or (f) of this section, as applicable. The Commission may at its discretion accept an earlier version of a prescribed form, provided that it contains all required information and meets the requirements of subsection (e)(3) of this section.

[Figure: 16 TAC §3.80(a)]

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

(e) Authorization and standards for electronic filing.

(1) An organization may file electronically any form [listed on Table 1] for which the Commission has provided an electronic version, provided that the organization pays all required filing fees and complies with all requirements, including but not limited to security procedures, for electronic filing.

(2) - (6) (No change.)

(f) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 25, 2014.

TRD-201401305

Cristina Martinez Self

Rules Attorney, Office of General Counsel

Railroad Commission of Texas

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 475-1295



PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 22. PROCEDURAL RULES

The Public Utility Commission of Texas (commission) proposes amendments to §22.1, relating to Purpose and Scope, and §22.71, relating to Filings of Pleadings, Documents, and Other Materials; new §22.248, relating to Water and Sewer Utilities, and new Subchapter P, §§22.291 - 22.299, relating to Emergency Orders for Water Utilities. The proposed amendments and new rules will address necessary procedures for practice to allow the commission to begin exercising its authority over proceedings related to water and wastewater utilities on September 1, 2014, pursuant to House Bill 1600 and Senate Bill 567, 83rd Legislature, Regular Session. Project Number 42191 is assigned to this proceeding.

Under §2.96(j) of House Bill 1600 and §96(j) of Senate Bill 567, the rules and procedures of the Texas Commission on Environmental Quality (TCEQ) continue in effect as a rule or procedure of the commission until amended or replaced. New §22.248 continues 30 TAC Chapter 80, the TCEQ's rules, in place as rules of the commission for hearings transferred to the commission on September 1, 2014. The presiding officer in a proceeding is given the discretion to use either 30 TAC Chapter 80 or 16 TAC Chapter 22 for certain activities. All matters filed at the commission on or after September 1, 2014 will be governed solely by Chapter 22 and new Chapter 24 of the commission's rules.

New Chapter 22, Subchapter P combines in a single location the requirements of Texas Water Code Chapter 5 and Chapter 13 as they relate to emergency orders over which the commission has authority.

Tom Hunter, Special Counsel, has determined that for each year of the first five-year period the proposed sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Hunter has determined that for each year of the first five years the proposed sections are in effect the public benefit anticipated as a result of enforcing the sections will be the just and efficient disposition of proceedings and public participation in the decision-making process. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing these sections. Therefore, no regulatory flexibility analysis is required. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Mr. Hunter has also determined that for each year of the first five years the proposed sections are in effect there should be no

effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rule-making, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. The request for a public hearing must be received within 30 days after publication.

Comments on the proposed amendments and new sections may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Sixteen copies of comments to the proposed amendments and new sections are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 45 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rules. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed sections. The commission will consider the costs and benefits in deciding whether to adopt the sections. All comments should refer to Project Number 42191.

SUBCHAPTER A. GENERAL PROVISIONS AND DEFINITIONS

16 TAC §22.1

The amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (West 2007 and Supp. 2013) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Texas Water Code §§5.501 - 5.508 and Chapter 13.

§22.1. Purpose and Scope.

(a) (No change.)

(b) Scope.

(1) (No change.)

(2) This chapter shall govern proceedings under the Texas Utilities Code, Texas Water Code, Texas Health and Safety Code, Texas Government Code, or any other statute granting the Public Utility Commission of Texas authority to conduct proceedings.

(3) [~~2~~] This chapter shall not be construed so as to enlarge, diminish, modify, or otherwise alter the jurisdiction, powers, or authority of the commission, the commission staff, or the substantive rights of any person.

(4) [~~3~~] To the extent that any provision of this chapter is in conflict with any statute or substantive rule of the commission, the statute or substantive rule shall control.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7293



SUBCHAPTER E. PLEADINGS AND OTHER DOCUMENTS

16 TAC §22.71

The amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (West 2007 and Supp. 2013) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Texas Water Code §§5.501 - 5.508 and Chapter 13.

§22.71. *Filing of Pleadings, Documents, and Other Materials.*

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

(c) Number of items to be filed. Unless otherwise provided by this chapter or ordered by the presiding officer, the number of copies to be filed, including the original, are as follows:

(1) - (8) (No change.)

(9) applications for certificates of convenience and necessity, amendments to certificates of convenience and necessity [for transmission lines or boundary changes, certificate of convenience and necessity exemptions], and service area exceptions: seven copies;

(10) - (14) (No change.)

(d) - (j) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER M. PROCEDURES AND FILING REQUIREMENTS IN PARTICULAR COMMISSION PROCEEDINGS

16 TAC §22.248

The new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 2007 and Supp. 2013) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Texas Water Code §§5.501 - 5.508 and Chapter 13.

§22.248. *Water and Sewer Utilities.*

(a) Scope. This section is intended to address proceedings related to water and sewer utilities, including applications related to certificates of convenience and necessity, rate proceedings, or appeals of rate actions.

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

(1) 30 TAC Chapter 80--Texas Commission on Environmental Quality (TCEQ) rules relating to Contested Case Hearings, as the rules existed on August 31, 2014.

(2) Water or sewer utility--A water or sewer utility as defined in Texas Water Code §13.002(23).

(c) Transfer of proceedings.

(1) On September 1, 2014, every proceeding related to a water or sewer utility's CCN or rates shall be transferred to the commission in accordance with law.

(2) The procedural rules of the commission shall be used in every water or sewer utility proceeding transferred to the commission as soon as practicable or as established by this section.

(3) The presiding officer shall have authority to determine in accordance with this section the cut-over to commission procedural rules in each water or sewer proceeding transferred to the commission.

(d) Specific procedures in transferred case. Every water or sewer utility proceeding transferred to the commission on September 1, 2014 shall be subject to this chapter as follows:

(1) If a preliminary hearing has not been held and a scheduling order has not been issued in a proceeding transferred to the commission, then this chapter shall govern all aspects of the proceeding that have not been completed.

(2) If a preliminary hearing has been held and a scheduling order has issued, but a hearing on the merits has not been held, then the presiding officer shall convene a prehearing conference to address and establish the following matters:

(A) whether 30 TAC Chapter 80 or this chapter shall govern discovery;

(B) whether the procedural schedule should be modified or the proceeding abated, or both, to allow a reasonable time for the staff of the commission to prepare and file testimony or to modify or adopt the testimony previously filed by the TCEQ;

(C) to discuss the filing requirements of the commission under this chapter; and

(D) to reconcile any other matters that may arise as a result of the transfer of the proceeding to the commission.

(3) If a hearing on the merits has been completed, but a proposal for decision has not been delivered, the proposal for decision shall be delivered to the commission and this chapter shall govern the remainder of the proceeding.

(4) If a proposal for decision has been issued, but the matter has not been decided, then:

(A) the administrative and hearing record shall be transferred to the commission as expeditiously as possible;

(B) if dates have not been set for exceptions and replies to exception to the proposal for decision, those dates shall be set and the parties notified of the dates; and

(C) the matter shall be scheduled for an open meeting before the commission.

(e) Motions for rehearing. Motions for rehearing for every proceeding transferred to the commission shall be governed by this chapter.

(f) Proceedings initiated after September 1, 2014. Every water or sewer utility proceeding initiated at the commission after September 1, 2014 shall be governed by this chapter and by Chapter 24 of this title (relating to Substantive Rules Applicable to Water and Sewer Service Providers).

(g) Continuation of TCEQ rules. The rules of the TCEQ related to the duties transferred to the commission regarding water and sewer utilities continue as rules of the commission until amended or replaced by this commission. This section is a replacement of those procedural rules, provided however, that the procedural rules of the TCEQ are continued for proceedings transferred to the commission to the extent not inconsistent with this section.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER P. EMERGENCY ORDERS FOR WATER UTILITIES

16 TAC §§22.291 - 22.299

The new sections are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 2007 and Supp. 2013) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Texas Water Code §§5.501 - 5.508 and Chapter 13.

§22.291. Purpose and Applicability.

(a) The purpose of this subchapter is to prescribe procedures to implement the commission's authority under the Texas Water Code to issue emergency orders or to authorize emergency rates.

(b) This subchapter applies to any application under the Texas Water Code for an emergency order or emergency rates.

§22.292. Definitions.

The following term, when used in this subchapter, shall have the following meaning unless the context clearly indicates otherwise: Emergency order--An order which must be issued immediately to appoint a person to temporarily manage and operate a utility under Texas Water Code §13.4132, to authorize an emergency rate increase as autho-

rized by Texas Water Code §5.508, or to compel a water or sewer service provider to provide service as authorized by Texas Water Code §13.041(d).

§22.293. Notification of Emergency Order.

(a) A water or sewer utility that applies for, obtains, or is subject to an emergency order issued by the Texas Commission on Environmental Quality shall notify the commission as soon as reasonably possible by:

(1) filing with the commission a copy of the application or order; or

(2) if the application or order is not available to the utility, filing with the commission a letter describing the facts and circumstances relating to the application or order.

(b) A water or sewer utility complies with this section if the information is provided as part of an application for an emergency order under §22.295 of this title (relating to Application for Emergency Order).

§22.294. Emergency Orders and Emergency Rates.

(a) The commission may issue an emergency order, with or without a hearing, to:

(1) appoint a person under §24.142 of this title (relating to Operation of Utility that Discontinues Operation or is Referred for Appointment of a Receiver), §24.143 of this title (relating to Operation of a Utility by a Temporary Manager), and Texas Water Code §5.507 and §13.4132 to temporarily manage and operate a utility that has discontinued or abandoned operations or that is being referred to the attorney general for the appointment of a receiver under Texas Water Code §13.412;

(2) to compel a water or sewer provider that has obtained or is required to obtain a certificate of public convenience and necessity to provide continuous and adequate water service, sewer service, or both, if the discontinuance of the service is imminent or has occurred because of the service provider's actions or inactions; or

(3) to compel a retail public utility to provide an emergency connection with a neighboring retail public utility for the provision of temporary water or sewer service, or both, for not more than 90 days if discontinuance of service or serious impairment in service is imminent or has occurred.

(b) The commission may establish reasonable compensation for temporary service ordered under subsection (a)(3) of this section and may allow the retail public utility receiving the service to make a temporary adjustment to its rate structure to ensure proper payment.

(c) The commission may issue an emergency order, with or without a hearing, to authorize an emergency rate increase if necessary to ensure the provision of continuous and adequate services to the utility's customers pursuant to Texas Water Code §5.508 and §13.4133:

(1) for a utility for which a person has been appointed under Texas Water Code §5.507 or §13.4132 to temporarily manage and operate the utility that has discontinued or abandoned operations; or

(2) for a utility for which a receiver has been appointed under Texas Water Code §13.412.

(d) The commission may issue an emergency order under Texas Water Code §13.253(b) after providing a retail public utility notice and an opportunity to be heard at an open meeting of the commission:

(1) to make specified improvements and repairs to the water or sewer system;

(2) to require the utility to obligate additional money to replace the financial assurance used for the improvements;

(3) if the commission has reason to believe that improvements and repairs to the water or sewer system are necessary to provide continuous and adequate service in any portion of the utility's service area; and

(4) if the utility has provided financial assurance under Texas Health and Safety Code §341.0355 or Texas Water Code Chapter 5.

(e) If an emergency order is issued without a hearing, the order shall fix a time for a hearing that is as soon after issuance of the emergency order as practicable and a place for a hearing to be held before the commission or the State Office of Administrative Hearings (SOAH).

(f) An emergency order issued under this subchapter does not vest any rights and expires in accordance with its terms or this subchapter.

(g) Notice of the commission's action under this subchapter is adequate if the notice is mailed or hand-delivered to the last known address of the utility's headquarters.

§22.295. Application for Emergency Order.

(a) A person seeking an emergency order under this subchapter shall submit a written application to the commission.

(b) For an applicant other than commission staff, the application must:

(1) be sworn;

(2) state whether the applicant is also seeking or has obtained an emergency order from the Texas Commission on Environmental Quality;

(3) 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;

(4) contain information sufficient to identify the facility and location to be affected by the order;

(5) describe the condition of emergency or other condition justifying the issuance of the order;

(6) allege facts to support any findings required under this subchapter;

(7) 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;

(8) describe the action sought and the activity proposed to be allowed, mandated, or prohibited;

(9) include any other statement or information required by this subchapter; and

(10) shall be signed as follows.

(A) For a corporation, the application shall be signed by a responsible corporate officer.

(B) For a partnership or sole proprietorship, the application shall be signed by a general partner or the proprietor, respectively.

(C) A person 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."

(c) For an application by commission staff, the application must:

(1) contain the items specified in subsection (b)(2) - (9) of this section; and

(2) be signed by commission staff.

§22.296. Additional Requirements for Emergency Rate Increases.

(a) An emergency rate increase may be granted under this subchapter for a period not to exceed 15 calendar months from the date on which the increase takes effect. The commission shall schedule a hearing to establish a final rate within that period and require the utility to provide notice of the hearing to each customer.

(b) The additional revenues collected under an emergency rate increase are subject to refund if the commission finds that the rate increase was larger than necessary to ensure continuous and adequate service.

(c) A request for an emergency rate increase must be filed by the utility in accordance with, and must contain the information required by §22.295 of this title (relating to Application for Emergency Order) and the following:

(1) the effective date of the rate increase;

(2) sufficient information to support the computation of the proposed rates; and

(3) any other information requested by the commission.

(d) The effective date of the emergency rates must be the first day of a billing cycle, unless otherwise authorized by the commission.

(e) Any emergency rate increase related to charges for actual consumption will be for consumption after the effective date. An increase or the portion of an increase that is not related to consumption may be billed at the emergency rate on the effective date or the first billing cycle after approval by the commission.

(f) A utility receiving authorization for an emergency rate increase shall provide notice of the increase to each ratepayer as soon as possible, but no later than the effective date for the emergency rate. The notice shall contain the following:

(1) the utility's name and address, the previous rates, the emergency rates, the effective date of the rate increase, and the classes of utility customers affected; and

(2) this statement: "This emergency rate increase has been approved by the Public Utility Commission of Texas under authority granted by the Texas Water Code §5.508 and §13.4133 to ensure the provision of continuous and adequate service to the utility's customers. The commission is also required to schedule a hearing to establish a final rate within 15 months after the date on which the emergency rates take effect. The utility is required to provide notice of the hearing to all customers at least 10 days before the date of the hearing. The additional revenues collected under this emergency rate increase are subject to refund if the commission finds that the rate increase was larger than necessary to ensure continuous and adequate service."

(g) The utility shall maintain adequate books and records for a period not less than 12 months to allow for the determination of a cost of service as set forth in §24.31 of this title (relating to Cost of Service).

(h) During the pendency of the emergency rate increase, the commission may require that the utility deposit all or part of the rate increase into an interest-bearing escrow account as set forth in §24.30 of this title (relating to Escrow of Proceeds Received under Rate Increase).

§22.297. Notice and Opportunity for Hearing.

(a) An emergency order under this subchapter may be issued with or without notice and an opportunity for hearing in accordance with this subchapter.

(b) An emergency order issued under this subchapter without a hearing is not subject to the requirements of the Texas Administrative Procedure Act.

(c) If an emergency order is issued under this subchapter without a hearing, the order shall set a time and place for a hearing to affirm, modify, or set aside the order to be held before the commission or SOAH as soon as practicable after the order is issued.

(d) Except as otherwise provided by this subchapter, notice of a hearing to affirm, modify, or set aside an emergency order under this subchapter shall be given not later than the tenth day before the date set for the hearing. This notice shall provide that an affected person may request an evidentiary hearing on issuance of the emergency order.

(e) A hearing to affirm, modify, or set aside an emergency order under this subchapter is subject to the Texas Administrative Procedure Act.

§22.298. Contents of Emergency Order.

An emergency order issued under this subchapter shall contain at least the following:

(1) the name and address of the applicant, if any, and information sufficient to identify the facility or location affected by the order;

(2) a description of the condition justifying the issuance of the order;

(3) any findings of facts required under this subchapter;

(4) a statement of the term of the order, including the dates on which it shall begin and end;

(5) a description of the action sought;

(6) if the order was issued without a hearing, a statement to that effect and a provision setting a time and place for a hearing before the commission or SOAH; and

(7) any other statement or information required by this subchapter.

§22.299. Hearing Required.

A hearing shall be held either before or after the issuance of each emergency order. If no hearing is held before the issuance of an emergency order, a hearing to affirm, modify, or set aside the order shall be held before the commission or SOAH as soon as practicable after the order is issued.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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CHAPTER 24. SUBSTANTIVE RULES APPLICABLE TO WATER AND SEWER SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) proposes a new Chapter 24 relating to Substantive Rules Applicable to Water and Sewer Service Providers. This new chapter includes §§24.1 - 24.6, 24.8, 24.9, 24.11, 24.12, 24.14, 24.15, 24.21 - 24.32, 24.34, 24.35, 24.41 - 24.45, 24.71 - 24.76, 24.80 - 24.95, 24.101 - 24.107, 24.109 - 24.125, 24.127 - 24.138, 24.140 - 24.144, 24.146, 24.147, and 24.150 - 24.153. This proposal will result in the migration of substantive rules regulating water and sewer utilities from the Texas Commission on Environmental Quality (TCEQ) (30 Texas Administrative Code (TAC) Chapter 291) to the commission (16 TAC Chapter 24). The proposed new chapter (Chapter 24) will implement the TCEQ's substantive rules related to the economic regulation of water and sewer utilities into the commission's substantive rules and includes necessary changes to implement the rules in accordance with commission procedures. This rulemaking is necessary to allow the commission to begin the economic regulation of water and sewer utilities effective September 1, 2014, pursuant to House Bill (H.B.) 1600 and Senate Bill (S.B.) 567, 83rd Legislature, Regular Session. Therefore, the new Chapter 24 substantive rules will be effective September 1, 2014.

Project Number 42190 is assigned to this proceeding.

Tom Hunter, Agency Counsel, has determined that for each year of the first five-year period the proposed sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Hunter has determined that for each year of the first five years the proposed sections are in effect the public benefit anticipated as a result of enforcing the sections will be the continued application of current TCEQ substantive rules related to water utilities until the commission amends or replaces such rules, pursuant to H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing these sections. Therefore, no regulatory flexibility analysis is required. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

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

The commission staff will conduct a public hearing on this rulemaking, if requested, pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on May 26, 2014. The request for a public hearing must be received by May 12, 2014.

Initial comments on the proposed sections may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 on or before May 12, 2014. Reply comments may be submitted on or before May 28, 2014. Sixteen copies of comments on the proposed new chapter are required to be filed pursuant to §22.71(c) of this title. Comments should be organized in a manner consistent with the organization of the proposed rule(s). The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed sections. The commission will consider the costs and benefits in deciding whether to adopt the sections. All comments and should refer to Project Number 42190.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §§24.1 - 24.6, 24.8, 24.9, 24.11, 24.12, 24.14, 24.15

This new subchapter is proposed under H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session, which grants the Public Utility Commission of Texas the authority to propose rules beginning September 1, 2013 related to functions to be transferred to the Public Utility Commission of Texas as of September 1, 2014. Specifically, Texas Water Code (TWC), §§5.507 - 5.508, and Chapter 13 provide the commission the authority to engage in the economic regulation of water and wastewater utilities, and provide the substantive basis to conduct the regulation. This new subchapter implements substantive rules pursuant to TWC, Chapter 13 and §§5.507 - 5.508, 11.041, 12.013.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session.

§24.1. *Purpose and Scope of this Chapter.*

(a) This chapter is intended to establish a comprehensive regulatory system under Texas Water Code (TWC), Chapter 13, to assure rates, operations, and services which are just and reasonable to the consumer and the retail public utilities, and to establish the rights and responsibilities of both the retail public utility and consumer. This chapter shall be given a fair and impartial construction to obtain these objectives and shall be applied uniformly regardless of race, color, religion, sex, or marital status. This chapter shall also govern the procedure for the institution, conduct and determination of all water and sewer rate causes and proceedings before the commission. These sections shall not be construed so as to enlarge, diminish, modify, or alter the jurisdiction, powers, or authority of the commission or the substantive rights of any person.

(b) A rule, form, policy, procedure, or decision of the Texas Commission on Environmental Quality (TCEQ) related to a power, duty, function, program, or activity transferred pursuant to House Bill 1600 and Senate Bill 567, 83rd Legislature, Regular Session (this Act), continues in effect as a rule, form, policy, procedure, or decision of the Public Utility Commission of Texas (commission) and remains in effect until amended or replaced by the commission. Beginning September 1, 2013, the commission may propose rules, forms, policies, and procedures related to a function to be transferred to the commission under this Act.

§24.2. *Severability Clause.*

(a) The adoption of this chapter will in no way preclude the commission from altering or amending it in whole or in part, or from requiring any other or additional service, equipment, facility, or standard, either upon complaint or upon its own motion or upon application of any utility. Furthermore, this chapter will not relieve in any way a retail public utility or customer from any of its duties under the laws of

this state or the United States. If any provision of this chapter is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end, the provisions of this chapter are declared to be severable.

(b) The commission may make exceptions to this chapter for good cause.

§24.3. *Definitions of Terms.*

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

(1) Acquisition adjustment--

(A) The difference between:

(i) the lesser of the purchase price paid by an acquiring utility or the current depreciated replacement cost of the plant, property, and equipment comparable in size, quantity, and quality to that being acquired, excluding customer contributed property; and

(ii) the original cost of the plant, property, and equipment being acquired, excluding customer contributed property, less accumulated depreciation.

(B) A positive acquisition adjustment results when subparagraph (A)(i) of this paragraph is greater than subparagraph (A)(ii) of this paragraph.

(C) A negative acquisition adjustment results when subparagraph (A)(ii) of this paragraph is greater than subparagraph (A)(i) of this paragraph.

(2) Affected county--A county to which Local Government Code, Chapter 232, Subchapter B, applies.

(3) Affected person--Any landowner within an area for which an application for a new or amended certificate of public convenience and necessity is filed; any retail public utility affected by any action of the regulatory authority; any person or corporation, whose utility service or rates are affected by any proceeding before the regulatory authority; or any person or corporation that is a competitor of a retail public utility with respect to any service performed by the retail public utility or that desires to enter into competition.

(4) Affiliated interest or affiliate--

(A) any person or corporation owning or holding directly or indirectly 5.0% or more of the voting securities of a utility;

(B) any person or corporation in any chain of successive ownership of 5.0% or more of the voting securities of a utility;

(C) any corporation 5.0% or more of the voting securities of which is owned or controlled directly or indirectly by a utility;

(D) any corporation 5.0% or more of the voting securities of which is owned or controlled directly or indirectly by any person or corporation that owns or controls directly or indirectly 5.0% or more of the voting securities of any utility or by any person or corporation in any chain of successive ownership of 5.0% of those utility securities;

(E) any person who is an officer or director of a utility or of any corporation in any chain of successive ownership of 5.0% or more of voting securities of a public utility;

(F) any person or corporation that the commission, after notice and hearing, determines actually exercises any substantial influence or control over the policies and actions of a utility or over which a utility exercises such control or that is under common control with a utility, such control being the possession directly or indirectly of the power to direct or cause the direction of the management and policies

of another, whether that power is established through ownership or voting of securities or by any other direct or indirect means; or

(G) any person or corporation that the commission, after notice and hearing, determines is exercising substantial influence over the policies and action of the utility in conjunction with one or more persons or corporations with which they are related by ownership or blood relationship, or by action in concert, that together they are affiliated within the meaning of this section, even though no one of them alone is so affiliated.

(5) Agency--Any state board, commission, department, or officer having statewide jurisdiction (other than an agency wholly financed by federal funds, the legislature, the courts, the Texas Department of Insurance, Division of Workers' Compensation, and institutions for higher education) which makes rules or determines contested cases.

(6) Allocations--For all retail public utilities, the division of plant, revenues, expenses, taxes, and reserves between municipalities, or between municipalities and unincorporated areas, where such items are used for providing water or sewer utility service in a municipality or for a municipality and unincorporated areas.

(7) Base rate--The portion of a consumer's utility bill which is paid for the opportunity of receiving utility service, excluding stand-by fees, which does not vary due to changes in utility service consumption patterns.

(8) Billing period--The usage period between meter reading dates for which a bill is issued or in nonmetered situations, the period between bill issuance dates.

(9) Certificate--The definition of certificate is that definition given to certificate of convenience and necessity in this subchapter.

(10) Certificate of Convenience and Necessity--A permit issued by the commission which authorizes and obligates a retail public utility to furnish, make available, render, or extend continuous and adequate retail water or sewer utility service to a specified geographic area.

(11) Certificate of Public Convenience and Necessity--The definition of certificate of public convenience and necessity is that definition given to certificate of convenience and necessity in this subchapter.

(12) Class of service or customer class--A description of utility service provided to a customer which denotes such characteristics as nature of use or type of rate.

(13) Code--The Texas Water Code (TWC). Any reference to TWC, §13.187 is to be construed to reference the substantive requirements of TWC, §13.187 as the TWC existed on August 31, 2013, until such time as the commission adopts rules to implement the changes in law made by this Act to TWC, Chapter 13 and §12.013, not later than September 1, 2015.

(14) Commission--The Public Utility Commission of Texas or a presiding officer, as applicable.

(15) Corporation--Any corporation, joint-stock company, or association, domestic or foreign, and its lessees, assignees, trustees, receivers, or other successors in interest, having any of the powers and privileges of corporations not possessed by individuals or partnerships, but shall not include municipal corporations unless expressly provided otherwise in the TWC.

(16) Customer--Any person, firm, partnership, corporation, municipality, cooperative, organization, or governmental agency provided with services by any retail public utility.

(17) Customer service line or pipe--The pipe connecting the water meter to the customer's point of consumption or the pipe which conveys sewage from the customer's premises to the service provider's service line.

(18) Facilities--All the plant and equipment of a retail public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any retail public utility.

(19) Incident of tenancy--Water or sewer service, provided to tenants of rental property, for which no separate or additional service fee is charged other than the rental payment.

(20) Landowner--An owner or owners of a tract of land including multiple owners of a single deeded tract of land as shown on the appraisal roll of the appraisal district established for each county in which the property is located.

(21) License--The whole or part of any commission permit, certificate, registration, or similar form of permission required by law.

(22) Licensing--The commission process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license, certificates of convenience and necessity, or any other authorization granted by the commission in accordance with its authority under the TWC.

(23) Main--A pipe operated by a utility service provider that is used for transmission or distribution of water or to collect or transport sewage.

(24) Mandatory water use reduction--The temporary reduction in the use of water imposed by court order, government agency, or other authority with appropriate jurisdiction. This does not include water conservation measures that seek to reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling or reuse of water so that a water supply is made available for future or alternative uses.

(25) Member--A person who holds a membership in a water supply or sewer service corporation and who is a record owner of a fee simple title to property in an area served by a water supply or sewer service corporation, or a person who is granted a membership and who either currently receives or will be eligible to receive water or sewer utility service from the corporation. In determining member control of a water supply or sewer service corporation, a person is entitled to only one vote regardless of the number of memberships the person owns.

(26) Membership fee--A fee assessed each water supply or sewer service corporation service applicant that entitles the applicant to one connection to the water or sewer main of the corporation. The amount of the fee is generally defined in the corporation's bylaws and payment of the fee provides for issuance of one membership certificate in the name of the applicant, for which certain rights, privileges, and obligations are allowed under said bylaws. For purposes of TWC, §13.043(g), a membership fee is a fee not exceeding approximately 12 times the monthly base rate for water or sewer service or an amount that does not include any materials, labor, or services required for or provided by the installation of a metering device for the delivery of service, capital recovery, extension fees, buy-in fees, impact fees, or contributions in aid of construction.

(27) Municipality--A city, existing, created, or organized under the general, home rule, or special laws of this state.

(28) Municipally owned utility--Any retail public utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities.

(29) Nonfunctioning system--A retail public utility under the supervision of a receiver, temporary manager, or that has been referred for the appointment of a temporary manager or receiver, pursuant to §24.142 of this title (relating to Operation of Utility That Discontinues Operation or Is Referred for Appointment of a Receiver) and §24.143 of this title (relating to Operation of a Utility by a Temporary Manager).

(30) Person--Any natural person, partnership, cooperative corporation, association, or public or private organization of any character other than an agency or municipality.

(31) Physician--Any public health official, including, but not limited to, medical doctors, doctors of osteopathy, nurse practitioners, registered nurses, and any other similar public health official.

(32) Point of use or point of ultimate use--The primary location where water is used or sewage is generated; for example, a residence or commercial or industrial facility.

(33) Potable water--Water that is used for or intended to be used for human consumption or household use.

(34) Premises--A tract of land or real estate including buildings and other appurtenances thereon.

(35) Public utility--The definition of public utility is that definition given to water and sewer utility in this subchapter.

(36) Purchased sewage treatment--Sewage treatment purchased from a source outside the retail public utility's system to meet system requirements.

(37) Purchased water--Raw or treated water purchased from a source outside the retail public utility's system to meet system demand requirements.

(38) Rate--Includes every compensation, tariff, charge, fare, toll, rental, and classification or any of them demanded, observed, charged, or collected, whether directly or indirectly, by any retail public utility, or water or sewer service supplier, for any service, product, or commodity described in TWC, §13.002(23), and any rules, regulations, practices, or contracts affecting any such compensation, tariff, charge, fare, toll, rental, or classification.

(39) Ratepayer--Each person receiving a separate bill shall be considered as a ratepayer, but no person shall be considered as being more than one ratepayer notwithstanding the number of bills received. A complaint or a petition for review of a rate change shall be considered properly signed if signed by any person, or spouse of any such person, in whose name utility service is carried.

(40) Reconnect fee--A fee charged for restoration of service where service has previously been provided. It may be charged to restore service after disconnection for reasons listed in §24.88 of this title (relating to Discontinuance of Service) or to restore service after disconnection at the customer's request.

(41) Retail public utility--Any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation.

(42) Retail water or sewer utility service--Potable water service or sewer service, or both, provided by a retail public utility to the ultimate consumer for compensation.

(43) Safe drinking water revolving fund--The fund established by the Texas Water Development Board to provide financial assistance in accordance with the federal program established under the provisions of the Safe Drinking Water Act and as defined in TWC, §15.602.

(44) Service--Any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under the TWC to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.

(45) Service line or pipe--A pipe connecting the utility service provider's main and the water meter or for sewage, connecting the main and the point at which the customer's service line is connected, generally at the customer's property line.

(46) Sewage--Ground garbage, human and animal, and all other waterborne type waste normally disposed of through the sanitary drainage system.

(47) Standby fee--A charge imposed on unimproved property for the availability of water or sewer service when service is not being provided.

(48) Tap fee--A tap fee is the charge to new customers for initiation of service where no service previously existed. A tap fee for water service may include the cost of physically tapping the water main and installing meters, meter boxes, fittings, and other materials and labor. A tap fee for sewer service may include the cost of physically tapping the main and installing the utility's service line to the customer's property line, fittings, and other material and labor. Water or sewer taps may include setting up the new customer's account, and allowances for equipment and tools used. Extraordinary expenses such as road bores and street crossings and grinder pumps may be added if noted on the utility's approved tariff. Other charges, such as extension fees, buy-in fees, impact fees, or contributions in aid of construction (CIAC) are not to be included in a tap fee.

(49) Tariff--The schedule of a retail public utility containing all rates, tolls, and charges stated separately by type or kind of service and the customer class, and the rules and regulations of the retail public utility stated separately by type or kind of service and the customer class.

(50) TCEQ--Texas Commission on Environmental Quality.

(51) Temporary water rate provision--A provision in a utility's tariff that allows a utility to adjust its rates in response to mandatory water use reduction.

(52) Test year--The most recent 12-month period for which representative operating data for a retail public utility are available. A utility rate filing must be based on a test year that ended less than 12 months before the date on which the utility made the rate filing.

(53) Utility--The definition of utility is that definition given to water and sewer utility in this subchapter.

(54) Water and sewer utility--Any person, corporation, cooperative corporation, affected county, or any combination of those persons or entities, other than a municipal corporation, water supply or sewer service corporation, or a political subdivision of the state, except an affected county, or their lessees, trustees, and receivers, owning or operating for compensation in this state equipment or facilities for

the production, transmission, storage, distribution, sale, or provision of potable water to the public or for the resale of potable water to the public for any use or for the collection, transportation, treatment, or disposal of sewage or other operation of a sewage disposal service for the public, other than equipment or facilities owned and operated for either purpose by a municipality or other political subdivision of this state or a water supply or sewer service corporation, but does not include any person or corporation not otherwise a public utility that furnishes the services or commodity only to itself or its employees or tenants as an incident of that employee service or tenancy when that service or commodity is not resold to or used by others.

(55) Water use restrictions--Restrictions implemented to reduce the amount of water that may be consumed by customers of the system due to emergency conditions or drought.

(56) Water supply or sewer service corporation--Any non-profit corporation organized and operating under TWC, Chapter 67, that provides potable water or sewer service for compensation and that has adopted and is operating in accordance with bylaws or articles of incorporation which ensure that it is member-owned and member-controlled. The term does not include a corporation that provides retail water or sewer service to a person who is not a member, except that the corporation may provide retail water or sewer service to a person who is not a member if the person only builds on or develops property to sell to another and the service is provided on an interim basis before the property is sold. For purposes of this chapter, to qualify as member-owned, member-controlled a water supply or sewer service corporation must also meet the following conditions.

(A) All members of the corporation meet the definition of "member" under this section, and all members are eligible to vote in those matters specified in the articles and bylaws of the corporation. Payment of a membership fee in addition to other conditions of service may be required provided that all members have paid or are required to pay the membership fee effective at the time service is requested.

(B) Each member is entitled to only one vote regardless of the number of memberships owned by that member.

(C) A majority of the directors and officers of the corporation must be members of the corporation.

(D) The corporation's bylaws include language indicating that the factors specified in subparagraphs (A) - (C) of this paragraph are in effect.

(57) Wholesale water or sewer service--Potable water or sewer service, or both, provided to a person, political subdivision, or municipality who is not the ultimate consumer of the service.

§24.4. Cooperative Corporation Rebates.

Nothing in this chapter prevents a cooperative corporation from returning to its members the whole or any part of the net earnings resulting from its operations in proportion to their purchases from or through the corporation.

§24.5. Submission of Documents.

All documents to be considered by the commission under this chapter are subject to Chapter 22 of this title (relating to Procedural Rules).

§24.6. Signatories to Applications.

(a) All applications shall be signed by a corporate officer, partner, proprietor, their attorney-at-law, or the principal executive officer or ranking elected official of a governmental entity, or other person having representative capacity to transact business on behalf of the retail public utility. If the signer is not a corporate officer, partner, proprietor, their attorney-at-law, or principal executive officer or ranking elected

official of a governmental entity, the application must contain written proof that such signature is duly authorized.

(b) Applications shall contain a certification stating that the person signing has personally examined and is familiar with the information submitted in the application and that the information is true, accurate, and complete.

§24.8. Administrative Completeness.

(a) Notice of rate/tariff change; report of sale, acquisition, lease, rental, merger, or consolidation; and sale, assignment of, or lease of a certificate; and applications for certificates of convenience and necessity shall be reviewed for administrative completeness within ten working days of receipt of the application. A notice or an application for rate/tariff change; report of sale, acquisition, lease, rental, merger, or consolidation; and applications for certificates of convenience and necessity are not considered filed until received by the commission, accompanied by the filing fee, if any, required by statute or commission rules, and a determination of administrative completeness is made. Upon determination that the notice or application is administratively complete, the applicant shall be notified by mail of that determination. If the commission determines that material deficiencies exist in any pleadings, statement of intent, applications, or other requests for commission action addressed by this chapter, the notice or application may be rejected and the effective date suspended until the deficiencies are corrected.

(b) In cases involving proposed rate changes, the effective date of the proposed change must be at least 60 days after:

(1) the date that an application and notice are received by the commission, provided the application and notice are determined to be administratively complete as filed;

(2) the date that the application and notice are determined to be administratively complete for previously rejected applications and notices; or

(3) the date that the notice is delivered to each ratepayer, whichever is later.

(c) In cases involving a proposed sale, acquisition, lease, rental, merger, or consolidation of any water or sewer system required by law to possess a certificate of convenience and necessity, the proposed effective date of the transaction must be at least 120 days after the date that an application is received by the commission and public notice is provided, unless notice is waived for good cause shown.

§24.9. Agreements to be in Writing.

No stipulation or agreement between the parties, their attorneys, or representatives, with regard to any matter involved in any proceeding before the commission shall be enforced, unless it shall have been reduced to writing and signed by the parties or representatives authorized by these sections to appear for them, or unless it shall have been dictated into the record by them during the course of a hearing, or incorporated into an order bearing their written approval. This section does not limit a party's ability to waive, modify, or stipulate any right or privilege afforded by this chapter, unless precluded by law.

§24.11. Informal Proceedings.

(a) Any hearing involving a retail public water or sewer utility as defined in §24.3 of this title (relating to Definitions of Terms) may be conducted as an informal proceeding when, in the judgment of the presiding officer, the conduct of a hearing under informal procedures will:

(1) result in savings of time or costs to all parties;

(2) lead to a negotiated or agreed settlement of facts or issues in controversy; and

(3) not prejudice the rights of any party.

(b) If during an informal proceeding, all parties reach a negotiated or agreed settlement which in the judgment of the presiding officer settles all facts or issues in controversy, the proceeding shall not be a contested case under the Texas Administrative Procedure Act, Government Code, Chapter 2001, and no proposal for decision nor detailed findings of fact and conclusions of law are required.

(c) If the parties do not reach a negotiated or agreed settlement of all facts and issues in controversy, the presiding officer may adjourn the informal proceeding and reconvene it as a contested case hearing under standard hearing procedures as otherwise provided for in this chapter.

§24.12. Burden of Proof.

In any proceeding involving any proposed change of rates, the burden of proof shall be on the provider of water and sewer services to show that the proposed change, if proposed by the retail public utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable. In any other matters or proceedings, the burden of proof is on the moving party.

§24.14. Emergency Orders.

(a) The commission may issue emergency orders, with or without a hearing:

(1) to compel a water or sewer service provider that has obtained or is required to obtain a certificate of public convenience and necessity to provide continuous and adequate water service, sewer service, or both, if the discontinuance of the service is imminent or has occurred because of the service provider's actions or failure to act. These orders may contain provisions requiring specific utility actions to ensure continuous and adequate utility service and compliance with regulatory guidelines;

(2) to compel a retail public utility to provide an emergency interconnection with a neighboring retail public utility for the provision of temporary water or sewer service, or both, for not more than 90 days if service discontinuance or serious impairment in service is imminent or has occurred; and/or

(3) to establish reasonable compensation for the temporary service required under paragraph (2) of this subsection and may allow the retail public utility receiving the service to make a temporary adjustment to its rate structure to ensure proper payment.

(b) The commission may also issue orders under Chapter 22, Subchapter P of this title (relating to Emergency Orders for Water Utilities):

(1) to appoint a temporary manager under TWC, §5.507 and §13.4132; and/or

(2) to approve an emergency rate increase under TWC, §5.508 and §13.4133.

(c) If an order is issued under this section without a hearing, the order shall fix a time, as soon after the emergency order is issued as is practicable, and place for a hearing to be held before the commission.

§24.15. Notice of Wholesale Water Supply Contract.

(a) A district or authority created under Texas Constitution, §52, Article III, or §59, Article XVI, a retail public utility, a wholesale water service, or other person providing a retail public utility with a wholesale water supply shall provide the commission with a certified copy of any wholesale water supply contract with a retail public utility within 30 days after the date of the execution of the contract.

(b) The submission must include:

(1) the amount of water being supplied;

(2) term of the contract;

(3) consideration being given for the water;

(4) purpose of use;

(5) location of use;

(6) source of supply;

(7) point of delivery;

(8) limitations on the reuse of water;

(9) a disclosure of any affiliated interest between the parties to the contract; and

(10) any other condition or agreement relating to the contract.

(c) The certified copy of the contract should be submitted to the commission.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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For further information, please call: (512) 936-7223



SUBCHAPTER B. RATES, RATE-MAKING, AND RATES/TARIFF CHANGES

16 TAC §§24.21 - 24.32, 24.34, 24.35

This new subchapter is proposed under H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session, which grants the Public Utility Commission of Texas the authority to propose rules beginning September 1, 2013 related to functions to be transferred to the Public Utility Commission of Texas as of September 1, 2014. Specifically, Texas Water Code (TWC), §§5.507 - 5.508, and Chapter 13 provide the commission the authority to engage in the economic regulation of water and wastewater utilities, and provide the substantive basis to conduct the regulation. This new subchapter implements substantive rules pursuant to TWC, Chapter 13 and §§5.507 - 5.508, 11.041, 12.013.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session.

§24.21. Form and Filing of Tariffs.

(a) Approved tariff. A utility may not directly or indirectly demand, charge, or collect any rate or charge, or impose any classifications, practices, rules, or regulations different from those prescribed in its approved tariff filed with the commission or with the municipality exercising original jurisdiction over the utility, except as noted in this subsection. A utility may charge the rates proposed under TWC, §13.187(a) (relating to Statement of Intent to Change Rates) after the proposed effective date, unless the rates are suspended or the commission or a judge sets interim rates. The regulatory assessment required in TWC, §5.235(n) does not have to be listed on the utility's approved

tariff to be charged and collected but must be included in the tariff at the earliest opportunity. A person who possesses facilities used to provide water utility service or a utility that holds a certificate of public convenience and necessity to provide water service that enters into an agreement in accordance with TWC, §13.250(b)(2), may collect charges for wastewater services on behalf of another retail public utility on the same bill with its water charges and shall at the earliest opportunity include a notation on its tariff that it has entered into such an agreement. A utility may enter into a contract with a county to collect solid waste disposal fees and include those fees on the same bill with its water charges and shall at the earliest opportunity include a notation on its tariff that it has entered into such an agreement.

(b) Requirements as to size, form, identification, minor changes, and filing of tariffs.

(1) Tariffs filed with applications for certificates of convenience and necessity.

(A) Every public utility shall file its tariff with the commission containing schedules of all its rates, tolls, charges, rules, and regulations pertaining to all of its utility service when it applies for a certificate of convenience and necessity to operate as a public utility. The tariff must be on the form the commission prescribes or another form acceptable to the commission.

(B) Every water supply or sewer service corporation shall file with the commission the number of copies of its tariff containing schedules of all its rates, tolls, charges, rules, and regulations pertaining to all of its utility service when it applies for a certificate of convenience and necessity to operate as a retail public utility.

(2) Minor tariff changes. Except for an affected county, a public utility's approved tariff may not be changed or amended without commission approval. An affected county may change rates for water or wastewater service without commission approval but shall file a copy of the revised tariff with the commission within 30 days after the effective date of the rate change.

(A) The commission may approve the following minor changes to tariffs, service rules and policies:

(i) changes in fees for customer deposits, meter tests, return check charges, and late charges, provided they do not exceed the maximum allowed by the applicable sections;

(ii) implementation of a purchased water or sewage treatment provision, a temporary water rate provision in response to mandatory reductions in water use imposed by a court, government agency, or other authority, or water use fee provision previously approved by the commission;

(iii) surcharges over a time period determined to reflect the change in the actual cost to the utility for sampling costs, commission inspection fees, or as appropriate, other governmental requirements beyond the utility's control;

(iv) addition of the regulatory assessment as a separate item or to be included in the currently authorized rate;

(v) addition of a provision allowing a utility to collect wastewater charges in accordance with TWC, §13.250(b)(2) or §13.147(d);

(vi) rate adjustments to implement authorized phased or multi-step rates or downward rate adjustments to reconcile rates with actual costs;

(vii) addition of a production fee charged by a groundwater conservation district as a separate item calculated by multiplying the customer's total consumption, including the number

of gallons in the base bill, by the actual production fee per thousand gallons; or

(viii) implementation of an energy cost adjustment clause.

(B) The addition of an extension policy to a tariff or a change to an existing extension policy does not qualify as a minor tariff change because it must be approved or amended in a rate change application.

(3) Tariff revisions and tariffs filed with rate changes. The utility shall file its revision with the commission. Each revision must be accompanied by a cover page that contains a list of pages being revised, a statement describing each change, its effect if it is a change in an existing rate, and a statement as to impact on rates of the change by customer class, if any. If a proposed tariff revision constitutes an increase in existing rates of a particular customer class or classes, then the commission may require that notice be given.

(4) Rate schedule. Each rate schedule must clearly state the territory, subdivision, city, or county in which the schedule is applicable.

(5) Tariff sheets. Tariff sheets must be numbered consecutively. Each sheet must show an effective date, a revision number, section number, sheet number, name of the utility, the name of the tariff, and title of the section in a consistent manner. Sheets issued under new numbers must be designated as original sheets. Sheets being revised must show the number of the revision, and the sheet numbers must be the same.

(c) Composition of tariffs. A utility's tariff, including those utilities operating within the corporate limits of a municipality, must contain sections setting forth:

(1) a table of contents;

(2) a list of the cities and counties, and subdivisions or systems, in which service is provided;

(3) the certificate of convenience and necessity number under which service is provided;

(4) the rate schedules;

(5) the service rules and regulations, including forms of the service agreements, if any, and customer service inspection forms required to be completed under 30 TAC §290.46(j) (relating to Minimum Acceptable Operating Practices for Public Drinking Water Systems) if the form used deviates from that specified in 30 TAC §290.47(d) (relating to Appendices);

(6) the extension policy;

(7) an approved drought contingency plan as required by 30 TAC §288.20 (relating to Drought Contingency Plans for Municipal Uses by Public Water Suppliers); and

(8) the form of payment to be accepted for utility services.

(d) Tariff filings in response to commission orders. Tariff filings made in response to an order issued by the commission must include a transmittal letter stating that the tariffs attached are in compliance with the order, giving the docket number, date of the order, a list of tariff sheets filed, and any other necessary information. Any service rules proposed in addition to those listed on the commission's model tariff or any modifications of a rule in the model tariff must be clearly noted. All tariff sheets must comply with all other sections in this chapter and must include only changes ordered. The effective date and/or wording of the tariffs must comply with the provisions of the order.

(e) Availability of tariffs. Each utility shall make available to the public at each of its business offices and designated sales offices within Texas all of its tariffs currently on file with the commission or regulatory authority, and its employees shall lend assistance to persons requesting information and afford these persons an opportunity to examine any of such tariffs upon request. The utility also shall provide copies of any portion of the tariffs at a reasonable cost to reproduce such tariff for a requesting party.

(f) Rejection. Any tariff filed with the commission and found not to be in compliance with this section must be so marked and returned to the utility with a brief explanation of the reasons for rejection.

(g) Change by other regulatory authorities. Tariffs must be filed to reflect changes in rates or regulations set by other regulatory authorities and must include a copy of the order or ordinance authorizing the change. Each utility operating within the corporate limits of a municipality exercising original jurisdiction shall file with the commission a copy of its current tariff that has been authorized by the municipality.

(h) Purchased water or sewage treatment provision.

(1) A utility that purchases water or sewage treatment may include a provision in its tariff to pass through to its customers changes in such costs. The provision must specify how it is calculated and affects customer billings.

(2) This provision must be approved by the commission in a rate proceeding. A proposed change in the method of calculation of the provision must be approved in a rate proceeding.

(3) Once the provision is approved, any revision of a utility's billings to its customers to allow for the recovery of additional costs under the provision may be made only upon issuing notice as required by paragraph (4) of this subsection. The review of a proposed revision is an informal proceeding. Only the commission staff or the utility may request a hearing on the proposed revision. The recovery of additional costs is defined as an increase in water use fees or in costs of purchased water or sewage treatment.

(4) A utility that wishes to revise utility billings to its customers pursuant to an approved purchased water or sewer treatment or water use fee provision to allow for the recovery of additional costs shall take the following actions prior to the beginning of the billing period in which the revision takes effect:

(A) submit a written notice to the commission; and

(B) mail notice to the utility's customers. Notice may be in the form of a billing insert and must contain the effective date of the change, the present calculation of customer billings, the new calculation of customer billings, and the change in charges to the utility for purchased water or sewage treatment or water use fees. The notice must include the following language: "This tariff change is being implemented in accordance with the utility's approved (purchased water) (purchased sewer) (water use fee) adjustment clause to recognize (increases) (decreases) in the (water use fee) (cost of purchased) (water) (sewage treatment). The cost of these charges to customers will not exceed the (increased) (decreased) cost of (the water use fee) (purchased) (water) (sewage treatment)."

(5) Notice to the commission must include a copy of the notice sent to the customers, proof that the cost of purchased water or sewage treatment has changed by the stated amount, and the calculations and assumptions used to determine the new rates.

(6) Purchased water or sewage treatment provisions may not apply to contracts or transactions between affiliated interests.

(i) Effective date. The effective date of a tariff change is the date of approval by the commission unless otherwise stated in the letter transmitting the approval or the date of approval by the commission, unless otherwise specified in a commission order or rule. The effective date of a proposed rate increase under TWC, §13.187 is the proposed date on the notice to customers and the commission, unless suspended and must comply with the requirements of §24.8(b) of this title (relating to Administrative Completeness).

(j) Tariffs filed by water supply or sewer service corporations. Every water supply or sewer service corporation shall file, for informational purposes only, one copy of its tariff showing all rates that are subject to the appellate jurisdiction of the commission and that are in force for any utility service, product, or commodity offered. The tariff must include all rules and regulations relating to or affecting the rates, utility service or extension of service or product, or commodity furnished and shall specify the certificate of convenience and necessity number and in which counties or cities it is effective.

(k) Surcharge.

(1) A surcharge is an authorized rate to collect revenues over and above the usual cost of service.

(2) If specifically authorized for the utility in writing by the commission or the municipality exercising original jurisdiction over the utility, a surcharge to recover the actual increase in costs to the utility may be collected over a specifically authorized time period without being listed on the approved tariff for:

(A) sampling fees not already included in rates;

(B) inspection fees not already included in rates;

(C) production fees or connection fees not already included in rates charged by a groundwater conservation district; or

(D) other governmental requirements beyond the control of the utility.

(3) A utility shall use the revenues collected pursuant to a surcharge only for the purposes noted and handle the funds in the manner specified according to the notice or application submitted by the utility to the commission. The utility may redirect or use the revenues for other purposes only after first obtaining the approval of commission.

(l) Temporary water rate.

(1) A utility's tariff may include a temporary water rate provision that will allow the utility to increase its retail customer rates during periods when a court, government agency, or other authority orders mandatory water use reduction measures that affect the utility customers' use of water service and the utility's water revenues. Implementation of the temporary water rate provision will allow the utility to recover from customers' revenues that the utility would otherwise have lost due to mandatory water use reductions in accordance with the temporary water rate provision approved by the commission. If a utility obtains a portion of its water supply from another unrestricted water source or water supplier during the time the temporary water rate is in effect, the rate resulting from implementation of the temporary water rate provision must be adjusted to account for the supplemental water supply and to limit over-recovery of revenues from customers. A temporary water rate provision may not be implemented by a utility if there exists an available, unrestricted, alternative water supply that the utility can use to immediately replace, without additional cost, the water made unavailable because of the action requiring a mandatory reduction of use of the affected water supply.

(2) The temporary water rate provision must be approved by the commission in a rate proceeding before it may be included in the utility's approved tariff or implemented as provided in this subsection. A proposed change in the temporary water rate must be approved in a rate proceeding. A utility that has filed a rate change within the last 12 months may file a request for the limited purpose of obtaining a temporary water rate provision.

(3) A utility may request a temporary water rate provision using the formula in this paragraph to recover 50% or less of the revenues that would otherwise have been lost due to mandatory water use reductions through a limited rate proceeding. The formula for a temporary water rate provision under this paragraph is:
Figure: 16 TAC §24.21(1)(3)

(A) The utility shall file a temporary water rate application prescribed by the commission and provide customer notice as required in the application, but is not required to provide complete financial data to support its existing rates. Notice must include a statement of when the temporary water rate provision would be implemented, the classes of customers affected, the rates affected, information on how to protest the rate change, the required number of protests to ensure a hearing, the address of the commission, the time frame for protests, and any other information that is required by the commission in the temporary water rate application. The utility's existing rates are not subject to review in the proceeding and the utility is only required to support the need for the temporary rate. A request for a temporary water rate provision under this paragraph is not considered a statement of intent to increase rates subject to the 12-month limitation in §24.23 of this title (relating to Time between Filings).

(B) The utility shall establish that the projected revenues that will be generated by the temporary water rate provision are required by the utility to pay reasonable and necessary expenses that will be incurred by the utility during the time mandatory water use reductions are in effect.

(4) A utility may request a temporary water rate provision using the formula in paragraph (3) of this subsection or any other method acceptable to the commission to recover up to 100% of the revenues that would otherwise have been lost due to mandatory water use reductions.

(A) If the utility requests authorization to recover more than 50% of lost revenues, it shall submit financial data to support its existing rates as well as the temporary water rate provision even if no other rates are proposed to be changed. The utility shall complete a rate application and provide notice in accordance with the requirements of §24.22 of this title (relating to Notice of Intent to Change Rates). The utility's existing rates are subject to review in addition to the temporary water rate provision.

(B) The utility shall establish that the projected revenues that will be generated by the temporary water rate provision are required by the utility to pay reasonable and necessary expenses that will be incurred by the utility during the time mandatory water use reductions are in effect; that the rate of return granted by the commission in the utility's last rate case does not adequately compensate the utility for the foreseeable risk that mandatory water use reductions will be ordered; and that revenues generated by existing rates do not exceed reasonable cost of service.

(5) The utility may place the temporary water rate into effect only after:

(A) the temporary water provision has been approved by the commission and included in the utility's approved tariff in a prior rate proceeding;

(B) there is an action by a court, government agency, or other authority requiring mandatory water use reduction measures that affect the utility's customers' use of utility services; and

(C) issuing notice as required by paragraph (7) of this subsection.

(6) The utility may readjust its rates using the temporary water rate provision as necessary to respond to modifications or changes to the original order requiring mandatory water use reductions by reissuing notice as required by paragraph (7) of this subsection. The commission's review of the proposed implementation of an approved temporary water rate provision is an informal proceeding. Only the commission or the utility may request a hearing on the proposed implementation.

(7) A utility that wishes to place a temporary water rate into effect shall take the following actions prior to the beginning of the billing period in which the temporary water rate takes effect:

(A) submit a written notice, including a copy of the notice received from the court, government agency, or other authority requiring the reduction in water use, to the commission; and

(B) mail notice to the utility's customers. Notice may be in the form of a billing insert and must contain the effective date of the implementation and the new rate the customers will pay after the temporary water rate is implemented. The notice must include the following language: "This rate change is being implemented in accordance with the temporary water rate provision approved by the Public Utility Commission of Texas to recognize the loss of revenues due to mandatory water use reduction ordered by (name of entity issuing order). The new rates will be effective on (date) and will remain in effect until the mandatory water use reductions are lifted or expired. The purpose of the rate is to ensure the financial integrity of the utility. The utility will recover through the rate (the percentage authorized by the temporary rate) % of the revenues the utility would otherwise have lost due to mandatory water use reduction by increasing the volume charge from (\$ per 1,000 gallons to \$ per 1,000 gallons)."

(8) A utility shall stop charging a temporary water rate as soon as is practical after the order that required mandatory water use reduction is ended, but in no case later than the end of the billing period that was in effect when the order was ended. The utility shall notify its customers of the date that the temporary water rate ends and that its rates will return to the level authorized before the temporary water rate was implemented.

(9) If the commission initiates an inquiry into the appropriateness or the continuation of a temporary water rate, it may establish the effective date of its decision on or after the date the inquiry is filed.

(m) Multiple system consolidation. Except as otherwise provided in subsection (o) of this section, a utility may consolidate its tariff and rate design for more than one system if:

(1) the systems included in the tariff are substantially similar in terms of facilities, quality of service, and cost of service; and

(2) the tariff provides for rates that promote water conservation for single-family residences and landscape irrigation.

(n) Regional rates. The commission, where practicable, shall consolidate the rates by region for applications submitted with a consolidated tariff and rate design for more than one system.

(o) Exemption. Subsection (m) of this section does not apply to a utility that provided service in only 24 counties on January 1, 2003.

(p) Energy cost adjustment clause.

(1) A utility that purchases energy (electricity or natural gas) that is necessary for the provision of water or sewer service may request the inclusion of an energy cost adjustment clause in its tariff to allow the utility to adjust its rates to reflect increases and decreases in documented energy costs.

(2) A utility that requests the inclusion of an energy cost adjustment clause in its tariff shall file an application with the commission. The utility shall also give notice of the proposed energy cost adjustment clause by mail, either separately or accompanying customer billings, or by hand delivery to all affected utility customers at least 60 days prior to the proposed effective date. Proof of notice in the form of an affidavit stating that proper notice was mailed to affected customers and stating the dates of such mailing shall be filed with the commission by the applicant utility as part of the application. Notice must be provided on the notice form included in the commission's application package and must contain the following information:

(A) the utility name and address, a description of how the increase or decrease in energy costs will be calculated, the effective date of the proposed change, and the classes of utility customers affected. The effective date of the proposed energy cost adjustment clause must be the first day of a billing period, which should correspond to the day of the month when meters are typically read, and the clause may not apply to service received before the effective date of the clause;

(B) information on how to submit comments regarding the energy cost adjustment clause, the address of the commission, and the time frame for comments; and

(C) any other information that is required by the application form.

(3) The commission's review of the utility's application is an uncontested matter not subject to a contested case hearing. However, the commission shall hold an uncontested public meeting on the application if requested by a member of the legislature who represents the area served by the utility or if the commission determines that there is substantial public interest in the matter.

(4) Once an energy cost adjustment clause has been approved, documented changes in energy costs must be passed through to the utility's customers within a reasonable time. The pass through, whether an increase or decrease, shall be implemented on at least an annual basis, unless the commission determines a special circumstance applies. Anytime changes are being made using this provision, notice shall be provided as required by paragraph (5) of this subsection.

(5) Before a utility implements a change in its energy cost adjustment clause as required by paragraph (4) of this subsection, the utility shall take the following actions prior to the beginning of the billing period in which the implementation takes effect:

(A) submit written notice to the commission, which must include a copy of the notice sent to the customers, proof that the documented energy costs have changed by the stated amount; and

(B) mail either separately or accompanying customer billings, or hand deliver notice to the utility's affected customers. Notice must contain the effective date of change and the increase or decrease in charges to the utility for documented energy costs. The notice must include the following language: "This tariff change is being implemented in accordance with the utility's approved energy cost adjustment clause to recognize (increases) (decreases) in the documented energy costs. The cost of these charges to customers will not exceed the (increase) (decrease) in documented energy costs."

(6) The commission may suspend the adoption or implementation of an energy cost adjustment clause if the utility has failed to properly complete the application or has failed to comply with the notice requirements or proof of notice requirements. If the utility cannot clearly demonstrate how the clause is calculated, the increase or decrease in documented energy costs or how the increase or decrease in documented energy costs will affect rates, the commission may suspend the adoption or implementation of the clause until the utility provides additional documentation requested by the commission. If the commission suspends the adoption or implementation of the clause, the adoption or implementation will be effective on the date specified by the commission

(7) Energy cost adjustment clauses may not apply to contracts or transactions between affiliated interests.

(8) A proceeding under this subsection is not a rate case, and TWC, §13.187 does not apply.

§24.22. Notice of Intent to Change Rates.

(a) Administrative requirements. In order to change rates, which are subject to the commission's original jurisdiction, the applicant utility shall file with the commission a completed application package and shall give notice of the proposed rate change by mail, e-mail, or hand delivery to all affected utility customers at least 60 days prior to the proposed effective date. Notice must be provided on the notice form included in the commission's rate application package and must contain the following information:

(1) the utility name and address, current rates, the proposed rates, the effective date of the proposed rate change, the increase or decrease requested over test year revenues as adjusted for test year customer growth and annualization of test year rate increases, stated as a dollar amount, and the classes of utility customers affected. The effective date of the new rates must be the first day of a billing period, which should correspond to the day of the month when meters are typically read, and the new rates may not apply to service received before the effective date of the new rates;

(2) information on how to protest the rate change, the required number of protests to ensure a hearing, the address of the commission, and the time frame for protests;

(3) a billing comparison showing the existing rate and the new computed water rate using 10,000 gallons of water and 30,000 gallons of water;

(4) a billing comparison showing the existing sewer rate and the new sewer rate for the use of 10,000 gallons, unless the utility proposes a flat rate for sewer services;

(5) disclosure of an ongoing proceeding under §24.113 of this title (relating to Revocation or Amendment of Certificate), if any;

(6) the reason or reasons for the proposed rate change;

(7) any bill payment assistance program available to low-income ratepayers; and

(8) any other information that is required by the commission in the rate change application form.

(b) Notice requirements. The governing body of a municipality or a political subdivision that provides retail water or sewer service to customers outside the boundaries of the municipality or political subdivision shall mail, e-mail, or hand deliver individual written notice to each affected ratepayer eligible to appeal who resides outside the boundaries within 60 days after the date of the final decision on a rate change. The governing body of a municipally owned utility or political subdivision may provide the notice electronically if the

municipality or political subdivision has access to a ratepayer's e-mail address. The commissioners court of an affected county that provides water or sewer service shall mail or hand deliver individual written notice to each affected ratepayer eligible to appeal within 30 days after the date of the final decision on a rate change. The notice must include, at a minimum, the effective date of the new rates, the new rates, and the location where additional information on rates can be obtained.

(c) Notice delivery requirements. Notices may be mailed separately, e-mailed, or may accompany customer billings. Notice of a proposed rate change by a utility must be mailed, e-mailed, or hand delivered to the customers at least 60 days prior to the effective date of the rate increase.

(d) Notice and statement of intent. The applicant utility shall mail, e-mail, or deliver a copy of the statement of intent to change rates to the appropriate officer of each affected municipality at least 60 days prior to the effective date of the proposed change. If the utility is requesting a rate change from the commission for customers residing outside the municipality, it shall also provide a copy of the rate application filed with the commission to the municipality. The commission may also require that notice be mailed, e-mailed, or delivered to other affected persons or agencies.

(e) Proof of notice. Proof of notice in the form of an affidavit stating that proper notice was mailed, e-mailed, or delivered to customers and affected municipalities and stating the dates of such delivery, shall be filed with the commission by the applicant utility as part of the rate change application. Notice to customers is sufficient if properly stamped and addressed to the customer and deposited in the United States mail at least 60 days before the effective date.

(f) Standby fees. A utility may request in a rate change application that standby fees be approved for property or lots for which the utility has previously entered into an agreement to serve or construction of water or sewer utility facilities has already begun or been completed if the developer owning the property at the time the rate change application is filed is given individual written notice by certified mail of the request and an opportunity to protest.

(g) Emergency rate increase in certain circumstances. After receiving a request, the commission may authorize an emergency rate increase under TWC, §5.508 and §13.4133 and Chapter 22, Subchapter P of this title (relating to Emergency Orders for Water Utilities) for a utility:

(1) for which a person has been appointed under TWC, §13.4132; or

(2) for which a receiver has been appointed under TWC, §13.412; and

(3) if the increase is necessary to ensure the provision of continuous and adequate services to the utility's customers.

(h) Line extension and construction charges. A utility shall request in a rate change application that its extension policy be approved or amended. The application must include the proposed tariff and other information requested by the commission. The request may be made with a request to change one or more of the utility's other rates.

§24.23. Time between Filings.

Unless the commission requires it to deliver a corrected statement of intent, a utility or two or more utilities under common control or ownership may not file a notice of intent to increase rates more than once in a 12-month period except:

(1) to implement an approved purchase water pass through provision;

(2) to adjust the rates of a newly acquired utility system;

(3) to comply with a commission order;

(4) to adjust rates authorized by §24.21(b)(2) of this title (relating to Form and Filing of Tariffs); or

(5) unless the regulatory authority determines that a financial hardship exists. A utility may be considered to be experiencing a financial hardship if revenues are insufficient to:

(A) cover reasonable and necessary operating expenses; or

(B) cover cash flow needs which may include regulatory sampling requirements, unusual repair and maintenance expenses, revenues to finance required capital improvements or, in certain instances, existing debt service requirements.

§24.24. Jurisdiction over Affiliated Interests.

(a) The commission has jurisdiction over affiliated interests having transactions with utilities under the jurisdiction of the commission to the extent of access to all accounts and records of those affiliated interests relating to such transactions, including, but not limited to, accounts and records of joint or general expenses, any portion of which may be applicable to those transactions.

(b) The owner of a utility that supplies retail water service may not contract to purchase wholesale water service from an affiliated supplier for any part of that owner's systems unless:

(1) the wholesale service is provided for not more than 90 days if service discontinuance or serious impairment in service is imminent or has occurred; or

(2) the commission determines that the utility cannot obtain wholesale water service from another source at a lower cost than from the affiliate.

§24.25. Rate Change Applications, Testimony and Exhibits.

(a) A change in rates under the TWC, §13.187, is initiated by the submission of a rate filing package which consists of a rate/tariff change application form, or such other forms as prescribed by the commission, a statement of intent to change rates, and a copy of the notice the applicant has provided to customers and other affected parties.

(b) A utility filing for a change in rates under the TWC, §13.187, shall be prepared to go forward at a hearing on the data which has been submitted under subsection (a) of this section and sustain the burden of proof of establishing that its proposed changes are just and reasonable.

(c) An original of the completed rate filing package and the required number of copies shall be submitted and filed with the commission. In the event that the proposed rate change becomes the subject of a hearing, the commission may require or allow, in addition to copies of the rate filing package, prefiled testimony and exhibits in support of the rate change request.

(d) The book data included in the schedules and information prepared and submitted as part of the filing shall be reported in a separate column or columns. All adjustments to book amounts shall also be shown in a separate column or columns so that books amounts, adjustments thereto, and adjusted amounts will be clearly disclosed, and any separation and allocation between interstate and intrastate operations shall be fully disclosed and clearly explained.

(e) All parties shall file the specified number of copies of their prepared testimony, if required, and exhibits within the time period specified by the judge assigned to the application.

(f) The items in the rate filing package may be modified on a showing of good cause.

§24.26. Suspension of Rates.

(a) The commission may suspend the rate change if the utility has failed to properly complete the rate application, has included in the cost of service for the noticed rates rate case expenses other than those necessary to complete and file the application, or has failed to comply with the notice requirements and proof of notice requirements. The utility may not re-notify its customers of a new proposed effective date until the utility receives written notification from the commission that all deficiencies have been corrected.

(b) The effective date of any rate change may be suspended by the commission if the utility does not have a certificate of convenience and necessity or a completed application pending with the commission to obtain or to transfer a certificate of convenience and necessity.

(c) If the commission receives the required number of protests that would require a contested case hearing, the commission may, pending the hearing and a final decision from the commission, suspend the date the rate change would be effective. The proposed rate may not be suspended for more than 150 days.

§24.27. Request for a Review of a Rate Change by Ratepayers Pursuant to the Texas Water Code, §13.187(b).

(a) Petitions for review of rate actions filed by ratepayers pursuant to the TWC, §13.187(b), shall contain the original petition for review with the required signatures. Each signature page of a petition should contain in legible form the following information for each signatory ratepayer:

(1) a clear and concise statement that the petition is an appeal of a specific rate action of the water or sewer service supplier in question as well as a concise description and date of that rate action; and

(2) the name, telephone number, and street or rural route address (post office box numbers are not sufficient) of each signatory ratepayer (the petition shall list the address of the location where service is received if it differs from the residential address of the signatory ratepayer).

(b) Ratepayers may initiate a review of a rate change application by filing individual complaints rather than joint petitions. Each complaint should contain the information required in subsection (a) of this section.

(c) In order for a review to be initiated under subsection (a) or (b) of this section, complaints must be received from a total of 1,000 or 10% of the affected ratepayers, whichever is less.

§24.28. Action on Notice of Rate Change Pursuant to Texas Water Code, §13.187(b).

The commission may conduct a public hearing on any application.

(1) If, before the 91st day after the effective date of the rate change, the commission receives a complaint from any affected municipality, or from the lesser of 1,000 or 10% of the ratepayers of the utility over whose rates the commission has original jurisdiction, or on its own motion, the commission shall set the matter for hearing. If after hearing, the commission finds the rates currently being charged or those proposed to be charged are unreasonable or in violation of law, the commission shall determine the rates to be charged by the utility and shall fix the rates by order.

(2) If a hearing is scheduled, the commission may require the utility to provide notice of the time and place of the hearing to its customers through a billing insert or separate mailing.

(3) If sufficient customer complaints are not received or if the commission staff does not request a hearing within 120 days after the effective date, the utility's proposed tariff will be reviewed for compliance with the TWC and the provisions of this chapter. If the proposed tariff complies with the TWC and the provisions of this chapter, it shall be stamped approved and a copy returned to the utility. The utility may be required to notify its customers that sufficient complaints were not received to schedule a hearing and the proposed rates were approved without hearing.

(4) The additional information may be requested from any utility in the course of evaluating the rate/tariff change request, and the utility shall provide that information within 20 days of receipt of the request, unless a different time is agreed to. If the utility fails to provide within a reasonable time after the application is filed the necessary documentation or other evidence that supports the costs and expenses that are shown in the application, the commission may disallow the unsupported costs or expenses.

(5) If the commission sets a rate different from that proposed by the utility in its notice of intent, the utility shall include in its first billing at the new rate a notice to the customers of the rate set by the commission including the following statement: "The Public Utility Commission of Texas, after public hearing, has established the following rates for utility service:".

(6) If the commission conducts a hearing, it may establish rates different from those currently being charged or proposed to be charged by the utility, but the total annual revenue increase resulting from the commission's rates may not exceed the greater of the annual revenue increase provided in the customer notice or revenue increase that would have been produced by the proposed rates except for the inclusion of reasonable rate case expenses. The commission may reclassify a portion of a utility's proposed rates as a capital improvement surcharge if the revenues are to be used for capital improvements or are to service debt on capital items.

(7) A utility may recover rate case expenses, including attorney fees, incurred as a result of a rate change application only if the expenses are reasonable, necessary, and in the public interest.

(8) A utility may not recover any rate case expenses if the increase in revenue generated by the just and reasonable rate determined by the commission after a contested case hearing is less than 51% of the increase in revenue that would have been generated by a utility's proposed rate.

(9) A utility may not recover any rate case expenses incurred after the date of a written settlement offer by all ratepayer parties if the revenue generated by the just and reasonable rate determined by the commission after a contested case hearing is less than or equal to the revenue that would have been generated by the rate contained in the written settlement offer.

§24.29. Interim Rates.

(a) The commission may, on a motion by the commission staff or by the appellant under TWC, §13.043(a), (b), or (f), as amended, establish interim rates to remain in effect until a final decision is made.

(b) At any time after the filing of a statement of intent to change rates under Chapter 13 of the TWC the commission staff may petition the commission to set interim rates to remain in effect until further commission action or a final rate determination is made. After a hearing is convened, any party may petition the judge or commission to set interim rates.

(c) At any time during the proceeding, the commission may, for good cause, require the utility to refund money collected under a proposed rate before the rate was suspended or an interim rate was

established to the extent the proposed rate exceeds the existing rate or the interim rate.

(d) Interim rates may be established by the commission in those cases under the commission's original or appellate jurisdiction where the proposed increase in rates could result in an unreasonable economic hardship on the utility's customers, unjust or unreasonable rates, or failure to set interim rates could result in an unreasonable economic hardship on the utility.

(e) In making a determination under subsection (d) of this section, the commission may limit its consideration of the matter to oral arguments of the affected parties and may:

(1) set interim rates not lower than the authorized rates prior to the proposed increase nor higher than the requested rates;

(2) deny interim rate relief; and

(3) require that all or part of the requested rate increase be deposited in an escrow account in accordance with §24.30 of this title (relating to Escrow of Proceeds Received under Rate Increase).

(f) The commission may also remand the request for interim rates to the State Office of Administrative Hearings for an evidentiary hearing on interim rates. The presiding officer shall issue a non-appealable interlocutory ruling setting interim rates to remain in effect until a final rate determination is made by the commission.

(g) The establishment of interim rates does not preclude the commission from establishing, as a final rate, a different rate from the interim rate.

(h) Unless otherwise agreed to by the parties to the rate proceeding, the retail public utility shall refund or credit against future bills all sums collected in excess of the rate finally ordered plus interest as determined by the commission in a reasonable number of monthly installments.

(i) Unless otherwise agreed to by the parties to the rate proceeding, the retail public utility shall be authorized by the commission to collect the difference, in a reasonable number of monthly installments, from its customers for the amounts by which the rate finally ordered exceeds the interim rates.

(j) The retail public utility shall provide a notice to its customers including the interim rates set by the commission or presiding officer with the first billing at the interim rates with the following wording: "The commission (or presiding officer) has established the following interim rates to be in effect until the final decision on the requested rate change (appeal) or until another interim rate is established."

§24.30. Escrow of Proceeds Received under Rate Increase.

(a) Rates received during the pendency of a rate proceeding.

(1) During the pendency of its rate proceeding, a utility may be required to deposit all or part of the rate increase into an interest-bearing escrow account with a federally insured financial institution, under such terms and conditions as determined by the commission.

(2) The utility shall file a completed escrow agreement between the utility and the financial institution with the commission for review and approval.

(3) If necessary to meet the utility's current operating expenses, or for other good cause shown, the commission may authorize the release of funds to the utility from the escrow account during the pendency of the proceeding.

(4) The commission, except for good cause shown, shall give all parties-of-record at least 10 days notice of an intent to release

funds from an escrow account. Any party may file a motion with the commission objecting to the release of escrow funds or to establish different terms and conditions for the release of escrowed funds.

(5) Upon the commission's establishment of final rates, all funds remaining in the escrow account shall be released to the utility or ratepayers in accordance with the terms of the commission's order.

(b) Surcharge revenues granted by commission order at the conclusion of a rate proceeding.

(1) A utility may be required to deposit all or part of surcharge funds authorized by the commission into an interest-bearing escrow account with a federally insured financial institution, under such terms and conditions as determined by the commission.

(2) Prior to collecting any surcharge revenues that are required to be escrowed, the utility shall submit for commission approval the completed escrow agreement between the utility and the financial institution. If the utility fails to promptly remedy any deficiencies in the agreement noted by the commission, the commission may suspend the collection of surcharge revenues until the agreement is properly amended.

(3) In order to allow the utility to complete the improvements for which surcharge funds were granted, the commission may authorize the release of funds to the utility from the escrow account after receiving a written request including appropriate documentation.

§24.31. Cost of Service.

(a) Components of cost of service. Rates are based upon a utility's cost of rendering service. The two components of cost of service are allowable expenses and return on invested capital.

(b) Allowable expenses. Only those expenses that are reasonable and necessary to provide service to the ratepayers may be included in allowable expenses. In computing a utility's allowable expenses, only the utility's historical test year expenses as adjusted for known and measurable changes may be considered.

(1) Components of allowable expenses. Allowable expenses, to the extent they are reasonable and necessary, and subject to this section, may include, but are not limited to, the following general categories:

(A) operations and maintenance expense incurred in furnishing normal utility service and in maintaining utility plant used by and useful to the utility in providing such service (payments to affiliated interests for costs of service, or any property, right, or thing, or for interest expense are not allowed as an expense for cost of service except as provided in TWC, §13.185(e));

(B) depreciation expense based on original cost and computed on a straight line basis over the useful life of the asset as approved by the commission. Depreciation is allowed on all currently used depreciable utility property owned by the utility except for property provided by explicit customer agreements or funded by customer contributions in aid of construction. Depreciation on all currently used and useful developer or governmental entity contributed property is allowed in the cost of service. On all applications, the depreciation accrual for all assets must account for expected net salvage value in the calculation of the depreciation rate and actual net salvage value related to retired plant. The depreciation rate and expense must be calculated on a straight line basis over the expected or remaining life of the asset. Utilities must calculate depreciation on a straight line basis, but are not required to use the remaining life method if salvage value is zero. When submitting an application that includes salvage value in depreciation calculations, the utility must submit sufficient evidence with the application establishing that the estimated salvage

value, including removal costs, is reasonable. Such evidence will be included for the asset group in depreciation studies for those utilities practicing group accounting while such evidence will relate to specific assets for those utilities practicing itemized accounting;

(C) assessments and taxes other than income taxes;

(D) federal income taxes on a normalized basis (federal income taxes must be computed according to the provisions of TWC, §13.185(f), if applicable);

(E) reasonable expenditures for ordinary advertising, contributions, and donations; and

(F) funds expended in support of membership in professional or trade associations, provided such associations contribute toward the professionalism of their membership.

(2) Expenses not allowed. The following expenses are not allowed as a component of cost of service:

(A) legislative advocacy expenses, whether made directly or indirectly, including, but not limited to, legislative advocacy expenses included in professional or trade association dues;

(B) funds expended in support of political candidates;

(C) funds expended in support of any political movement;

(D) funds expended in promotion of political or religious causes;

(E) funds expended in support of or membership in social, recreational, fraternal, or religious clubs or organizations;

(F) funds promoting increased consumption of water;

(G) additional funds expended to mail any parcel or letter containing any of the items mentioned in subparagraphs (A) - (F) of this paragraph;

(H) costs, including, but not limited to, interest expense of processing a refund or credit of sums collected in excess of the rate finally ordered by the commission;

(I) any expenditure found by the commission to be unreasonable, unnecessary, or not in the public interest, including, but not limited to, executive salaries, advertising expenses, rate case expenses, legal expenses, penalties and interest on overdue taxes, criminal penalties or fines, and civil penalties or fines; and

(J) the costs of purchasing groundwater from any source if:

(i) the source of the groundwater is located in a priority groundwater management area; and

(ii) a wholesale supply of surface water is available.

(c) Return on invested capital. The return on invested capital is the rate of return times invested capital.

(1) Rate of return. The commission shall allow each utility a reasonable opportunity to earn a reasonable rate of return, which is expressed as a percentage of invested capital, and shall fix the rate of return in accordance with the following principles.

(A) The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.

(B) The commission shall consider the efforts and achievements of the utility in the conservation of resources, the quality of the utility's services, the efficiency of the utility's operations, and the quality of the utility's management, along with other relevant conditions and practices.

(C) The commission may, in addition, consider inflation, deflation, the growth rate of the service area, and the need for the utility to attract new capital. In each case, the commission shall consider the utility's cost of capital, which is the composite of the cost of the various classes of capital used by the utility.

(i) Debt capital. The cost of debt capital is the actual cost of debt.

(ii) Equity capital. The cost of equity capital must be based upon a fair return on its value. For companies with ownership expressed in terms of shares of stock, equity capital commonly consists of the following classes of stock.

(I) Common stock capital. The cost of common stock capital must be based upon a fair return on its value.

(II) Preferred stock capital. The cost of preferred stock capital is its annual dividend requirement, if any, plus an adjustment for premiums, discounts, and cost of issuance.

(2) Invested capital, also referred to as rate base. The rate of return is applied to the rate base. Components to be included in determining the rate base are as follows:

(A) original cost, less accumulated depreciation, of utility plant, property, and equipment used by and useful to the utility in providing service;

(B) original cost, less net salvage and accumulated depreciation at the date of retirement, of depreciable utility plant, property and equipment retired by the utility; and

(i) original cost under subparagraph (A) of this paragraph or this subparagraph is the actual money cost, or the actual money value of any consideration paid other than money, of the property at the time it was dedicated to public use, whether by the utility that is the present owner or by a predecessor. Assets may be booked in itemized or group accounting, but all accounting for assets and their retirements must be supported by an approved accounting system. On all assets retired from service after June 19, 2009, the original cost of an asset must be the book cost less net salvage value. If a utility calculates annual depreciation expense for an asset with allowance for salvage value, then it must account for the actual salvage amounts when the asset is actually retired. The utility must include the actual salvage calculation(s) in its net plant calculation(s) in the first full rate change application (excluding alternative rate method applications as described in §24.34 of this title (relating to Alternative Rate Methods)) it files after the date on which the asset was removed from service, even if it was not retired during the test year. Recovery of investment on assets retired from service before the estimated useful life or remaining life of the asset shall be combined with over accrual of depreciation expense for those assets retired after the estimated useful life or remaining life and the net amount shall be amortized over a reasonable period of time taking into account prudent regulatory principles. The following list shall govern the manner by which depreciation will be accounted for.

(I) Accelerated depreciation is not allowed.

(II) For those utilities that elect a group accounting approach, all mortality characteristics, both life and net salvage, must be supported by an engineering or economic based depreciation study for which the test year for the depreciation is no more than five

years old in comparison to the rate case test year. The engineering or economic based depreciation study must include:

- (-a) investment by homogenous category;
- (-b) expected level of gross salvage by category;
- (-c) expected cost of removal by category;
- (-d) the accumulated provision for depreciation as appropriately reflected on the company's books by category;
- (-e) the average service life by category;
- (-f) the remaining life by category;
- (-g) the Iowa Dispersion Pattern by category; and

(-h) a detailed narrative identifying the specific factors, data, criteria and assumptions that were employed to arrive at the specific mortality proposal for each homogenous group of property.

(ii) reserve for depreciation under subparagraph (A) of this paragraph or this subparagraph is the accumulation of recognized allocations of original cost, representing recovery of initial investment, over the estimated useful life or remaining life of the asset. If individual accounting is used, a utility must continue booking depreciation expense until the asset is actually retired, and the reserve for depreciation shall include any additional depreciation expense accrued past the estimated useful or remaining life of the asset. If salvage value is zero, depreciation must be computed on a straight line basis over the expected useful life or remaining life of the item or facility. If salvage value is not zero, depreciation must also be computed on a straight line basis over the expected useful life or the remaining life. For an asset removed from service after June 19, 2009, accumulated depreciation will be calculated on book cost less net salvage of the asset. The retirement of a plant asset from service is accounted for by crediting the book cost to the utility plant account in which it is included. Accumulated depreciation must also be debited with the original cost and the cost of removal and credited with the salvage value and any other amounts recovered. Return is allowed for assets removed from service after June 19, 2009, that result in an increased rate base through recognition in the reserve for depreciation if the utility proves that the decision to retire the asset was financially prudent, unavoidable, necessary because of technological obsolescence, or otherwise reasonable. The utility must also provide evidence establishing the original cost of the asset, the cost of removal, salvage value, any other amounts recovered, the useful life of the asset (or remaining life as may be appropriate), the date the asset was taken out of service, and the accumulated depreciation up to the date it was taken out of service. Additionally, the utility must show that it used due diligence in recovering maximum salvage value of a retired asset. The requirements relating to the accounting for the reasonableness of retirement decisions for individual assets and the net salvage value calculations for individual assets only apply to those utilities using itemized accounting. For those utilities practicing group accounting, the depreciation study will provide similar information by category. TWC, §13.185(e) relating to dealings with affiliated interests, will apply to business dealings with any entity involved in the retirement, removal, or recovery of assets. Assets retired subsequent to June 19, 2009, will be included in a utility's application for a rate change if the application is the first application for a rate change filed by the utility after the date the asset was retired and specifically identified if the utility uses itemized accounting. Retired assets will be reported for the asset group in depreciation studies for those utilities practicing group accounting, while retired assets will be specifically identified for those utilities practicing itemized accounting;

(iii) the original cost of plant, property, and equipment acquired from an affiliated interest may not be included in invested capital except as provided in TWC, §13.185(e);

(iv) utility property funded by explicit customer agreements or customer contributions in aid of construction such as surcharges may not be included in original cost or invested capital; and

(C) working capital allowance to be composed of, but not limited to the following:

(i) reasonable inventories of materials and supplies, held specifically for purposes of permitting efficient operation of the utility in providing normal utility service;

(ii) reasonable prepayments for operating expenses (prepayments to affiliated interests) are subject to the standards set forth in TWC, §13.185(e); and

(iii) a reasonable allowance up to one-eighth of total annual operations and maintenance expense excluding amounts charged to operations and maintenance expense for materials, supplies, and prepayments (operations and maintenance expense does not include depreciation, other taxes, or federal income taxes).

(3) Terms not included in rate base. Unless otherwise determined by the commission, for good cause shown, the following items will not be included in determining the overall rate base.

(A) Miscellaneous items. Certain items that include, but are not limited to, the following:

(i) accumulated reserve for deferred federal income taxes;

(ii) unamortized investment tax credit to the extent allowed by the Internal Revenue Code;

(iii) contingency and/or property insurance reserves;

(iv) contributions in aid of construction; and

(v) other sources of cost-free capital, as determined by the commission.

(B) Construction work in progress. Under ordinary circumstances, the rate base consists only of those items that are used and useful in providing service to the public. Under exceptional circumstances, the commission may include construction work in progress in rate base to the extent that the utility has proven that:

(i) the inclusion is necessary to the financial integrity of the utility; and

(ii) major projects under construction have been efficiently and prudently planned and managed. However, construction work in progress may not be allowed for any portion of a major project that the utility has failed to prove was efficiently and prudently planned and managed.

(d) Recovery of positive acquisition adjustments.

(1) For utility plant, property, and equipment acquired by a utility from another retail public utility as a sale, merger, etc. of utility service area for which an application for approval of sale has been filed with the commission on or after September 1, 1997, and that sale application closed thereafter, a positive acquisition adjustment will be allowed to the extent that the acquiring utility proves that:

(A) the property is used and useful in providing water or sewer service at the time of the acquisition or as a result of the acquisition;

(B) reasonable, prudent, and timely investments will be made if required to bring the system into compliance with all applicable rules and regulations;

(C) as a result of the sale, merger, etc.:

(i) the customers of the system being acquired will receive higher quality or more reliable water or sewer service or that the acquisition was necessary so that customers of the acquiring utility's other systems could receive higher quality or more reliable water or sewer service;

(ii) regionalization of retail public utilities (meaning a pooling of financial, managerial, or technical resources that achieve economies of scale or efficiencies of service) was achieved; or

(iii) the acquiring system will become financially stable and technically sound as a result of the acquisition, or the system being acquired that is not financially stable and technically sound will become a part of a financially stable and technically sound utility;

(D) any and all transactions between the buyer and the seller entered into as a part or condition of the sale are fully disclosed to the commission and were conducted at arm's length;

(E) the actual purchase price is reasonable in consideration of the condition of the plant, property, and equipment being acquired; the impact on customer rates if the acquisition adjustment is granted; the benefits to the customers; and the amount of contributions in aid of construction in the system being acquired;

(F) in a single or multi-stage sale, the owner of the acquired retail public utility and the final acquiring utility are not affiliated. A multi-stage sale is where a stock transaction is followed by a transfer of assets in what is essentially a single sales transaction. A positive acquisition adjustment is allowed only in those cases where the multi-stage transaction was fully disclosed to the commission in the application for approval of the initial stock sale. Any multi-stage sale occurring between September 1, 1997 and February 4, 1999 is exempt from the requirement for commission notification at the time of the approval of the initial sale, but must provide such notification by April 5, 1999; and

(G) the rates charged by the acquiring utility to its pre-acquisition customers will not increase unreasonably because of the acquisition.

(2) The amount of the acquisition adjustment approved by the regulatory authority must be amortized using a straight line method over a period equal to the weighted average remaining useful life of the acquired plant, property, and equipment, at an interest rate equal to the rate of return determined under subsection (c) of this section. The acquisition adjustment may be treated as a surcharge and may be recovered using non-system-wide rates.

(3) The authorization for and the amount of an acquisition adjustment can only be determined as a part of a rate change application.

(4) The acquisition adjustment can only be included in rates as a part of a rate change application.

§24.32. Rate Design.

(a) General. In fixing the rates of a utility, the commission shall fix its overall revenues at a level which will permit such utility a reasonable opportunity to earn a reasonable return on its invested capital used and useful in rendering service to the public, over and above its reasonable and necessary operating expenses (unless an alternative rate method is used as set forth in §24.34 of this title (relating to Alternative Rate Methods), and preserve the financial integrity of the utility.

(b) Conservation.

(1) In order to encourage the prudent use of water or promote conservation, water and sewer utilities shall not apply rate struc-

tures which offer discounts or encourage increased usage within any customer class.

(2) After receiving final authorization from the regulatory authority through a rate change proceeding, a utility may implement a water conservation surcharge using an inclining block rate or other conservation rate structure. A utility may not implement such a rate structure to avoid providing facilities necessary to meet the TCEQ's minimum standards for public drinking water systems. A water conservation rate structure may generate revenues over and above the utility's usual cost of service:

(A) to reduce water usage or promote conservation either on a continuing basis or in specified restricted use periods identified in the utility's approved drought contingency plan required by 30 TAC §288.20 (relating to Drought Contingency Plans for Municipal Uses by Public Water Suppliers) included in its tariff in order to:

(i) comply with mandatory reductions directed by a wholesale supplier or underground water district; or

(ii) conserve water supplies, maintain acceptable pressure or storage, or other reasons identified in its approved drought contingency plan;

(B) to generate additional revenues necessary to provide facilities for maintaining or increasing water supply, treatment, production, or distribution capacity.

(3) All additional revenues over and above the utility's usual cost of service collected under paragraph (2) of this subsection:

(A) must be accounted for separately and reported to the commission, as requested;

(B) are considered customer contributed capital unless otherwise specified in a commission order; and

(C) may only be used in a manner approved by the commission for applications not subject to hearing under TWC, §13.187(b).

(c) Volume charges. Charges for additional usage above the base rate shall be based on metered usage over and above any volume included in the base rate rounded up or down as appropriate to the nearest 1,000 gallons or 100 cubic feet, or the fractional portion of the usage.

(d) Surcharges.

(1) Capital improvements. In a rate proceeding, the commission may authorize collection of additional revenues from the customers to provide funds for capital improvements necessary to provide facilities capable of providing adequate and continuous utility service, and for the preparation of design and planning documents.

(2) Debt repayments. In a rate proceeding, the commission may authorize collection of additional revenues from customers to provide funds for debt repayments and associated costs, including funds necessary to establish contingency funds and reserve funds. Surcharge funds may be collected to meet all of the requirements of the Texas Water Development Board in regard to financial assistance from the Safe Drinking Water Revolving Fund.

§24.34. Alternative Rate Methods.

(a) Alternative rate methods. To ensure that retail customers receive a higher quality, more affordable, or more reliable water or sewer service, to encourage regionalization, or to maintain financially stable and technically sound utilities, the commission may utilize alternate methods of establishing rates. The commission shall assure that rates, operations, and service are just and reasonable to the consumers

and to the utilities. The commission may prescribe modified rate filing packages for these alternate methods of establishing rates.

(b) Single issue rate change. Unless a utility is using the cash needs method, it may request approval to increase rates to reflect a change in any one specific cost component. The following conditions apply to this type of request.

(1) The proposed effective date of the single issue rate change request must be within 24 months of the effective date of the last rate change request in which a complete rate change application was filed.

(2) The change in rates is limited to those amounts necessary to recover the increase in the specific cost component and the increase will be allocated to the rate structure in the same manner as in the previous rate change.

(3) The scope of a single issue rate proceeding is limited to the single issue prompting a change in rates. For capital items this includes depreciation and return determined using the rate of return established in the prior rate change proceeding.

(4) The utility shall provide notice as described in §24.22(a) - (e) of this title (relating to Notice of Intent to Change Rates), and the notice must describe the cost component and reason for the increased cost.

(5) A utility exercising this option shall submit a complete rate change application within three years following the effective date of the single issue rate change request.

(c) Phased and multi-step rate changes. In a rate proceeding, the commission may authorize a phased, stepped, or multi-year approach to setting and implementing rates to eliminate the requirement that a utility file another rate application.

(1) A utility may request to use the phased or multi-step rate method:

(A) to include the capital cost of installation of utility plant items that are necessary to improve service or achieve compliance with commission regulations in the utility's rate base and operating expenses in the revenue requirement when facilities are placed in service;

(B) to provide additional construction funds after major milestones are met;

(C) to provide assurance to a lender that rates will be immediately increased when facilities are placed in service;

(D) to allow a utility to move to metered rates from unmetered rates as soon as meters can be installed at all service connections;

(E) to phase in increased rates when a utility has been acquired by another utility with higher rates;

(F) to phase in rates when a utility with multiple rate schedules is making the transition to a system-wide rate structure; or

(G) when requested by the utility.

(2) Construction schedules and cost estimates for new facilities that are the basis for the phased or multi-step rate increase must be prepared by a licensed professional engineer.

(3) Unless otherwise specified in the commission order, the next phase or step cannot be implemented without verification of completion of each step by a licensed professional engineer, agency inspector, or agency subcontractor.

(4) At the time each rate step is implemented, the utility shall review actual costs of construction versus the estimates upon which the phase-in rates were based. If the revenues received from the phased or multi-step rates are higher than what the actual costs indicate, the excess amount must be reported to the commission prior to implementing the next phase or step. Unless otherwise specified in a commission order, the utility may:

(A) refund or credit the overage to the customers in a lump sum; or

(B) retain the excess to cover shortages on later phases of the project. Any revenues retained but not needed for later phases must be proportioned and refunded to the customers at the end of the project with interest paid at the rate on deposits.

(5) The original notice to customers must include the proposed phased or multi-step rate change and informational notice must be provided to customers and the commission 30 days prior to the implementation of each step.

(6) A utility that requests and receives a phased or multi-step rate increase cannot apply for another rate increase during the period of the phase-in rate intervals unless:

(A) the utility can prove financial hardship; or

(B) the utility is willing to void the next steps of the phase-in rate structure and undergo a full cost of service analysis.

(d) Cash needs method. The cash needs method of establishing rates allows a utility to recover reasonable and prudently incurred debt service, a reasonable cash reserve account, and other expenses not allowed under standard methods of establishing rates.

(1) A utility may request to use the cash needs method of setting rates if:

(A) the utility is a nonprofit corporation controlled by individuals who are customers and who represent a majority of the customers; or

(B) the utility can demonstrate that use of the cash needs basis:

(i) is necessary to preserve the financial integrity of the utility;

(ii) will enable it to develop the necessary financial, managerial, and technical capacity of the utility; and

(iii) will result in higher quality and more reliable utility service for customers.

(2) Under the cash needs method, the allowable components of cost of service are: allowable operating and maintenance expenses; depreciation expense; reasonable and prudently incurred debt service costs; recurring capital improvements, replacements, and extensions that are not debt-financed; and a reasonable cash reserve account.

(A) Allowable operating and maintenance expenses. Only those expenses that are reasonable and necessary to provide service to the ratepayers may be included in allowable operations and maintenance expenses and they must be based on the utility's historical test year expenses as adjusted for known and measurable changes and reasonably anticipated, prudent projected expenses.

(B) Depreciation expense. Depreciation expense may be included on any used and useful depreciable plant, property, or equipment that was paid for by the utility and that has a positive net book value on the effective date of the rate change in the same manner

as described in §24.31(b)(1)(B) of this title (relating to Cost of Service).

(C) Debt service costs. Debt service costs are cash outlays to an unaffiliated interest necessary to repay principal and interest on reasonably and prudently incurred loans. If required by the lender, debt service costs may also include amounts placed in a debt service reserve account in escrow or as required by the commission, Texas Water Development Board, or other state or federal agency or other financial institution. Hypothetical debt service costs may be used for:

(i) self-financed major capital asset purchases where the useful life of the asset is ten years or more. Hypothetical debt service costs may include the debt repayments using an amortization schedule with the same term as the estimated service life of the asset using the prime interest rate at the time the application is filed; and

(ii) prospective loans to be executed after the new rates are effective. Any pre-commitments, amortization schedules, or other documentation from the financial institution pertaining to the prospective loan must be presented for consideration.

(D) Recurring capital improvements, replacements, and extensions that are not debt-financed. Capital assets, repairs, or extensions that are a part of the normal business of the utility may be included as allowable expenses. This does not include routine capital expenses that are specifically debt-financed.

(E) Cash reserve account. A reasonable cash reserve account, up to 10% of annual operation and maintenance expenses, must be maintained and revenues to fund it may be included as an allowable expense. Funds from this account may be used to pay expenses incurred before revenues from rates are received and for extraordinary repair and maintenance expenses and other capital needs or unanticipated expenses if approved in writing by the commission. The utility shall account for these funds separately and report to the commission. Unless the utility requests an exception in writing and the exception is explicitly allowed by the commission in writing, any funds in excess of 10%, shall be refunded to the customers each year with the January billing either as a credit on the bill or refund accompanied by a written explanation that explains the method used to calculate the amounts to be refunded. Each customer must receive the same refund amount. These reserves are not for the personal use of the management or ownership of the utility and may not be used to compensate an owner, manager, or individual employee above the amount approved for that position in the most recent rate change request unless authorized in writing by the commission.

(3) If the revenues collected exceed the actual cost of service, defined in paragraph (2) of this subsection, during any calendar year, these excess cash revenues must be placed in the cash reserve account described in paragraph (2)(D) of this subsection and are subject to the same restrictions.

(4) If the utility demonstrates to the commission that it has reduced expenses through its efforts, and has improved its financial, managerial, and technical capability, the commission may allow the utility to retain 50% of the savings that result for the personal use of the management or ownership of the utility rather than pass on the full amount of the savings through lower rates or refund all of the amounts saved to the customers.

(5) If a utility elects to use the cash needs method, it may not elect to use the utility method for any rate change application initiated within five years after beginning to use the cash needs method. If after the five-year period, the utility does elect to use the utility method, it may not include in rate base, or recover the depreciation expense, for

the portion of any capital assets paid for by customers as a result of including debt service costs in rates. It may, however, include in rate base, and recover through rates, the depreciation expense for capital assets that were not paid for by customers as a result of including debt service costs in rates. The net book value of these assets may be recovered over the remaining useful life of the asset.

§24.35. Jurisdiction of Commission over Certain Water or Sewer Supply Corporations.

(a) Notwithstanding any other law, the commission has the same jurisdiction over a water supply or sewer service corporation that the commission has under this chapter over a water and sewer utility if the commission finds, after notice and opportunity for hearing, that the water supply or sewer service corporation:

(1) is failing to conduct annual or special meetings in compliance with TWC, §67.007; or

(2) is operating in a manner that does not comply with the requirements for classification as a nonprofit water supply or sewer service corporation prescribed by TWC, §13.002(11) and (24).

(b) The commission's jurisdiction provided by this section ends if:

(1) the water supply or sewer service corporation voluntarily converts to a special utility district operating under TWC, Chapter 65;

(2) the time period specified in the commission order expires; or

(3) the water supply or sewer service corporation demonstrates that for the past 24 consecutive months it has conducted annual meetings as required by TWC, §67.007 and has operated in a manner that complies with the requirements for membership and nonprofit organizations as outlined in TWC, §13.002(11) and (24).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER C. RATE-MAKING APPEALS

16 TAC §§24.41 - 24.45

This new subchapter is proposed under H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session, which grants the Public Utility Commission of Texas the authority to propose rules beginning September 1, 2013 related to functions to be transferred to the Public Utility Commission of Texas as of September 1, 2014. Specifically, Texas Water Code (TWC), §§5.507 - 5.508, and Chapter 13 provide the commission the authority to engage in the economic regulation of water and wastewater utilities, and provide the substantive basis to conduct the regulation. This new subchapter implements substantive rules pursuant to TWC, Chapter 13 and §§5.507 - 5.508, 11.041, 12.013.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session.

§24.41. Appeal of Rate-making Pursuant to the Texas Water Code, §13.043.

(a) Any party to a rate proceeding before the governing body of a municipality may appeal the decision of the governing body to the commission. This subsection does not apply to a municipally owned utility, but does include privately owned utilities operating within the corporate limits of a municipality. An appeal under this subsection may be initiated by filing with the commission a petition signed by a responsible official of the party to the rate proceeding or its authorized representative and by serving a copy of the petition on all parties to the original proceeding. The appeal must be initiated within 90 days after the date of notice of the final decision of the governing body.

(b) An appeal under TWC, §13.043(b) must be initiated within 90 days after the effective date of the rate change or, if appealing under §13.043(b)(2) or (5), within 90 days after the date on which the governing body of the municipality or affected county makes a final decision. An appeal is initiated by filing a petition for review with the commission and by sending a copy of the petition to the entity providing service and with the governing body whose decision is being appealed if it is not the entity providing service. The petition must be signed by the lesser of 10,000 or 10% of the ratepayers whose rates have been changed and who are eligible to appeal under subsection of this section.

(c) Retail ratepayers of the following entities may appeal the decision of the governing body of the entity affecting their water or sewer utility rates to the commission:

(1) a nonprofit water supply or sewer service corporation created and operating under TWC, Chapter 67;

(2) a utility under the jurisdiction of a municipality inside the corporate limits of the municipality;

(3) a municipally owned utility, if the ratepayers reside outside the corporate limits of the municipality;

(4) a district or authority created under the Texas Constitution, Article III, §52, or Article XVI, §59, that provides water or sewer service to household users;

(5) a utility owned by an affected county, if the ratepayers' rates are actually or may be adversely affected. For the purposes of this subchapter, ratepayers who reside outside the boundaries of the district or authority shall be considered a separate class from ratepayers who reside inside those boundaries; and

(6) in an appeal under this subsection, the retail public utility shall provide written notice of hearing to all affected customers in a form prescribed by the commission.

(d) In an appeal under TWC, §13.043(b), each person receiving a separate bill is considered a ratepayer, but one person may not be considered more than one ratepayer regardless of the number of bills the person receives. The petition for review is considered properly signed if signed by a person, or the spouse of the person, in whose name utility service is carried.

(e) The commission shall hear an appeal under this section de novo and fix in its final order the rates the governing body should have fixed in the action from which the appeal was taken. The commission may:

(1) in an appeal under the TWC, §13.043(a), include reasonable expenses incurred in the appeal proceedings;

(2) in an appeal under the TWC, §13.043(b), include reasonable expenses incurred by the retail public utility in the appeal proceedings;

(3) establish the effective date;

(4) order refunds or allow surcharges to recover lost revenues;

(5) consider only the information that was available to the governing body at the time the governing body made its decision and evidence of reasonable expenses incurred in the appeal proceedings; or

(6) establish interim rates to be in effect until a final decision is made.

(f) A retail public utility that receives water or sewer service from another retail public utility or political subdivision of the state, including an affected county, may appeal to the commission, a decision of the provider of water or sewer service affecting the amount paid for water or sewer service. An appeal under this subsection must be initiated within 90 days after notice of the decision is received from the provider of the service by filing a petition by the retail public utility.

(g) An applicant requesting service from an affected county or a water supply or sewer service corporation may appeal to the commission a decision of the county or water supply or sewer service corporation affecting the amount to be paid to obtain service other than the regular membership or tap fees. An appeal under TWC, §13.043(g) must be initiated within 90 days after written notice of the amount to be paid to obtain service is provided to the service applicant or member of the decision of an affected county or water supply or sewer service corporation affecting the amount to be paid to obtain service as requested in the applicant's initial request for that service.

(1) If the commission finds the amount charged to be clearly unreasonable, it shall establish the fee to be paid and shall establish conditions for the applicant to pay any amounts due to the affected county or water supply or sewer service corporation. Unless otherwise ordered, any portion of the charges paid by the applicant that exceed the amount determined in the commission's order shall be repaid to the applicant with interest at a rate determined by the commission within 30 days of the signing of the order.

(2) In an appeal brought under this subsection, the commission shall affirm the decision of the water supply or sewer service corporation if the amount paid by the applicant or demanded by the water supply or sewer service corporation is consistent with the tariff of the water supply or sewer service corporation and is reasonably related to the cost of installing on-site and off-site facilities to provide service to that applicant, in addition to the factors specified under subsection (i) of this section.

(3) A determination made by the commission on an appeal from an applicant for service from a water supply or sewer service corporation under this subsection is binding on all similarly situated applicants for service, and the commission may not consider other appeals on the same issue until the applicable provisions of the tariff of the water supply or sewer service corporation are amended.

(h) The commission may, on a motion by the commission staff or by the appellant under subsection (a), (b), or (f) of this section, establish interim rates to be in effect until a final decision is made.

(i) In an appeal under this section, the commission shall ensure that every rate made, demanded, or received by any retail public utility or by any two or more retail public utilities jointly is just and reasonable. Rates must not be unreasonably preferential, prejudicial, or discriminatory but must be sufficient, equitable, and consistent in application to each class of customers. The commission shall use a

methodology that preserves the financial integrity of the retail public utility. To the extent of a conflict between this subsection and TWC, §49.2122, TWC, §49.2122 prevails.

(j) A customer of a water supply corporation may appeal to the commission a water conservation penalty. The customer shall initiate an appeal under TWC, §67.011(b) within 90 days after the customer receives written notice of the water conservation penalty amount from the water supply corporation per its tariff. The commission shall approve the water supply corporation's water conservation penalty if:

(1) the penalty is clearly stated in the tariff;

(2) the penalty is reasonable and does not exceed six times the minimum monthly bill in the water supply corporation's current tariff; and

(3) the water supply corporation has deposited the penalty in a separate account dedicated to enhancing water supply for the benefit of all of the water supply corporation's customers.

§24.42. *Contents of Petition Seeking Review of Rates Pursuant to the Texas Water Code, §13.043(b).*

(a) Petitions for review of rate actions filed pursuant to the TWC, §13.043(b), shall contain the original petition for review with the required signatures. Each signature page of a petition should contain in legible form the following information for each signatory ratepayer:

(1) a clear and concise statement that the petition is an appeal of a specific rate action of the water or sewer service supplier in question as well as a concise description and date of that rate action;

(2) the name, telephone number, and street or rural route address (post office box numbers are not sufficient) of each signatory ratepayer. The petition shall list the address of the location where service is received if it differs from the residential address of the signatory ratepayer;

(3) the effective date of the decision being appealed;

(4) the basis of the request for review of rates; and

(5) any other information the commission may require.

(b) A petition must be received from a total of 10,000 or 10% of the ratepayers whose rates have been changed and who are eligible to appeal, whichever is less.

(c) A filing fee is not required for appeals or complaints filed under the TWC, §13.043(b).

§24.43. *Refunds During Pendency of Appeal.*

A utility which is appealing the action of the governing body of a municipality under the TWC, §13.043, shall not be required to make refunds of any over-collections during the pendency of the appeal.

§24.44. *Seeking Review of Rates for Sales of Water Under the Texas Water Code, §11.041 and §12.013.*

(a) Ratepayers seeking commission participation under the TWC, §11.041 or action under TWC, §12.013 should include in a written petition to the commission, the following information:

(1) the petitioner's name;

(2) the name of the water supplier from which water supply service is received or sought;

(3) the specific section of the code under which petitioner seeks relief, with an explanation of why petitioner is entitled to receive or use the water;

(4) that the petitioner is willing and able to pay a just and reasonable price for the water;

(5) that the party owning or controlling the water supply has water not contracted to others and available for the petitioner's use; and

(6) that the party owning or controlling the water supply fails or refuses to supply the available water to the petitioner, or that the price or rental demanded for the available water is not just and reasonable or is discriminatory.

(b) Water suppliers seeking commission participation under the TWC, §11.041, or action under TWC, §12.013 should include in a written petition for relief to the commission, the following information:

(1) petitioner's name;

(2) the name of the ratepayers to whom water supply service is rendered;

(3) the specific section of the code under which petitioner seeks relief, with an explanation of why petitioner is entitled to the relief requested;

(4) that the petitioner is willing and able to supply water at a just and reasonable price; and

(5) that the price demanded by petitioner for the water is just and reasonable and is not discriminatory.

§24.45. *Rates Charged by a Municipality to a District.*

(a) A district created pursuant to Texas Constitution, Article XVI, §59, which district is located within the corporate limits or the extraterritorial jurisdiction of a municipality and which receives water or sewer service or whose residents receive water or sewer service from the municipality may by filing a petition with the commission appeal the rates charged by the municipality if the resolution, ordinance, or agreement of the municipality consenting to the creation of the district required the district to purchase water or sewer service from the municipality.

(b) The commission shall hear the appeal de novo and the municipality shall have the burden of proof to establish that the rates are just and reasonable.

(c) After the commission establishes just and reasonable rates, the municipality may not increase those rates without approval of the commission. A municipality desiring to increase rates must provide the commission with updated information in a format specified in the current rate data package developed by the Rates Section.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER D. RECORDS AND REPORTS

16 TAC §§24.71 - 24.76

This new subchapter is proposed under H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session, which grants the Public Util-

ity Commission of Texas the authority to propose rules beginning September 1, 2013 related to functions to be transferred to the Public Utility Commission of Texas as of September 1, 2014. Specifically, Texas Water Code (TWC), §§5.507 - 5.508, and Chapter 13 provide the commission the authority to engage in the economic regulation of water and wastewater utilities, and provide the substantive basis to conduct the regulation. This new subchapter implements substantive rules pursuant to TWC, Chapter 13 and §§5.507 - 5.508, 11.041, 12.013.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session.

§24.71. General Reports.

(a) Who shall file. The recordkeeping, reporting, and filing requirements listed in this section shall apply only to water and sewer utilities, unless otherwise noted in this subchapter.

(b) Report attestation. All reports submitted to the commission shall be attested to by an officer or manager of the utility under whose direction the report is prepared, or if under trust or receivership, by the receiver or a duly authorized person, or if not incorporated, by the proprietor, manager, superintendent, or other official in responsible charge of the utility's operation.

(c) Due dates of reports. All reports must be received by the commission on or before the dates specified.

(d) Information omitted from reports. The commission may waive the reporting of any information required in this subchapter if it determines that it is either impractical or unduly burdensome on any utility to furnish the requested information. If any such information is omitted by permission of the commission, a written explanation of the omission must be stated in the report.

(e) Special and additional reports. Each utility shall report on forms prescribed by the commission special and additional information as requested which relates to the operation of the business of the utility.

(f) Report amendments. Corrections of reports resulting from new information or errors shall be filed on a form prescribed by the commission.

(g) Penalty for refusal to file on time. In addition to penalties prescribed by law, the commission may disallow for rate making purposes the costs related to the activities for which information was requested and not timely filed.

§24.72. Financial Records and Reports--Uniform System of Accounts.

Every public utility, except a utility operated by an affected county, shall keep uniform accounts as prescribed by the commission of all business transacted. The classification of utilities, index of accounts, definitions, and general instructions pertaining to each uniform system of accounts, as amended from time to time, shall be adhered to at all times, unless provided otherwise by these sections or by rules of a federal regulatory body having jurisdiction over the utility, or unless specifically permitted by the commission.

(1) Classification. For the purposes of accounting and reporting to the commission, each public water and/or sewer utility shall be classified with respect to its annual operating revenues as follows:

(A) Class A--annual operating revenues exceeding \$750,000;

(B) Class B--annual operating revenues exceeding \$150,000 but not more than \$750,000;

(C) Class C--annual operating revenues not exceeding \$150,000.

(2) System of accounts. For the purpose of accounting and reporting to the commission, each public water and/or sewer utility shall maintain its books and records in accordance with the following prescribed uniform system of accounts:

(A) Class A--system of accounts approved by the commission which will be adequately informative for all regulatory purposes or uniform system of accounts as adopted and amended by the National Association of Regulatory Utility Commissioners for Class A utilities;

(B) Class B--system of accounts approved by the commission which will be adequately informative for all regulatory purposes or uniform system of accounts as adopted and amended by the National Association of Regulatory Utility Commissioners for Class B utilities;

(C) Class C--system of accounts approved by the commission which will be adequately informative for all regulatory purposes or uniform system of accounts as adopted and amended by the National Association of Regulatory Utility Commissioners for Class C utilities.

(3) Accounting period. Each utility shall keep its books on a monthly basis so that for each month all transactions applicable thereto shall be entered in the books of the utility.

§24.73. Water and Sewer Utilities Annual Reports.

(a) Each utility, except a utility operated by an affected county, shall file a service and financial report by April 1 of each year unless otherwise specified in a form prescribed by the commission.

(b) Contents of report. The annual report shall disclose the information required on the forms and may include:

(1) the rates that are subject to the original or appellate jurisdiction of the commission for any service, product, or commodity offered by the utility;

(2) rules and regulations relating to or affecting the rates, utility service, product or commodity furnished by the utility;

(3) all ownership and management relationships among the utility and other entities, including individuals, with which the utility has had financial transactions during the reporting period;

(4) all transactions with affiliates, including, but not limited to, payments for costs of any services, interest expense, or for any property, right, or thing;

(5) information on receipts and disbursements of revenues;

(6) all payments of compensation (other than salary or wages subject to the withholding of federal income tax) for legislative matters in Texas or for representation before the Texas Legislature or any governmental agency or body; and

(7) a verified or certified copy of the appropriate permit, issued by the conservation, reclamation, or subsidence district, for each utility which withdraws groundwater from conservation, reclamation, or subsidence districts.

§24.74. Maintenance and Location of Records.

Unless otherwise permitted by the commission, all records required by these sections or necessary for the administration thereof shall be kept within the State of Texas at a central location or at the main business office located in the immediate area served. These records shall be available for examination by the commission or its authorized representative

between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday, except holidays. The commission may consider alternate hours of inspection if the utility provides a written request 72 hours in advance of any scheduled inspection.

§24.75. Management Audits.

The commission may inquire into the management and affairs of all utilities and the affiliated interests of those utilities in order to keep itself informed as to the manner and method in which they are conducted and may obtain all information to enable it to perform management audits. The utility and, if applicable, the affiliated interest shall report to the commission on the status of the implementation of the recommendations of the audit and shall file subsequent reports at the times the commission considers appropriate.

§24.76. Regulatory Assessment.

(a) For the purpose of this section, utility service provider means a public utility, water supply or sewer service corporation as defined in the TWC, §13.002, or a district as defined in the TWC, §49.001.

(b) Except as otherwise provided, a utility service provider which provides potable water or sewer utility service shall collect a regulatory assessment from each retail customer and remit such fee to the TCEQ.

(c) A utility service provider is prohibited from collecting a regulatory assessment from the state or a state agency or institution.

(d) The utility service provider may include the assessment as a separate line item on a customer's bill or include it in the retail charge.

(e) The utility service provider shall be responsible for keeping proper records of the annual charges and assessment collections for retail water and sewer service and provide such records to the commission upon request.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER E. CUSTOMER SERVICE AND PROTECTION

16 TAC §§24.80 - 24.90

This new subchapter is proposed under H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session, which grants the Public Utility Commission of Texas the authority to propose rules beginning September 1, 2013 related to functions to be transferred to the Public Utility Commission of Texas as of September 1, 2014. Specifically, Texas Water Code (TWC), §§5.507 - 5.508, and Chapter 13 provide the commission the authority to engage in the economic regulation of water and wastewater utilities, and provide the substantive basis to conduct the regulation. This new subchapter implements substantive rules pursuant to TWC, Chapter 13 and §§5.507 - 5.508, 11.041, 12.013.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session.

§24.80. Applicability.

Unless otherwise noted, this subchapter is applicable only to "water and sewer utilities" as defined under Subchapter A of this chapter (relating to General Provisions) and includes affected counties.

§24.81. Customer Relations.

(a) Information to customers.

(1) Upon receipt of a request for service or service transfer, the utility shall fully inform the service applicant or customer of the cost of initiating or transferring service. The utility shall clearly inform the service applicant which service initiation costs will be borne by the utility and which costs are to be paid by the service applicant. The utility shall inform the service applicant if any cost information is estimated. Also see §24.85 of this title (relating to Response to Requests for Service by a Retail Public Utility Within Its Certificated Area).

(2) The utility shall notify each service applicant or customer who is required to have a customer service inspection performed. This notification must be in writing and include the applicant's or customer's right to get a second customer service inspection performed by a qualified inspector at their expense and their right to use the least expensive backflow prevention assembly acceptable under 30 TAC §290.44(h) (relating to Water Distribution) if such is required. The utility shall ensure that the customer or service applicant receives a copy of the completed and signed customer service inspection form and information related to thermal expansion problems that may be created if a backflow prevention assembly or device is installed.

(3) Upon request, the utility shall provide the customer or service applicant with a free copy of the applicable rate schedule from its approved tariff. A complete copy of the utility's approved tariff must be available at its local office for review by a customer or service applicant upon request.

(4) Each utility shall maintain a current set of maps showing the physical locations of its facilities. All facilities (production, transmission, distribution or collection lines, treatment plants, etc.) must be labeled to indicate the size, design capacity, and any pertinent information that will accurately describe the utility's facilities. These maps, and such other maps as may be required by the commission, shall be kept by the utility in a central location and must be available for commission inspection during normal working hours.

(5) Each utility shall maintain a current copy of the commission's substantive rules of this chapter at each office location and make them available for customer inspection during normal working hours.

(6) Each water utility shall maintain a current copy of 30 TAC Chapter 290, Subchapter D (relating to Rules and Regulations for Public Water Systems), at each office location and make them available for customer inspection during normal working hours.

(b) Customer complaints. Customer complaints are also addressed in §24.82 of this title (relating to Resolution of Disputes).

(1) Upon receipt of a complaint from a customer or service applicant, either in person, by letter or by telephone, the utility shall promptly conduct an investigation and report its finding(s) to the complainant.

(2) In the event the complainant is dissatisfied with the utility's report, the utility shall advise the complainant of recourse through the Public Utility Commission of Texas complaint process. The commission encourages all complaints to be made in writing to assist the

commission in maintaining records on the quality of service of each utility.

(3) Each utility shall make an initial response to the commission within 15 days of receipt of a complaint from the commission on behalf of a customer or service applicant. The commission may require a utility to provide a written response to the complainant, to the commission, or both. Pending resolution of a complaint, the commission may require continuation or restoration of service.

(4) The utility shall keep a record of all complaints for a period of two years following the final settlement of each complaint. The record of complaint must include the name and address of the complainant, the date the complaint was received by the utility, a description of the nature of the complaint, and the adjustment or disposition of the complaint.

(c) Telephone number. For each of the systems it operates, the utility shall maintain and note on the customer's monthly bill either a local or toll free telephone number (or numbers) to which a customer can direct questions about their utility service.

(d) Local office.

(1) Unless otherwise authorized by the commission in response to a written request, each utility shall have an office in the county or immediate area (within 20 miles) of a portion of its utility service area in which it keeps all books, records, tariffs, and memoranda required by the commission.

(2) Unless otherwise authorized by the commission in response to a written request, each utility shall make available and notify customers of a business location where applications for service can be submitted and payments can be made to prevent disconnection of service or to restore service after disconnection for nonpayment, nonuse, or other reasons specified in §24.88 of this title (relating to Discontinuance of Service). The business location must be located:

(A) in each county where utility service is provided; or

(B) not more than 20 miles from any residential customer if there is no location to receive payments in that county.

(3) Upon request by the utility, the requirement for a local office may be waived by the commission if the utility can demonstrate that these requirements would cause a rate increase or otherwise harm or inconvenience customers. Unless otherwise authorized by the commission in response to a written request, such utility shall make available and notify customers of a location within 20 miles of each of its utility service facilities where applications for service can be submitted and payments can be made to prevent disconnection of service or restore service after disconnection for nonpayment, nonuse, or other reasons specified in §24.88 of this title.

§24.82. Resolution of Disputes.

(a) Any customer or service applicant requesting the opportunity to dispute any action or determination of a utility under the utility's customer service rules shall be given an opportunity for a review by the utility. If the utility is unable to provide a review immediately following the customer's request, arrangements for the review shall be made for the earliest possible date. Service shall not be disconnected pending completion of the review. The commission may require continuation or restoration of service pending resolution of a complaint. If the customer will not allow an inspection or chooses not to participate in such review or not to make arrangements for such review to take place within five working days after requesting it, the utility may disconnect service for the reasons listed in §24.88 of this title (relating to Discontinuance of Service), provided notice has been given in accordance with that section.

(b) In regards to a customer complaint arising out of a charge made by a public utility, if the commission finds that the utility has failed to make the proper adjustment to the customer's bill after the conclusion of the complaint process established by the commission, the commission may issue an order requiring the utility to make the adjustment. Failure to comply with the order within 30 working days of receiving the order is a violation for which the commission may impose an administrative penalty under TWC, §13.4151.

§24.83. Refusal of Service.

(a) Grounds for refusal to serve. A utility may decline to serve a service applicant for the following reasons:

(1) the service applicant is not in compliance with state or municipal regulations applicable to the type of service requested;

(2) the service applicant is not in compliance with the rules and regulations of the utility governing the type of service requested which are in its approved tariff on file with the commission;

(3) the service applicant is indebted to any utility for the same type of service as that requested. However, in the event the indebtedness of the service applicant is in dispute, the service applicant shall be served upon complying with the deposit requirements in §24.84 of this title (relating to Service Applicant and Customer Deposit) and upon a demonstration that the service applicant has complied with all of the provisions of §24.87(k) of this title (relating to Billing);

(4) the service applicant's primary point of use is outside the certificated area;

(5) standby fees authorized under §24.87(o) of this title have not been paid for the specific property or lot on which service is being requested; or

(6) the utility is prohibited from providing service under Vernon's Texas Civil Statutes, Local Government Code, §212.012 or §232.029.

(b) Service Applicant's recourse. In the event the utility refuses to serve a service applicant under the provisions of these sections, the utility shall inform the service applicant in writing of the basis of its refusal and that the service applicant may file a complaint with the commission thereon.

(c) Insufficient grounds for refusal to serve. The following shall not constitute sufficient cause for refusal of service to a present customer or service applicant:

(1) delinquency in payment for service by a previous occupant of the premises to be served;

(2) violation of the utility's rules pertaining to operation of nonstandard equipment or unauthorized attachments which interferes with the service of others, unless the customer has first been notified and been afforded reasonable opportunity to comply with said rules;

(3) failure to pay a bill of another customer as guarantor thereof, unless the guarantee was made in writing to the utility as a condition precedent to service;

(4) failure to pay the bill of another customer at the same address except where a change of customer identity is made to avoid or evade payment of a utility bill;

(5) failure to pay for the restoration of a tap removed by the utility at its option or removed as the result of tampering or delinquency in payment by a previous customer;

(6) the service applicant or customer chooses to use a type of backflow prevention assembly approved under 30 TAC §290.44(h)

(relating to Water Distribution) even if the assembly is not the one preferred by the utility; or

(7) failure to comply with regulations or rules for anything other than the type of utility service specifically requested including failure to comply with septic tank regulations or sewer hook-up requirements.

§24.84. Service Applicant and Customer Deposit.

(a) Deposit on Tariff. Deposits may only be charged if listed on the utility's approved tariff.

(1) Residential service applicants. If a residential service applicant does not establish credit to the satisfaction of the utility, the residential service applicant may be required to pay a deposit that does not exceed \$50 for water service and \$50 for sewer service.

(2) Commercial and Nonresidential service applicants. If a commercial or nonresidential service applicant does not establish credit to the satisfaction of the utility, the service applicant may be required to make a deposit. The required deposit shall not exceed an amount equivalent to one-sixth of the estimated annual billings.

(3) Commercial and Nonresidential Customers. If actual monthly billings of a commercial or nonresidential customer are more than twice the amount of the estimated billings at the time service was established, a new deposit amount may be calculated and an additional deposit may be required to be made within 15 days after the issuance of written notice.

(b) Customers not disconnected. Current customers who have not been disconnected for nonpayment or other similar reasons in §24.88 of this title (relating to Discontinuance of Service) shall not be required to pay a deposit.

(c) Applicants 65 years of age or older. No deposit may be required of a residential service applicant who is 65 years of age or older if the applicant does not have a delinquent account balance with the utility or another water or sewer utility.

(d) Interest on deposits. Each utility shall pay a minimum interest on all customer deposits at an annual rate at least equal to a rate set each calendar year by the Public Utility Commission of Texas in accordance with the provisions of Texas Civil Statutes, Article 1440a. Payment of the interest to the customer shall be made annually if requested by the customer, or at the time the deposit is returned or credited to the customer's account. Inquiries about the appropriate interest rate to be paid each year a deposit is held may be directed to the commission.

(e) Landlords/tenants. In cases of landlord/tenant relationships, the utility may require both parties to sign an agreement specifying which party is responsible for bills and deposits. This agreement may be included as a provision of the utility's approved service application form. The utility shall not require the landlord to guarantee the tenant's customer deposit or monthly service bill as a condition of service. The utility may require the landlord to guarantee the payment of service extension fees under the utility's approved tariff if these facilities will remain in public service after the tenant vacates the leased premises. If the landlord signs a guarantee of payment for deposits or monthly service bills, the guarantee shall remain in full force and effect until the guarantee is withdrawn in writing and copies are provided to both the utility and the tenant.

(f) Reestablishment of credit or deposit. Every service applicant who has previously been a customer of the utility and whose service has been discontinued for nonpayment of bills, meter tampering, bypassing of meter or failure to comply with applicable state and municipal regulations or regulations of the utility shall be required, before

service is resumed, to pay all amounts due the utility or execute a deferred payment agreement, if offered, and may be required to pay a deposit if the utility does not currently have a deposit from the customer. The burden shall be on the utility to prove the amount of utility service received but not paid for and the reasonableness of any charges for such unpaid service, as well as all other elements of any bill required to be paid as a condition of service restoration.

(g) Records of deposits.

(1) The utility shall keep records to show:

(A) the name and address of each depositor;

(B) the amount and date of the deposit;

(C) each transaction concerning the deposit; and

(D) the amount of interest earned on customer deposit funds.

(2) The utility shall issue a receipt of deposit to each service applicant or customer from whom a deposit is received.

(3) A record of each unclaimed deposit shall be maintained for at least seven years, during which time the utility shall make a reasonable effort to return the deposit or may transfer the unclaimed deposit to the Texas Comptroller of Public Accounts. If not already transferred, after seven years, unclaimed deposits shall be transferred to the Texas Comptroller of Public Accounts.

(h) Refund of deposit.

(1) If service is not connected, or after disconnection of service, the utility shall promptly and automatically refund the service applicant's or customer's deposit plus accrued interest or the balance, if any, in excess of the unpaid bills for service furnished. The utility may refund deposits plus accumulated interest at any time prior to termination of utility service. The utility's policy for refunds to current customers must be consistent and nondiscriminatory.

(2) When a residential customer has paid bills for service for 18 consecutive billings without being delinquent, the utility shall promptly refund the deposit with interest to the customer either by payment or credit to the customer's bill. Deposits from customers who do not meet this criteria may be retained until service is terminated.

(i) Transfer of service. A transfer of service from one service location to another within the service area of the utility shall not be deemed a disconnection within the meaning of this section, and no additional deposit may be demanded unless permitted by this subchapter.

§24.85. Response to Requests for Service by a Retail Public Utility Within Its Certificated Area.

(a) Except as provided for in subsection (e) of this section, every retail public utility shall serve each qualified service applicant within its certificated area as soon as is practical after receiving a completed application. A qualified service applicant is an applicant who has met all of the retail public utility's requirements contained in its tariff, schedule of rates, or service policies and regulations for extension of service including the delivery to the retail public utility of any service connection inspection certificates required by law.

(1) Where a new service tap is required, the retail public utility may require that the property owner make the request for the tap to be installed.

(2) Upon request for service by a service applicant, the retail public utility shall make available and accept a completed written application for service.

(3) Except for good cause, at a location where service has previously been provided the utility must reconnect service within one working day after the applicant has submitted a completed application for service and met any other requirements in the utility's approved tariff.

(4) A request for service that requires a tap but does not require line extensions, construction, or new facilities shall be filled within five working days after a completed service application has been accepted.

(5) If construction is required to fill the order and if it cannot be completed within 30 days, the retail public utility shall provide a written explanation of the construction required and an expected date of service.

(b) Except for good cause shown, the failure to provide service within 30 days of an expected date or within 180 days of the date a completed application was accepted from a qualified applicant may constitute refusal to serve, and may result in the assessment of administrative penalties or revocation of the certificate of convenience and necessity or the granting of a certificate to another retail public utility to serve the applicant.

(c) The cost of extension and any construction cost options such as rebates to the customer, sharing of construction costs between the utility and the customer, or sharing of costs between the customer and other applicants shall be provided to the customer in writing upon assessment of the costs of necessary line work, but before construction begins. Also see §24.81(a)(1) of this title (relating to Customer Relations).

(d) Easements.

(1) Where recorded public utility easements on the service applicant's property do not exist or public road right-of-way easements are not available to access the property of a service applicant, the public utility may require the service applicant or land owner to grant a permanent recorded public utility easement dedicated to the public utility which will provide a reasonable right of access and use to allow the public utility to construct, install, maintain, inspect and test water and/or sewer facilities necessary to serve that applicant.

(2) As a condition of service to a new subdivision, public utilities may require developers to provide permanent recorded public utility easements to and throughout the subdivision sufficient to construct, install, maintain, inspect, and test water and/or sewer facilities necessary to serve the subdivision's anticipated service demands upon full occupancy.

(3) A district or water supply corporation may require an applicant for service to grant an easement as allowed under applicable law.

(e) Service Extensions by a Water Supply or Sewer Service Corporation or Special Utility District.

(1) A water supply or sewer service corporation or a special utility district organized under Chapter 65 of the code is not required to extend retail water or sewer utility service to a service applicant in a subdivision within its certificated area if it documents that:

(A) the developer of the subdivision has failed to comply with the subdivision service extension policy as set forth in the tariff of the corporation or the policies of the special utility district; and

(B) the service applicant purchased the property after the corporation or special utility district gave notice of its rules which are applicable to service to subdivisions in accordance with the notice requirements in this subsection.

(2) Publication of notice, in substantial compliance with the form notice in Appendix A, in a newspaper of general circulation in each county in which the corporation or special utility district is certificated for utility service of the requirement to comply with the subdivision service extension policy constitutes notice under this subsection. The notice must be published once a week for two consecutive weeks on a biennial basis and must contain information describing the subdivision service extension policy of the corporation or special utility district. The corporation or special utility district must be able to provide proof of publication through an affidavit of the publisher of the newspaper that specifies each county in which the newspaper is generally circulated:

Figure: 16 TAC §24.85(e)(2)

(3) As an alternative to publication of notice, a corporation or special utility district may demonstrate by any reasonable means that a developer has been notified of the requirement to comply with the subdivision service extension policy, including:

(A) an agreement executed by the developer;

(B) correspondence with the developer that sets forth the subdivision service extension policy; or

(C) any other documentation that reasonably establishes that the developer should be aware of the subdivision service extension policy.

(4) For purposes of this subsection:

(A) "Developer" means a person who subdivides land or requests more than two water or sewer service connections on a single contiguous tract of land.

(B) "Service applicant" means a person, other than a developer, who applies for water or sewer utility service.

§24.86. Service Connections.

(a) Water Service Connections.

(1) Tap Fees. The fees for initiation of service, where no service previously existed, shall be in accordance with the following:

(A) The fee charged by a utility for connecting a residential service applicant's premises to the system shall be as stated on the approved tariff. In determining the reasonableness of a tap fee, the commission will consider the actual costs of materials, labor, and administrative costs for such service connections and road construction or impact fees charged by authorities with control of road use if typically incurred and may allow a reasonable estimate of tax liabilities. The commission may limit the tap fee to an amount equal to the average costs incurred by the utility.

(B) Whether listed on the utility's approved tariff or not, the tap fee charged for all service connections requiring meters larger than 3/4 inch shall be limited to the actual cost of materials, labor and administrative costs for making the individual service connection and road construction or impact fees charged by authorities with control of road use and a reasonable estimate of tax liabilities. The service applicant shall be given an itemized statement of the costs.

(C) An additional fee may be charged to a residential service applicant, if stated on the approved tariff, for a tap expense not normally incurred; for example, a road bore for customers outside of subdivisions or residential areas.

(2) Installation and Service Connection.

(A) The utility shall furnish and install, for the purpose of connecting its distribution system to the service applicant's property, the service pipe from its main to the meter location on the service ap-

applicant's property. See also paragraph (3) of this subsection. For all new installations, a utility-owned cut-off valve shall be provided on the utility side of the meter. Utilities without customer meters shall provide and maintain a cut-off valve on the customer's property as near the property line as possible. This does not relieve the utility of the obligation to comply with §24.89 of this title (relating to Meters).

(B) The service applicant shall be responsible for furnishing and laying the necessary service line from the meter to the place of consumption and shall keep the service line in good repair. For new taps or for new service at a location with an existing tap, service applicants may be required to install a customer owned cut-off valve on the customer's side of the meter or connection. Customers who have damaged the utility's cut-off valve or curb stop through unauthorized use or tampering may be required to install a customer owned cut-off valve on the customer's side of the meter or connection within a reasonable time frame of not less than 30 days if currently connected or prior to restoration of service if the customer has been lawfully disconnected under these rules. The customer's responsibility shall begin at the discharge side of the meter or utility's cut-off valve if there are no meters. If the utility's meter or cut-off valve is not on the customer's property, the customer's responsibility will begin at the property line.

(3) Location of meters. Meters shall be located on the customer's property, readily accessible for maintenance and reading and, so far as practicable, the meter shall be at a location mutually acceptable to the customer and the utility. The meter shall be installed so as to be unaffected by climatic conditions and reasonably secure from damage.

(4) Relocation and conversion of meters. If an existing meter is moved to a location designated by the customer for the customer's convenience, the utility may not be responsible except for negligence. The customer may be charged the actual cost of relocating the meter. If the customer requests that an existing meter be replaced with a meter of another size or capacity, the customer may be charged the actual cost of converting the meter including enlarging the line from the main to the meter if necessary.

(b) Sewer Service Connections.

(1) Tap Fees. The fees for initiation of sewer service, where no service previously existed, shall be in accordance with the following:

(A) The fee charged by a utility for connecting a residential service applicant's premises to the sewer system shall be as stated on the approved tariff. In determining the reasonableness of a tap fee, the commission will consider the actual costs of materials, labor, and administrative costs for such service connections and road construction or impact fees charged by authorities with control of road use if typically incurred and may allow a reasonable estimate of tax liabilities. The commission may limit the tap fee to an amount equal to the average costs incurred by the utility.

(B) The fee charged for all commercial or nonstandard service connections shall be set at the actual cost of materials, labor and administrative costs for making the service connection and road construction or impact fees charged by authorities with control of road use and may include a reasonable estimate of tax liabilities. The service applicant shall be given an itemized statement of the costs.

(C) A fee in addition to the standard tap fee may be charged for a new residential service connection which requires expenses not normally incurred if clearly identified on the approved tariff; for example, a road bore for service applicants outside of subdivisions or residential areas.

(D) Tap fees for sewer systems designed to receive effluent from a receiving tank located on the customer's property, whether fed by gravity or pressure into the utility's sewer main, may include charges to install a receiving tank and appurtenances on the customer's property and service line from the tank to the utility's main which meets the minimum standards set by the utility and authorized by the commission. The tank may include grinder pumps, etc. to pump the effluent into the utility's main. Ownership of and maintenance responsibilities for the receiving tank and appurtenances shall be specified in the utility's approved tariff.

(2) Installation and Service Connections.

(A) The utility shall furnish and install, for the purpose of connecting its collection system to the service applicant's service line, the service pipe from its main to a point on the customer's property.

(B) The customer shall be responsible for furnishing and laying the necessary customer service line from the utility's line to the residence.

(3) Maintenance by Customer.

(A) The customer service line and appurtenances installed by the customer shall be constructed in accordance with the laws and regulations of the State of Texas governing plumbing practices which must be at least as stringent and comprehensive as one of the following nationally recognized codes: the Southern Standard Plumbing Code, the Uniform Plumbing Code, and/or the National Standard Plumbing Code, or other standards as prescribed by the commission.

(B) It shall be the customer's responsibility to maintain the customer service line and any appurtenances which are the customer's responsibility in good operating condition, such as, clear of obstruction, defects, leaks or blockage. If the utility can provide evidence of excessive infiltration or inflow into the customer's service line or failure to provide proper pretreatment, the utility may, with the written approval of the commission, require that the customer repair the line or eliminate the infiltration or inflow or take such actions necessary to correct the problem. If the customer fails to correct the problem within a reasonable time, the utility may disconnect the service after notice as required under §24.88 of this title (relating to Discontinuance of Service). Less than ten days notice may be given if authorized by the commission.

(C) If the customer retains ownership of receiving tanks and appurtenances located on the customer's property under the utility's tariff, routine maintenance and repairs are the customer's responsibility. The utility may require in its approved tariff that parts and equipment meet the minimum standards set by the utility to ensure proper and efficient operation of the sewer system but cannot require that the customer purchase parts or repair service from the utility.

(c) Line extension and construction charges. Each utility shall file its extension policy with the commission as part of its tariff. The policy shall be consistent and nondiscriminatory. No contribution in aid of construction may be required of any service applicant except as provided for in the approved extension policy.

(1) Contributions in aid of construction shall not be required of individual residential service applicants for production, storage, treatment, or transmission facilities unless that residential customer places unique, non-standard service demands upon the system, in which case, the customer may be charged the additional cost of extending service to and throughout his property, including the cost of all necessary collection or transmission facilities necessary to meet the service demands anticipated to be created by that property.

(2) Developers may be required to provide contributions in aid of construction in amounts sufficient to reimburse the utility for:

(A) existing uncommitted facilities at their original cost if the utility has not previously been reimbursed. A utility shall not be reimbursed for facilities in excess of the amount the utility paid for the facilities. A utility is not required to allocate existing uncommitted facilities to a developer for projected development beyond a reasonable planning period; or

(B) additional facilities compliant with the commission's minimum design criteria for facilities used in the production, transmission, pumping, or treatment of water or the commission's minimum design criteria for wastewater collection and treatment facilities and to provide for reasonable local demand requirements. Income tax liabilities which may be incurred due to collection of contributions in aid of construction may be included in extension charges to developers. Additional tax liabilities due to collection of the original tax liability may not be collected unless they can be supported and are specifically noted in the approved extension policy.

(3) For purposes of this subsection, a developer is one who subdivides or requests more than two water service connections or sewer service connections on a single contiguous tract of land.

(d) Cost utilities and service applicants shall bear.

(1) Within its certificated area, a utility shall be required to bear the cost of the first 200 feet of any water main or sewer collection line necessary to extend service to an individual residential service applicant within a platted subdivision unless the utility can document:

(A) that the developer of the subdivision refused to provide facilities compatible with the utility's facilities in accordance with the utility's approved extension policy after receiving a written request from the utility; or

(B) that the developer of the subdivision defaulted on the terms and conditions of a written agreement or contract existing between the utility and the developer regarding payment for services, extensions, or other requirements; or in the event the developer declared bankruptcy and was therefore unable to meet obligations; and

(C) that the residential service applicant purchased the property from the developer after the developer was notified of the need to provide facilities to the utility.

(2) A residential service applicant may be charged the remaining costs of extending service to his property; provided, however, that the residential service applicant may only be required to pay the cost equivalent to the cost of extending the nearest water main or wastewater collection line, whether or not that line has adequate capacity to serve that residential service applicant. The following criteria shall be considered to determine the residential service applicant's cost for extending service:

(A) The residential service applicant shall not be required to pay for costs of main extensions greater than two inches in diameter for water distribution and pressure wastewater collection lines and six inches in diameter for gravity wastewater lines.

(B) Exceptions may be granted by the commission if:

(i) adequate service cannot be provided to the applicant using the maximum line sizes listed due to distance or elevation, in which case, it shall be the utility's burden to justify that a larger diameter pipe is required for adequate service;

(ii) larger minimum line sizes are required under subdivision platting requirements or building codes of municipalities

within whose corporate limits or extraterritorial jurisdiction the point of use is located; or

(iii) the residential service applicant is located outside the CCN service area.

(C) If an exception is granted, the utility must establish a proportional cost plan for the specific extension or a rebate plan which may be limited to seven years to return the portion of the applicant's costs for oversizing as new customers are added to ensure that future applicants for service on the line pay at least as much as the initial service applicant.

(3) The utility shall bear the cost of any oversizing of water distribution lines or wastewater collection lines necessary to serve other potential service applicants or customers in the immediate area or for fire flow requirements unless an exception is granted under paragraph (2)(B) of this subsection.

(4) For purposes of determining the costs that service applicants shall pay, commercial customers with service demands greater than residential customer demands in the certificated area, industrial, and wholesale customers may be treated as developers. A service applicant requesting a one inch meter for a lawn sprinkler system to service a residential lot is not considered nonstandard service.

(e) Other Fees for Service Applicants. Except for an affected county, utilities shall not charge membership fees or application fees.

§24.87. Billing.

(a) Authorized rates. Bills must be calculated according to the rates approved by the regulatory authority and listed on the utility's approved tariff. Unless specifically authorized by the commission, a utility may not apply a metered rate to customers in a subdivision or geographically defined area unless all customers in the subdivision or geographically defined area are metered.

(b) Due date.

(1) The due date of the bill for utility service may not be less than 16 days after issuance unless the customer is a state agency. If the customer is a state agency, the due date for the bill may not be less than 30 days after issuance unless otherwise agreed to by the state agency. The postmark on the bill or the recorded date of mailing by the utility if there is no postmark on the bill, constitutes proof of the date of issuance. Payment for utility service is delinquent if the full payment, including late fees and regulatory assessments, is not received at the utility or at the utility's authorized payment agency by 5:00 p.m. on the due date. If the due date falls on a holiday or weekend, the due date for payment purposes is the next work day after the due date.

(2) If a utility has been granted an exception to the requirements for a local office in accordance with §24.81(d)(3) of this title (relating to Customer Relations), the due date of the bill for utility service may not be less than 30 days after issuance.

(c) Penalty on delinquent bills for retail service. Unless otherwise provided, a one-time penalty of either \$5.00 or 10% for all customers may be charged for delinquent bills. If, after receiving a bill including a late fee, a customer pays the bill in full except for the late fee, the bill may be considered delinquent and subject to termination after proper notice under §24.88 of this title (relating to Discontinuance of Service). An additional late fee may not be applied to a subsequent bill for failure to pay the prior late fee. The penalty on delinquent bills may not be applied to any balance to which the penalty was applied in a previous billing. No such penalty may be charged unless a record of the date the utility mails the bills is made at the time of the mailing and maintained at the principal office of the utility. Late fees may not be charged on any payment received by 5:00 p.m. on the due date at

the utility's office or authorized payment agency. The commission may prohibit a utility from collecting late fees for a specified period if it determines that the utility has charged late fees on payments that were not delinquent.

(d) Deferred payment plan. A deferred payment plan is any arrangement or agreement between the utility and a customer in which an outstanding bill will be paid in installments. The utility shall offer a deferred payment plan to any residential customer if the customer's bill is more than three times the average monthly bill for that customer for the previous 12 months and if that customer has not been issued more than two disconnection notices at any time during the preceding 12 months. In all other cases, the utility is encouraged to offer a deferred payment plan to residential customers who cannot pay an outstanding bill in full but are willing to pay the balance in reasonable installments. A deferred payment plan may include a finance charge that may not exceed an annual rate of 10% simple interest. Any finance charges must be clearly stated on the deferred payment agreement.

(e) Rendering and form of bills.

(1) Bills for water and sewer service shall be rendered monthly unless otherwise authorized by the commission, or unless service is terminated before the end of a billing cycle. Service initiated less than one week before the next billing cycle begins may be billed with the following month's bill. Bills shall be rendered as promptly as possible following the reading of meters. One bill shall be rendered for each meter.

(2) The customer's bill must include the following information, if applicable, and must be arranged so as to allow the customer to readily compute the bill with a copy of the applicable rate schedule:

(A) if the meter is read by the utility, the date and reading of the meter at the beginning and at the end of the period for which the bill is rendered;

(B) the number and kind of units metered;

(C) the applicable rate class or code;

(D) the total amount due for water service;

(E) the amount deducted as a credit required by a commission order;

(F) the amount due as a surcharge;

(G) the total amount due on or before the due date of the bill;

(H) the due date of the bill;

(I) the date by which customers must pay the bill in order to avoid addition of a penalty;

(J) the total amount due as penalty for nonpayment within a designated period;

(K) a distinct marking to identify an estimated bill;

(L) any conversions from meter reading units to billing units, or any other calculations to determine billing units from recording or other devices, or any other factors used in determining the bill;

(M) the total amount due for sewer service;

(N) the gallonage used in determining sewer usage;

(O) the local telephone number or toll free number where the utility can be reached.

(3) Except for an affected county or for solid waste disposal fees collected under a contract with a county or other public agency,

charges for nonutility services or any other fee or charge not specifically authorized by the Texas Water Code or these rules or specifically listed on the utility's approved tariff may not be included on the bill.

(f) Charges for sewer service. Utilities are not required to use meters to measure the quantity of sewage disposed of by individual customers. When a sewer utility is operated in conjunction with a water utility that serves the same customer, the charge for sewage disposal service may be based on the consumption of water as registered on the customer's water meter. Where measurement of water consumption is not available, the utility shall use the best means available for determining the quantity of sewage disposal service used. A method of separating customers by class shall be adopted so as to apply rates that will accurately reflect the cost of service to each class of customer.

(g) Consolidated billing and collection contracts.

(1) This subsection applies to all retail public utilities.

(2) A retail public utility providing water service may contract with a retail public utility providing sewer service to bill and collect the sewer service provider's fees and payments as part of a consolidated process with the billing and collection of the water service provider's fees and payments. The water service provider may provide that service only for customers who are served by both providers in an area covered by both providers' certificates of public convenience and necessity. If the water service provider refuses to enter into a contract under this section or if the water service provider and sewer service provider cannot agree on the terms of a contract, the sewer service provider may petition the commission to issue an order requiring the water service provider to provide that service.

(3) A contract or order under this subsection must provide procedures and deadlines for submitting filing and customer information to the water service provider and for the delivery of collected fees and payments to the sewer service provider.

(4) A contract or order under this subsection may require or permit a water service provider that provides consolidated billing and collection of fees and payments to:

(A) terminate the water services of a person whose sewage services account is in arrears for nonpayment; and

(B) charge a customer a reconnection fee if the customer's water service is terminated for nonpayment of the customer's sewage services account.

(5) A water service provider that provides consolidated billing and collection of fees and payments may impose on each sewer service provider customer a reasonable fee to recover costs associated with providing consolidated billing and collection of fees and payments for sewage services.

(h) Overbilling and underbilling. If billings for utility service are found to differ from the utility's lawful rates for the services being provided to the customer, or if the utility fails to bill the customer for such services, a billing adjustment shall be calculated by the utility. If the customer is due a refund, an adjustment must be made for the entire period of the overcharges. If the customer was undercharged, the utility may backbill the customer for the amount that was underbilled. The backbilling may not exceed 12 months unless such undercharge is a result of meter tampering, bypass, or diversion by the customer as defined in §24.89 of this title (relating to Meters). If the underbilling is \$25 or more, the utility shall offer to such customer a deferred payment plan option for the same length of time as that of the underbilling. In cases of meter tampering, bypass, or diversion, a utility may, but is not required to, offer a customer a deferred payment plan.

(i) Estimated bills. When there is good reason for doing so, a water or sewer utility may issue estimated bills, provided that an actual meter reading is taken every two months and appropriate adjustments made to the bills.

(j) Prorated charges for partial-month bills. When a bill is issued for a period of less than one month, charges should be computed as follows.

(1) Metered service. Service shall be billed for the base rate, as shown in the utility's tariff, prorated for the number of days service was provided; plus the volume metered in excess of the prorated volume allowed in the base rate.

(2) Flat-rate service. The charge shall be prorated on the basis of the proportionate part of the period during which service was rendered.

(3) Surcharges. Surcharges approved by the commission do not have to be prorated on the basis of the number of days service was provided.

(k) Prorated charges due to utility service outages. In the event that utility service is interrupted for more than 24 consecutive hours, the utility shall prorate the base charge to the customer to reflect this loss of service. The base charge to the customer shall be prorated on the basis of the proportionate part of the period during which service was interrupted.

(l) Disputed bills.

(1) A customer may advise a utility that a bill is in dispute by written notice or in person during normal business hours. A dispute must be registered with the utility and a payment equal to the customer's average monthly usage at current rates must be received by the utility prior to the date of proposed discontinuance for a customer to avoid discontinuance of service as provided by §24.88 of this title.

(2) Notwithstanding any other section of this chapter, the customer may not be required to pay the disputed portion of a bill that exceeds the amount of that customer's average monthly usage at current rates pending the completion of the determination of the dispute. For purposes of this section only, the customer's average monthly usage will be the average of the customer's usage for the preceding 12-month period. Where no previous usage history exists, consumption for calculating the average monthly usage will be estimated on the basis of usage levels of similar customers under similar conditions.

(3) Notwithstanding any other section of this chapter, a utility customer's service may not be subject to discontinuance for nonpayment of that portion of a bill under dispute pending the completion of the determination of the dispute. The customer is obligated to pay any billings not disputed as established in §24.88 of this title.

(m) Notification of alternative payment programs or payment assistance. Any time customers contact a utility to discuss their inability to pay a bill or indicate that they are in need of assistance with their bill payment, the utility or utility representative shall provide information to the customers in English and in Spanish, if requested, of available alternative payment and payment assistance programs available from the utility and of the eligibility requirements and procedure for applying for each.

(n) Adjusted bills. There is a presumption of reasonableness of billing methodology by a sewer utility for winter average billing or by a water utility with regard to a case of meter tampering, bypassing, or other service diversion if any one of the following methods of calculating an adjusted bill is used:

(1) estimated bills based upon service consumed by that customer at that location under similar conditions during periods preceding the initiation of meter tampering or service diversion. Such estimated bills must be based on at least 12 consecutive months of comparable usage history of that customer, when available, or lesser history if the customer has not been served at that site for 12 months. This subsection, however, does not prohibit utilities from using other methods of calculating bills for unmetered water when the usage of other methods can be shown to be more appropriate in the case in question;

(2) estimated bills based upon that customer's usage at that location after the service diversion has been corrected;

(3) calculation of bills for unmetered consumption over the entire period of meter bypassing or other service diversion, if the amount of actual unmetered consumption can be calculated by industry recognized testing procedures; or

(4) a reasonable adjustment is made to the sewer bill if a water leak can be documented during the winter averaging period and winter average water use is the basis for calculating a customer's sewer charges. If the actual water loss can be calculated, the consumption shall be adjusted accordingly. If not, the prior year average can be used if available. If the actual water loss cannot be calculated and the customer's prior year's average is not available, then a typical average for other customers on the system with similar consumption patterns may be used.

(o) Equipment damage charges. A utility may charge for all labor, material, equipment, and all other actual costs necessary to repair or replace all equipment damaged due to negligence, meter tampering or bypassing, service diversion, or the discharge of wastes that the system cannot properly treat. The utility may charge for all actual costs necessary to correct service diversion or unauthorized taps where there is no equipment damage, including incidents where service is reconnected without authority. An itemized bill of such charges must be provided to the customer. A utility may not charge any additional penalty or any other charge other than actual costs unless such penalty has been expressly approved by the commission and filed in the utility's tariff. Except in cases of meter tampering or service diversion, a utility may not disconnect service of a customer refusing to pay damage charges unless authorized to in writing by the commission.

(p) Fees. Except for an affected county, utilities may not charge disconnect fees, service call fees, field collection fees, or standby fees except as authorized in this chapter.

(1) A utility may only charge a developer standby fees for unrecovered costs of facilities committed to a developer's property under the following circumstances:

(A) under a contract and only in accordance with the terms of the contract;

(B) if service is not being provided to a lot or lots within two years after installation of facilities necessary to provide service to the lots has been completed and if the standby fees are included on the utility's approved tariff after a rate change application has been properly filed. The fees cannot be billed to the developer or collected until the standby fees have been approved by the commission; or

(C) for purposes of this subsection, a manufactured housing rental community can only be charged standby fees under a contract or if the utility installs the facilities necessary to provide individually metered service to each of the rental lots or spaces in the community.

(2) Except as provided in §24.88(h)(2) and §24.89(c) of this title other fees listed on a utility's approved tariff may be charged

when appropriate. Return check charges included on a utility's approved tariff may not exceed the utility's documentable cost.

(q) Payment with cash. When a customer pays any portion of a bill with cash, the utility shall issue a written receipt for the payment.

(r) Voluntary contributions for certain emergency services.

(1) A utility may implement as part of its billing process a program under which the utility collects from its customers a voluntary contribution including a voluntary membership or subscription fee, on behalf of a volunteer fire department or an emergency medical service. A utility that collects contributions under this section shall provide each customer at the time the customer first becomes a customer, and at least annually thereafter, a written statement:

(A) describing the procedure by which the customer may make a contribution with the customer's bill payment;

(B) designating the volunteer fire department or emergency medical service to which the utility will deliver the contribution;

(C) informing the customer that a contribution is voluntary;

(D) if applicable, informing the customer the utility intends to keep a portion of the contributions to cover related expenses; and

(E) describing the deductibility status of the contribution under federal income tax law.

(2) A billing by the utility that includes a voluntary contribution under this section must clearly state that the contribution is voluntary and that it is not required to be paid.

(3) The utility shall promptly deliver contributions that it collects under this section to the designated volunteer fire department or emergency medical service, except that the utility may keep from the contributions an amount equal to the lesser of:

(A) the utility's expenses in administering the contribution program; or

(B) 5.0% of the amount collected as contributions.

(4) Amounts collected under this section are not rates and are not subject to regulatory assessments, late payment penalties, or other utility related fees, are not required to be shown in tariffs filed with the regulatory authority, and non-payment may not be the basis for termination of service.

§24.88. Discontinuance of Service.

(a) Disconnection with notice.

(1) Notice requirements. Proper notice shall consist of a separate written statement which a utility must mail or hand deliver to a customer before service may be disconnected. The notice must be provided in English and Spanish if necessary to adequately inform the customer and must include the following information:

(A) the words "termination notice" or similar language approved by the commission written in a way to stand out from other information on the notice;

(B) the action required to avoid disconnection, such as paying past due service charges,

(C) the date by which the required action must be completed to avoid disconnection. This date must be at least ten days from the date the notice is provided unless a shorter time is authorized by the commission;

(D) the intended date of disconnection;

(E) the office hours, telephone number, and address of the utility's local office;

(F) the total past due charges;

(G) all reconnect fees that will be required to restore water or sewer service if service is disconnected.

(H) if notice is provided by a sewer service provider under subsection (e) of this section, the notice must also state:

(i) that failure to pay past due sewer charges will result in termination of water service; and

(ii) that water service will not be reconnected until all past due and currently due sewer service charges and the sewer reconnect fee are paid.

(2) Reasons for disconnection. Utility service may be disconnected after proper notice for any of the following reasons:

(A) failure to pay a delinquent account for utility service or failure to comply with the terms of a deferred payment agreement.

(i) Payment by check which has been rejected for insufficient funds, closed account, or for which a stop payment order has been issued is not deemed to be payment to the utility.

(ii) Payment at a utility's office or authorized payment agency is considered payment to the utility.

(iii) The utility is not obligated to accept payment of the bill when an employee is at the customer's location to disconnect service;

(B) violation of the utility's rules pertaining to the use of service in a manner which interferes with the service of others;

(C) operation of non-standard equipment, if a reasonable attempt has been made to notify the customer and the customer is provided with a reasonable opportunity to remedy the situation;

(D) failure to comply with deposit or guarantee arrangements where required by §24.84 of this title (relating to Service Applicant and Customer Deposit);

(E) failure to pay charges for sewer service provided by another retail public utility in accordance with subsection (e) of this section; and

(F) failure to pay solid waste disposal fees collected under contract with a county or other public agency.

(b) Disconnection without notice. Utility service may be disconnected without prior notice for the following reasons:

(1) where a known and dangerous condition related to the type of service provided exists. Where reasonable, given the nature of the reason for disconnection, a written notice of the disconnection, explaining the reason service was disconnected, shall be posted at the entrance to the property, the place of common entry or upon the front door of each affected residential unit as soon as possible after service has been disconnected;

(2) where service is connected without authority by a person who has not made application for service;

(3) where service has been reconnected without authority following termination of service for nonpayment under subsection (a) of this section;

(4) or in instances of tampering with the utility's meter or equipment, bypassing the same, or other instances of diversion as defined in §24.89 of this title (relating to Meters).

(c) Disconnection prohibited. Utility service may not be disconnected for any of the following reasons:

(1) failure to pay for utility service provided to a previous occupant of the premises;

(2) failure to pay for merchandise, or charges for non-utility service provided by the utility;

(3) failure to pay for a different type or class of utility service unless the fee for such service is included on the same bill or unless such disconnection is in accordance with subsection (e) of this section;

(4) failure to pay the account of another customer as guarantor thereof, unless the utility has in writing the guarantee as a condition precedent to service;

(5) failure to pay charges arising from an underbilling due to any faulty metering, unless the meter has been tampered with or unless such underbilling charges are due under §24.89 of this title;

(6) failure to pay an estimated bill other than a bill rendered pursuant to an approved meter-reading plan, unless the utility is unable to read the meter due to circumstances beyond its control;

(7) failure to comply with regulations or rules regarding anything other than the type of service being provided including failure to comply with septic tank regulations or sewer hook-up requirements;

(8) refusal of a current customer to sign a service agreement; or

(9) failure to pay standby fees.

(d) Disconnection due to utility abandonment. No public utility may abandon a customer or a certificated service area unless it has complied with the requirements of §24.114 of this title (relating to Requirement to Provide Continuous and Adequate Service) and obtained approval from the commission.

(e) Disconnection of water service due to nonpayment of sewer charges.

(1) Where sewer service is provided by one retail public utility and water service is provided by another retail public utility, the retail public utility that provides the water service shall disconnect water service to a customer who has not paid undisputed sewer charges if requested by the sewer service provider and if an agreement exists between the two retail public utilities regarding such disconnection or if an order has been issued by the commission specifying a process for such disconnections.

(A) Before water service may be terminated, proper notice of such termination must be given to the customer and the water service provider by the sewer service provider. Such notice must be in conformity with subsection (a) of this section.

(B) Water and sewer service shall be reconnected in accordance with subsection (h) of this section. The water service provider may not charge the customer a reconnect fee prior to reconnection unless it is for nonpayment of water service charges in accordance with its approved tariff. The water service provider may require the customer to pay any water service charges which have been billed but remain unpaid prior to reconnection. The water utility may require the sewer utility to reimburse it for the cost of disconnecting the water service in an amount not to exceed \$50. The sewer utility may charge the customer its approved reconnect fee for nonpayment in addition to any past due charges.

(C) If the retail public utilities providing water and sewer service cannot reach an agreement regarding disconnection of water service for nonpayment of sewer charges, the commission may issue an order requiring disconnections under specified conditions.

(D) The commission will issue an order requiring termination of service by the retail public utility providing water service if either:

(i) the retail public utility providing sewer service has obtained funding through the State or Federal government for the provision, expansion or upgrading of such sewer service; or

(ii) the commission finds that an order is necessary to effectuate the purposes of the Texas Water Code.

(2) A utility providing water service to customers who are provided sewer service by another retail public utility may enter into an agreement to provide billing services for the sewer service provider. In this instance, the customer may only be charged the tariffed reconnect fee for nonpayment of a bill on the water service provider's tariff.

(3) This section outlines the duties of a water service provider to an area served by a sewer service provider of certain political subdivisions.

(A) This section applies only to an area:

(i) that is located in a county that has a population of more than 1.3 million; and

(ii) in which a customer's sewer service is provided by a municipality or conservation and reclamation district that also provides water service to other customers and the same customer's water service is provided by another entity.

(B) For each person the water service provider serves in an area to which this section applies, the water service provider shall provide the municipality or district with any relevant customer information so that the municipality or district may bill users of the sewer service directly and verify the water consumption of users. Relevant customer information provided under this section includes the name, address, and telephone number of the customer of the water service provider, the monthly meter readings of the customer, monthly consumption information, including any billing adjustments, and certain meter information, such as brand, model, age, and location.

(C) The municipality or district shall reimburse the water service provider for its reasonable and actual incremental costs for providing services to the municipality or district under this section. Incremental costs are limited to only those costs that are in addition to the water service provider's costs in providing its services to its customers, and those costs must be consistent with the costs incurred by other water utility providers. Only if requested by the wastewater provider, the water service provider must provide the municipality or district with documentation certified by a certified public accountant of the reasonable and actual incremental costs for providing services to the municipality or district under this section.

(D) A municipality or conservation and reclamation district may provide written notice to a person to whom the municipality's or district's sewer service system provides service if the person has failed to pay for the service for more than 90 days. The notice must state the past due amount owed and the deadline by which the past due amount must be paid or the person will lose water service. The notice may be sent by First Class mail or hand-delivered to the location at which the sewer service is provided.

(E) The municipality or district may notify the water service provider of a person who fails to make timely payment after

the person receives notice under subparagraph (D) of this paragraph. The notice must indicate the number of days the person has failed to pay for sewer service and the total amount past due. On receipt of the notice, the water service provider shall discontinue water service to the person.

(F) This subsection does not apply to a nonprofit water supply or sewer service corporation created under Texas Water Code, Chapter 67, or a district created under Texas Water Code, Chapter 65.

(f) Disconnection for ill customers. No utility may discontinue service to a delinquent residential customer when that customer establishes that some person residing at that residence will become seriously ill or more seriously ill if service is discontinued. To avoid disconnection under these circumstances, the customer must provide a written statement from a physician to the utility prior to the stated date of disconnection. Service may be disconnected in accordance with subsection (a) of this section if the next month's bill and the past due bill are not paid by the due date of the next month's bill, unless the customer enters into a deferred payment plan with the utility.

(g) Disconnection upon customer request. A utility shall disconnect service no later than the end of the next working day after receiving a written request from the customer.

(h) Service restoration.

(1) Utility personnel must be available during normal business hours to accept payment on the day service is disconnected and the day after service is disconnected, unless the disconnection is at the customer's request or due to the existence of a dangerous condition related to the type of service provided. Once the past due service charges and applicable reconnect fees are paid or other circumstances which resulted in disconnection are corrected, the utility must restore service within 36 hours.

(2) Reconnect Fees.

(A) A reconnect fee, or seasonal reconnect fee as appropriate, may be charged for restoring service if listed on the utility's approved tariff.

(B) A reconnect fee may not be charged where service was not disconnected, except in circumstances where a utility representative arrives at a customer's service location with the intent to disconnect service because of a delinquent bill, and the customer prevents the utility from disconnecting the service.

(C) Except as provided under §24.89(c) of this title when a customer prevents disconnection at the water meter or connecting point between the utility and customer sewer lines, a reconnect fee charged for restoring water or sewer service after disconnection for nonpayment of monthly charges shall not exceed \$25 provided the customer pays the delinquent charges and requests to have service restored within 45 days. If a request to have service reconnected is not made within 45 days of the date of disconnection, the utility may charge its approved reconnect fee or seasonal reconnect fee.

(D) A reconnect fee cannot be charged for reconnecting service after disconnection for failure to pay solid waste disposal fees collected under a contract with a county or other public agency.

§24.89. Meters.

(a) Meter requirements.

(1) Use of meter. All charges for water service shall be based on meter measurements, except where otherwise authorized in the utility's approved tariff.

(2) Installation by utility. Unless otherwise authorized by the commission, each utility shall provide, install, own and maintain

all meters necessary for the measurement of water provided to its customers.

(3) Standard type. No utility shall furnish, set up, or put in use any meter which is not reliable and of a standard type which meets industry standards; provided, however, special meters not necessarily conforming to such standard types may be used for investigation or experimental purposes.

(4) One meter is required for each residential, commercial, or industrial service connection. An apartment building, condominium, manufactured housing community, or mobile home park may be considered by the utility to be a single commercial facility for the purpose of these sections. The commission may grant an exception to the individual meter requirement if the plumbing of an existing multiple use or multiple occupant building would prohibit the installation of individual meters at a reasonable cost or would result in unreasonable disruption of the customary use of the property.

(b) Meter readings.

(1) Meter unit indication. In general, each meter shall indicate clearly the gallons of water or other units of service for which charge is made to the customer.

(2) Reading of meters.

(A) Service meters shall be read at monthly intervals, and as nearly as possible on the corresponding day of each month, but may be read at other than monthly intervals if authorized in the utility's approved tariff.

(B) The utility shall charge for volume usage at the lowest block charge on its approved tariff when the meter reading date varies by more than two days from the normal meter reading date.

(c) Access to meters and utility cutoff valves.

(1) At the customer's request, utility employees must present information identifying themselves as employees of the utility in order to establish the right of access.

(2) Utility employees shall be allowed access for the purpose of reading, testing, installing, maintaining and removing meters and using utility cutoff valves. Conditions that may hinder access include, but are not limited to, fences with locked gates, vehicles or objects placed on top of meters or meter boxes, and unrestrained animals.

(3) When access is hindered on an ongoing basis, utilities may, but are not required to, make alternative arrangements for obtaining meter readings as described in paragraphs (4) and (5) of this subsection. Alternative arrangements for obtaining meter readings shall be made in writing with a copy provided to the customer and a copy filed in the utility's records on that customer.

(4) If access to a meter is hindered and the customer agrees to read his own meter and provide readings to the utility, the utility may bill according to the customer's readings; provided the meter is read by the utility at regular intervals (not exceeding six months) and billing adjustments are made for any overcharges or undercharges.

(5) If access to a meter is hindered and the customer does not agree to read their own meter, the utility may bill according to estimated consumption; provided the meter is read by the utility at regular intervals (not exceeding three months) and billing adjustments are made for any overcharges or undercharges.

(6) If access to a meter is hindered and the customer will not arrange for access at regular intervals, the utility may relocate the meter to a more accessible location and may charge the customer for the actual cost of relocating the meter. Before relocating the meter, the

utility shall provide the customer with written notice of its intent to do so. The notice required under this subparagraph shall include information on the estimated cost of relocating the meter, an explanation of the condition hindering access and what the customer can do to correct that condition, and information on how to contact the utility. The notice shall give the customer a reasonable length of time to arrange for utility access so the customer may avoid incurring the relocation cost. A copy of the notice given to the customer shall be filed with the utility's records on the customer's account.

(7) If access to a meter, cutoff valve or sewer connection is hindered by the customer and the customer's service is subject to disconnection under §24.88 of this title (relating to Discontinuance of Service), the utility may disconnect service at the main and may charge the customer for the actual cost of disconnection and any subsequent reconnection. The utility shall document the condition preventing access by providing photographic evidence or a sworn affidavit. Before disconnecting service at the main, the utility shall provide the customer with written notice of its intent to do so. The notice required under this subparagraph shall include information on the estimated cost of disconnecting service at the main and reconnecting service and shall give the customer at least 72 hours to correct the condition preventing access and to pay any delinquent charges due the utility before disconnection at the main. The customer may also be required to pay the tariffed reconnect fee for nonpayment in addition to delinquent charges even if service is not physically disconnected. A copy of the notice given to the customer shall be filed with the utility's records on the customer's account.

(d) Meter tests on request of customer.

(1) Upon the request of a customer, each utility shall make, without charge, a test of the accuracy of the customer's meter. If the customer asks to observe the test, the test shall be conducted in the customer's presence or in the presence of the customer's authorized representative. The test shall be made during the utility's normal working hours at a time convenient to the customer. Whenever possible, the test shall be made on the customer's premises, but may, at the utility's discretion, be made at the utility's testing facility.

(2) Following the completion of any requested test, the utility shall promptly advise the customer of the date of the test, the result of the test, who made the test and the date the meter was removed if applicable.

(3) If the meter has been tested by the utility or a testing facility at the customer's request, and within a period of two years the customer requests a new test, the utility shall make the test, but if the meter is found to be within the accuracy standards established by the American Water Works Association, the utility may charge the customer a fee which reflects the cost to test the meter, but this charge shall in no event be more than \$25 for a residential customer.

(e) Meter testing.

(1) The accuracy of a water meter shall be tested by comparing the actual amount of water passing through it with the amount indicated on the dial. The test shall be conducted in accordance with the standards for testing cold water meters as prescribed by the American Water Works Association or other procedures approved by the commission.

(2) The utility shall provide the necessary standard facilities, instruments, and other equipment for testing its meters in compliance with these sections. Any utility may be exempted from this requirement by the commission provided that satisfactory arrangements are made for testing its meters by another utility or testing facility equipped to test meters in compliance with these sections.

(3) Measuring devices for testing meters may consist of a calibrated tank or container for volumetric measurement or a tank mounted upon scales for weight measurement. If a volumetric standard is used, it shall be accompanied by a certificate of accuracy from any standard laboratory as may be approved by the commission. The commission can also authorize the use of a volumetric container for testing meters without a laboratory certification when it is in the best interest of the customer and utility to reduce the cost of testing. If a weight standard is used, the scales shall be tested and calibrated periodically by an approved laboratory and a record maintained of the results of the test.

(4) Standards used for meter testing shall be of a capacity sufficient to insure accurate determination of meter accuracy and shall be subject to the approval of the commission.

(5) A standard meter may be provided and used by a utility for the purpose of testing meters in place. This standard meter shall be tested and calibrated at least once per year unless a longer period is approved by the commission to insure its accuracy within the limits required by these sections. A record of such tests shall be kept by the utility for at least three years following the tests.

(f) Meter test prior to installation. No meter shall be placed in service unless its accuracy has been established. If any meter shall have been removed from service, it must be properly tested and adjusted before being placed in service again. No meter shall be placed in service if its accuracy falls outside the limits as specified by the American Water Works Association.

(g) Bill adjustment due to meter error. If any meter is found to be outside of the accuracy standards established by the American Water Works Association, proper correction shall be made of previous readings for the period of six months immediately preceding the removal of such meter from service for the test, or from the time the meter was in service since last tested, but not exceeding six months, as the meter shall have been shown to be in error by such test, and adjusted bills shall be rendered. No refund is required from the utility except to the customer last served by the meter prior to the testing. If a meter is found not to register for any period, unless bypassed or tampered with, the utility shall make a charge for units used, but not metered, for a period not to exceed three months, based on amounts used under similar conditions during the period preceding or subsequent thereto, or during corresponding periods in previous years.

(h) Meter tampering. For purposes of these sections, meter tampering, bypass, or diversion shall be defined as tampering with a water or sewer utility company's meter or equipment causing damage or unnecessary expense to the utility, bypassing the same, or other instances of diversion, such as physically disorienting the meter, objects attached to the meter to divert service or to bypass, insertion of objects into the meter, other electrical and mechanical means of tampering with, bypassing, or diverting utility service, removal or alteration of utility-owned equipment or locks, connection or reconnection of service without utility authorization, or connection into the service line of adjacent customers or of the utility. The burden of proof of meter tampering, bypass, or diversion is on the utility. Photographic evidence must be accompanied by a sworn affidavit by the utility when any action regarding meter tampering as provided for in these sections is initiated. A court finding of meter tampering may be used instead of photographic or other evidence, if applicable.

§24.90. Continuity of Service.

(a) Service interruptions.

(1) Every utility or water supply or sewer service corporation shall make all reasonable efforts to prevent interruptions of service.

When interruptions occur, the utility shall reestablish service within the shortest possible time.

(2) Each utility shall make reasonable provisions to meet emergencies resulting from failure of service, and each utility shall issue instructions to its employees covering procedures to be followed in the event of emergency in order to prevent or mitigate interruption or impairment of service.

(3) In the event of national emergency or local disaster resulting in disruption of normal service, the utility may, in the public interest, interrupt service to other customers to provide necessary service to civil defense or other emergency service agencies on a temporary basis until normal service to these agencies can be restored.

(b) Record of interruption. Except for momentary interruptions due to automatic equipment operations, each utility shall keep a complete record of all interruptions, both emergency and scheduled. This record shall show the cause for interruptions, date, time, duration, location, approximate number of customers affected, and, in cases of emergency interruptions, the remedy and steps taken to prevent recurrence.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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For further information, please call: (512) 936-7223



SUBCHAPTER F. QUALITY OF SERVICE

16 TAC §§24.91 - 24.95

This new subchapter is proposed under H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session, which grants the Public Utility Commission of Texas the authority to propose rules beginning September 1, 2013 related to functions to be transferred to the Public Utility Commission of Texas as of September 1, 2014. Specifically, Texas Water Code (TWC), §§5.507 - 5.508, and Chapter 13 provide the commission the authority to engage in the economic regulation of water and wastewater utilities, and provide the substantive basis to conduct the regulation. This new subchapter implements substantive rules pursuant to TWC, Chapter 13 and §§5.507 - 5.508, 11.041, 12.013.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session.

§24.91. Applicability.

Except where otherwise noted, this chapter applies to retail public utilities as defined by §24.3 of this title (relating to Definitions of Terms) which possess or are required to possess a Certificate of Convenience and Necessity.

§24.92. Requirements by Others.

(a) The application of commission rules shall not relieve the retail public utility from abiding by the requirements of the laws and regulations of the state, local department of health, local ordinances, and all other regulatory agencies having jurisdiction over such matters.

(b) The commission's rules in this chapter relating to rates, records and reporting, customer service and protection and quality of service shall apply to utilities operating within the corporate limits of a municipality exercising original rate jurisdiction, unless the municipality adopts its own rules.

§24.93. Adequacy of Water Utility Service.

Sufficiency of service. Each retail public utility which provides water service shall plan, furnish, operate, and maintain production, treatment, storage, transmission, and distribution facilities of sufficient size and capacity to provide a continuous and adequate supply of water for all reasonable consumer uses.

(1) The water system quantity and quality requirements of the TCEQ shall be the minimum standards for determining the sufficiency of production, treatment, storage, transmission, and distribution facilities of water suppliers and the safety of the water supplied for household usage. Additional capacity shall be provided to meet the reasonable local demand characteristics of the service area, including reasonable quantities of water for outside usage and livestock.

(2) In cases of drought, periods of abnormally high usage, or extended reduction in ability to supply water due to equipment failure, to comply with a state agency or court order on conservation or other reasons identified in the utility's approved drought contingency plan required by 30 TAC §288.20 (relating to Drought Contingency Plans for Municipal Uses by Public Water Suppliers), restrictions may be instituted to limit water usage in accordance with the utility's approved drought contingency plan. For utilities, these temporary restrictions must be in accordance with an approved drought contingency plan. Unless specifically authorized by TCEQ, retail public utilities may not use water use restrictions in lieu of providing facilities which meet the minimum capacity requirements of 30 TAC Chapter 290 (relating to Public Drinking Water), or reasonable local demand characteristics during normal use periods, or when the system is not making all immediate and necessary efforts to repair or replace malfunctioning equipment.

(A) A utility must file a copy of its TCEQ-approved drought contingency with the utility's approved tariff. The utility may not implement mandatory water use restrictions without an approved drought contingency plan unless authorized by the TCEQ. If TCEQ provides such authorization, the utility must provide immediate notice to the commission.

(B) Temporary restrictions must be in accordance with the utility's approved drought contingency plan on file or specifically authorized by the TCEQ. The utility shall file a copy of any status report required to be filed with the TCEQ at the same time it is required to file the report with the TCEQ.

(C) The utility must provide written notice to each customer in accordance with the drought contingency plan prior to implementing the provisions of the plan. The utility must provide written notice to the commission prior to implementing the provisions of the plan.

(3) A retail public utility that possesses a certificate of public convenience and necessity that is required to file a planning report with the TCEQ under requirements in 30 TAC Chapter 290, Subchapter D (relating to Rules and Regulations for Public Water Systems) shall also file a copy of the planning report with the commission at the same time it is required to file the report with the TCEQ.

(A) If the TCEQ waives or limits the reporting requirements the utility shall file with the commission within ten days a notice that the reporting requirements have been waived or limited, including a copy of any order or other authorization.

(B) A retail public utility shall file a copy of any updated plan or report required to be filed under this section.

(C) Submission of this report shall not relieve the retail public utility from abiding by the requirements of other regulatory agencies as set forth in §24.92 of this title (relating to Requirements by Others).

(4) Each retail public utility which possesses or is required to possess a certificate of convenience and necessity shall furnish safe water which meets TCEQ's minimum quality criteria for drinking water.

(5) Every retail public utility shall maintain its facilities to protect them from contamination, ensure efficient operation, and promptly repair leaks.

§24.94. Adequacy of Sewer Service.

(a) Sufficiency of service. Each retail public utility shall plan, furnish, operate, and maintain collection, treatment, and disposal facilities to collect, treat and dispose of waterborne human waste and waste from domestic activities such as washing, bathing, and food preparation. These facilities must be of sufficient size to meet TCEQ's minimum design criteria for wastewater facilities of the commission for all normal demands for service and provide a reasonable reserve for emergencies.

(b) Sufficiency of treatment. Each retail public utility shall maintain and operate treatment facilities of adequate size and properly equipped to treat sewage and discharge the effluent at the quality required by the laws and regulations of the State of Texas.

(c) Maintenance of facilities.

(1) The retail public utility shall maintain its collection system and appurtenances to minimize blockages.

(2) If the utility retains ownership of receiving tanks located on the customer's property or other facilities and appurtenances, it is the utility's responsibility and liability to perform routine maintenance and repair.

§24.95. Standards of Construction.

In determining standard practice, the commission will be guided by the provisions of the American Water Works Association, and such other codes and standards that are generally accepted by the industry, except as modified by this commission, or municipal regulations within their jurisdiction. Each system shall construct, install, operate, and maintain its plant, structures, equipment, and lines in accordance with these standards, and in such manner to best accommodate the public, and to prevent interference with service furnished by other retail public utilities insofar as practical.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER G. CERTIFICATES OF CONVENIENCE AND NECESSITY

16 TAC §§24.101 - 24.107, 24.109 - 24.120

This new subchapter is proposed under H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session, which grants the Public Utility Commission of Texas the authority to propose rules beginning September 1, 2013 related to functions to be transferred to the Public Utility Commission of Texas as of September 1, 2014. Specifically, Texas Water Code (TWC), §§5.507 - 5.508, and Chapter 13 provide the commission the authority to engage in the economic regulation of water and wastewater utilities, and provide the substantive basis to conduct the regulation. This new subchapter implements substantive rules pursuant to TWC, Chapter 13 and §§5.507 - 5.508, 11.041, 12.013.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session.

§24.101. Certificate Required.

(a) Unless otherwise specified, a utility, a utility operated by an affected county except an affected county to which Local Government Code, §412.017 applies, or a water supply or sewer service corporation may not in any way render retail water or sewer utility service directly or indirectly to the public without first having obtained from the commission a certificate that the present or future public convenience and necessity requires or will require that installation, operation, or extension. Except as otherwise provided by this subchapter, a retail public utility may not furnish, make available, render, or extend retail water or sewer utility service to any area to which retail water or sewer service is being lawfully furnished by another retail public utility without first having obtained a certificate of public convenience and necessity that includes the area in which the consuming facility is located.

(b) A person that is not a retail public utility or a utility or water supply corporation that is operating under provisions pursuant to the TWC, §13.242(c) may not construct facilities to provide water or sewer service to more than one service connection not on the property owned by the person and that are within the certificated service area of a retail public utility without first obtaining written consent from the retail public utility.

(c) A district may not provide services within an area for which a retail public utility holds a certificate of convenience and necessity or within the boundaries of another district without the district's consent, unless the district has a valid certificate of convenience and necessity to provide services to that area.

(d) A supplier of wholesale water or sewer service may not require a purchaser to obtain a certificate of public convenience and necessity if the purchaser is not otherwise required by this chapter to obtain the certificate.

§24.102. Criteria for Considering and Granting Certificates or Amendments.

(a) In determining whether to grant or amend a certificate of public convenience and necessity (CCN), the commission shall ensure that the applicant possesses the financial, managerial, and technical capability to provide continuous and adequate service.

(1) For water utility service, the commission shall ensure that the applicant has obtained a finding from TCEQ that it is capable of providing drinking water that meets the requirements of Texas Health and Safety Code, Chapter 341 and TCEQ rules and has access to an adequate supply of water.

(2) For sewer utility service, the commission shall ensure that the applicant has obtained a finding from TCEQ that it is capable of meeting the TCEQ's design criteria for sewer treatment plants, TCEQ rules, and the TWC.

(b) Where a new CCN is being issued for an area which would require construction of a physically separate water or sewer system, the applicant must demonstrate that regionalization or consolidation with another retail public utility is not economically feasible. To demonstrate this, the applicant must at a minimum provide:

(1) a list of all public drinking water supply systems or sewer systems within a two-mile radius of the proposed system;

(2) copies of written requests seeking to obtain service from each of the public drinking water supply systems or sewer systems or demonstrate that it is not economically feasible to obtain service from a neighboring public drinking water supply system or sewer system;

(3) copies of written responses from each of the systems from which written requests for service were made or evidence that they failed to respond;

(4) a description of the type of service that a neighboring public drinking water supply system or sewer system is willing to provide and comparison with service the applicant is proposing;

(5) an analysis of all necessary costs for constructing, operating, and maintaining the new system for at least the first five years, including such items as taxes and insurance;

(6) an analysis of all necessary costs for acquiring and continuing to receive service from the neighboring public drinking water supply system or sewer system for at least the first five years.

(c) The commission may approve applications and grant or amend a certificate only after finding that the certificate or amendment is necessary for the service, accommodation, convenience, or safety of the public. The commission may issue or amend the certificate as applied for, or refuse to issue it, or issue it for the construction of a portion only of the contemplated system or facility or extension thereof, or for the partial exercise only of the right or privilege and may impose special conditions necessary to ensure that continuous and adequate service is provided.

(d) In considering whether to grant or amend a certificate, the commission shall also consider:

(1) the adequacy of service currently provided to the requested area;

(2) the need for additional service in the requested area, including, but not limited to:

(A) whether any landowners, prospective landowners, tenants, or residents have requested service;

(B) economic needs;

(C) environmental needs;

(D) written application or requests for service; or

(E) reports or market studies demonstrating existing or anticipated growth in the area;

(3) the effect of the granting of a certificate or of an amendment on the recipient of the certificate or amendment, on the landowners in the area, and on any retail public utility of the same kind already serving the proximate area, including, but not limited to, regionalization, compliance, and economic effects;

(4) the ability of the applicant to provide adequate service, including meeting the standards of the commission, taking into consideration the current and projected density and land use of the area;

(5) the feasibility of obtaining service from an adjacent retail public utility;

(6) the financial ability of the applicant to pay for the facilities necessary to provide continuous and adequate service and the financial stability of the applicant, including, if applicable, the adequacy of the applicant's debt-equity ratio;

(7) environmental integrity;

(8) the probable improvement in service or lowering of cost to consumers in that area resulting from the granting of the certificate or amendment; and

(9) the effect on the land to be included in the certificated area.

(e) The commission may require an applicant for a certificate or for an amendment to provide a bond or other financial assurance to ensure that continuous and adequate utility service is provided. The commission shall set the amount of financial assurance. The form of the financial assurance will be as specified in 30 TAC Chapter 37, Subchapter O (relating to Financial Assurance for Public Drinking Water Systems and Utilities). The obligation to obtain financial assurance under this chapter does not relieve an applicant from any requirements to obtain financial assurance in satisfaction of another state agency's rules.

(f) Where applicable, in addition to the other factors in this section the commission shall consider the efforts of the applicant to extend service to any economically distressed areas located within the service areas certificated to the applicant. For purposes of this subsection, "economically distressed area" has the meaning assigned in TWC, §15.001.

(g) For two or more retail public utilities that apply for a CCN to provide water or sewer utility service to an uncertificated area located in an economically distressed area as defined in TWC, §15.001, the commission shall conduct an assessment of the applicants to determine which applicant is more capable financially, managerially and technically of providing continuous and adequate service. The assessment shall be conducted after the preliminary hearing and only if the parties are unable to resolve the service area dispute. The assessment shall be conducted using a standard form designed by the commission and will include:

(1) all criteria from subsections (a) - (f) of this section;

(2) source water adequacy;

(3) infrastructure adequacy;

(4) technical knowledge of the applicant;

(5) ownership accountability;

(6) staffing and organization;

(7) revenue sufficiency;

(8) credit worthiness;

(9) fiscal management and controls;

(10) compliance history; and

(11) planning reports or studies by the applicant to serve the proposed area.

(h) Except as provided by subsection (i) of this section, a landowner who owns a tract of land that is at least 25 acres and that

is wholly or partially located within the proposed service area may elect to exclude some or all of the landowner's property from the proposed service area by providing written notice to the commission before the 30th day after the date the landowner receives notice of a new application for a CCN or for an amendment to an existing CCN. The landowner's election is effective without a further hearing or other process by the commission. If a landowner makes an election under this subsection, the application shall be modified so that the electing landowner's property is not included in the proposed service area. An applicant for a CCN that has land removed from its proposed certificated service area because of a landowner's election under this subsection may not be required to provide service to the removed land for any reason, including the violation of law or commission rules by the water or sewer system of another person.

(i) A landowner is not entitled to make an election under subsection (h) of this section but is entitled to contest the inclusion of the landowner's property in the proposed service area at a hearing regarding the application if the proposed service area is located within the boundaries or extraterritorial jurisdiction of a municipality with a population of more than 500,000 and the municipality or a utility owned by the municipality is the applicant.

§24.103. Certificates Not Required.

(a) Extension of Service.

(1) Except for a utility or water supply or sewer service corporation which possesses a facilities only certificate of public convenience and necessity, a retail public utility is not required to secure a certificate of public convenience and necessity for:

(A) an extension into territory contiguous to that already served by it, if the point of ultimate use is within one quarter mile of the boundary of its certificated area, and not receiving similar service from another retail public utility and not within the area of public convenience and necessity of another retail public utility; or

(B) an extension within or to territory already served by it or to be served by it under a certificate of public convenience and necessity.

(2) Whenever an extension is made pursuant to paragraph (1)(A) of this subsection, the utility or water supply or sewer service corporation making the extension must inform the commission of the extension by submitting within 30 days of the date service is commenced, a copy of a map of the certificated area clearly showing the extension, accompanied by a written explanation of the extension.

(b) Construction of Facilities. A certificate is not required for the construction or upgrading of distribution facilities within the retail public utility's service area. The term construction and/or extension, as used in this subsection, shall not include the purchase or condemnation of real property for use as facility sites or right-of-way. However, prior acquisition of such sites or right-of-way shall not be deemed to entitle a retail public utility to the grant of a certificate of convenience and necessity without showing that the proposed extension is necessary for the service, accommodation, convenience, or safety of the public.

(c) Municipality Pursuant to the TWC, §13.255. A municipality which has given notice under the TWC, §13.255 that it intends to provide retail water service to an area or customers not currently being served is not required to obtain a certificate prior to beginning to provide service if the municipality provides:

(1) a copy of the notice required pursuant to the TWC, §13.255; and

(2) a map showing the area affected under the TWC, §13.255 and the location of new connections in the area affected which the municipality proposes to serve.

(d) Utility or Water Supply Corporation With Less Than 15 Potential Connections.

(1) A utility or water supply corporation is exempt from the requirement to possess a certificate of convenience and necessity in order to provide retail water service if it:

(A) has less than 15 potential service connections;

(B) is not owned by or affiliated with a retail public utility or any other provider of potable water service;

(C) is not within the certificated area of another retail public utility; and

(D) is not within the corporate boundaries of a district or municipality unless it receives written authorization from the district or municipality.

(2) Utilities or water supply corporations with less than 15 potential connections currently operating under a certificate of convenience and necessity may request revocation of the certificate at any time.

(3) The commission may revoke the current certificate of convenience and necessity upon written request by the exempt utility or water supply corporation.

(4) An exempted utility shall comply with the service rule requirements in the Exempt Utility Tariff Form prescribed by the commission which shall not be more stringent than those in §§24.80 - 24.90 of this title (relating to Customer Service and Protection).

(5) The exempted utility shall provide each future customer at the time service is requested and each current customer upon request with a copy of the exempt utility tariff.

(6) Exempt Utility Tariff and Rate Change Requirements. An exempted utility operating with or without a certificate of convenience and necessity:

(A) must maintain a current copy of the exempt utility tariff form with its current rates at its business location; and

(B) may change its rates without following the requirements in §24.22 of this title (relating to Notice of Intent to Change Rates) if it provides each customer with written notice of rate changes prior to the effective date of the rate change indicating the old rates, the new rates, the effective date of the new rates and the address of the commission along with a statement that written protests may be submitted to the commission at that address. If the commission receives written protests to a proposed rate change from at least 50% of the customers of an exempt utility following this procedure within 90 days after the effective date of the rate change, the commission will review the exempt utility's records or other information relating to the cost of providing service. After reviewing the information and any comments from customers or the exempt utility, the commission will establish the rates to be charged by the exempt utility which shall be effective on the date originally noticed by the exempt utility unless a different effective date is agreed to by the exempt utility and customers. These rates may not be changed for 12 months after the proposed effective date without authorization by the commission. The exempt utility shall refund any rates collected in excess of the rates established by the commission in accordance with the time frames or other requirements established by the commission.

(C) The exempt utility or water supply corporation, office of public utility counsel, commission staff, or any affected customer may file a written motion for rehearing. The rates determined by the commission shall remain in effect while the commission considers the request or protest.

(D) A rate change application filed by an exempt utility that follows the rate change procedures in §24.22 of this title will be processed according to the requirements and procedures which apply to rate changes under that section.

(7) Unless authorized in writing by commission, a utility or a water supply corporation operating under these requirements may not cease utility operations. A utility may not discontinue service to a customer with or without notice except in accordance with the Exempt Utility Tariff Form and a water supply corporation may not discontinue service to a customer for any reason not in accordance with its bylaws.

(8) A utility or water supply corporation operating under this exemption which does not comply with the requirements of these rules or the minimum requirements of the Exempt Utility Tariff specified by the commission shall be subject to any and all enforcement remedies provided by this chapter and the TWC, Chapter 13.

(e) This subsection applies only to a home-rule municipality that is located in a county with a population of more than 1.75 million that is adjacent to a county with a population of more than 1 million, and has within its boundaries a part of a district. If a district does not establish a fire department under TWC, §49.352, a municipality that contains a part of the district inside its boundaries may by ordinance or resolution provide that a water system be constructed or extended into the area that is in both the municipality and the district for the delivery of potable water for fire flow that is sufficient to support the placement of fire hydrants and the connection of the water system to fire suppression equipment. For purposes of this subsection, a municipality may obtain single certification in the manner provided by TWC, §13.255, except that the municipality may file an application with the commission to grant single certification immediately after the municipality provides notice of intent to provide service as required by TWC, §13.255(b).

§24.104. Applicant.

(a) It is the responsibility of the owner of the utility or the president of the board of directors or designated representative of the water supply or sewer service corporation, affected county, district, or municipality to submit an application for a certificate of convenience and necessity.

(b) The applicant shall have the continuing duty to submit information regarding any material change in the applicant's financial, managerial, or technical status that arises during the application review process.

§24.105. Contents of Certificate of Convenience and Necessity Applications.

(a) Application. To obtain a certificate of public convenience and necessity (CCN) or an amendment to a certificate, a public utility or water supply or sewer service corporation shall submit to the commission an application for a certificate or for an amendment. Applications for CCNs or for an amendment to a certificate must contain the following materials, unless otherwise specified in the application:

(1) the appropriate application form prescribed by the commission, completed as instructed and properly executed;

(2) a map and description of only the proposed service area by:

(A) metes and bounds survey certified by a licensed state land surveyor or a registered professional land surveyor;

(B) the Texas State Plane Coordinate System or any standard map projection and corresponding metadata;

(C) a state county base map, scale one inch equals two-miles showing the area to be served that clearly defines the proposed location of the applicant and each neighboring water or sewer utility within five miles of the applicant's proposed service area for a CCN and within two miles of the applicant's proposed service area for a CCN amendment;

(D) verifiable landmarks, including a road, creek, or railroad line; or a copy of the recorded plat of the area, if it exists, with lot and block number

(E) maps as described in §24.119 of this title (relating to Filing of Maps);

(F) a separate map for each county in which the applicant seeks a CCN or CCN amendment;

(G) a general location map; and

(H) other maps as requested.

(3) a description of any requests for service in the proposed service area;

(4) any evidence as required by the commission to show that the applicant has received the necessary consent, franchise, permit, or license from the proper municipality or other public authority;

(5) an explanation of the applicant's reasons for contending that issuance of a certificate as requested is necessary for the service, accommodation, convenience, or safety of the public;

(6) a capital improvements plan, including a budget and estimated time line for construction of all facilities necessary to provide full service to the entire proposed service area, keyed to maps showing where such facilities will be located to provide service;

(7) a description of the sources of funding for all facilities;

(8) for utilities or water supply or sewer service corporation previously exempted for operations or extensions in progress as of September 1, 1975, a list of all current customer locations which were being served on September 1, 1975, and an accurate location of them on the maps submitted. Current customer locations which were not being served on that date should also be located on the same map in a way which clearly distinguishes the two groups;

(9) disclosure of all affiliated interests as defined by §24.3 of this title (relating to Definitions of Terms);

(10) to the extent known, a description of current and projected land uses, including densities;

(11) a current financial statement of the applicant;

(12) according to the tax roll of the central appraisal district for each county in which the proposed service area is located, a list of the owners of each tract of land that is:

(A) at least 25 acres; and

(B) wholly or partially located within the proposed service area;

(13) if dual certification is being requested, and an agreement between the affected utilities exists, a copy of the agreement;

(14) for a water CCN for a new or existing system, a copy of:

(A) the approval letter for the plans approved by the TCEQ and specifications for the system or proof that the applicant has submitted either a preliminary engineering report or plans and specification for the first phase of the system unless 30 TAC §290.39(j)(1)(D) (relating to General Provisions) applies;

(B) other information that indicates the applicant is in compliance with §24.93 of this title (relating to Adequacy of Water Utility Service) for the system; or

(C) a contract with a wholesale provider that meets the requirements in §24.93 of this title;

(15) for a sewer CCN for a new or existing facility, a copy of:

(A) a wastewater permit or proof that a wastewater permit application for that facility has been filed with the TCEQ;

(B) other information that indicates that the applicant is in compliance with §24.94 of this title (relating to Adequacy of Sewer Service) for the facility; or

(C) a contract with a wholesale provider that meets the requirements in §24.94 of this title; and

(16) any other item required by the commission.

(b) Application within the municipal boundaries or extraterritorial jurisdiction of certain municipalities.

(1) This subsection applies only to a municipality with a population of 500,000 or more.

(2) Except as provided by paragraphs (3) - (7) of this subsection, the commission may not grant to a retail public utility a CCN for a service area within the boundaries or extraterritorial jurisdiction of a municipality without the consent of the municipality. The municipality may not unreasonably withhold the consent. As a condition of the consent, a municipality may require that all water and sewer facilities be designed and constructed in accordance with the municipality's standards for facilities.

(3) If a municipality has not consented under paragraph (2) of this subsection before the 180th day after the date the municipality receives the retail public utility's application, the commission shall grant the CCN without the consent of the municipality if the commission finds that the municipality:

(A) does not have the ability to provide service; or

(B) has failed to make a good faith effort to provide service on reasonable terms and conditions.

(4) If a municipality has not consented under this subsection before the 180th day after the date a landowner or a retail public utility submits to the municipality a formal request for service according to the municipality's application requirements and standards for facilities on the same or substantially similar terms as provided by the retail public utility's application to the commission, including a capital improvements plan required by TWC, §13.244(d)(3) or a subdivision plat, the commission may grant the CCN without the consent of the municipality if:

(A) the commission makes the findings required by paragraph (3) of this subsection;

(B) the municipality has not entered into a binding commitment to serve the area that is the subject of the retail public utility's application to the commission before the 180th day after the date the formal request was made; and

(C) the landowner or retail public utility that submitted the formal request has not unreasonably refused to:

(i) comply with the municipality's service extension and development process; or

(ii) enter into a contract for water or sewer services with the

(5) If a municipality refuses to provide service in the proposed service area, as evidenced by a formal vote of the municipality's governing body or an official notification from the municipality, the commission is not required to make the findings otherwise required by this section and may grant the CCN to the retail public utility at any time after the date of the formal vote or receipt of the official notification.

(6) The commission must include as a condition of a CCN granted under paragraph (4) or (5) of this subsection that all water and sewer facilities be designed and constructed in accordance with the municipality's standards for water and sewer facilities.

(7) Paragraphs (4) - (6) of this subsection do not apply in the following counties: Cameron, Fannin, Grayson, Guadalupe, Hidalgo, Willacy, or Wilson.

(8) A commitment by a city to provide service must, at a minimum, provide that the construction of service facilities will begin within one year and will be substantially completed within two years after the date the retail public utility's application was filed with the municipality.

(9) If the commission makes a decision under paragraph (3) of this subsection regarding the granting of a CCN without the consent of the municipality, the municipality or the retail public utility may appeal the decision to the appropriate state district court.

(c) Extension beyond extraterritorial jurisdiction.

(1) Except as provided by paragraph (2) of this subsection, if a municipality extends its extraterritorial jurisdiction to include an area certificated to a retail public utility, the retail public utility may continue and extend service in its area of public convenience and necessity under the rights granted by its certificate and this chapter.

(2) The commission may not extend a municipality's CCN beyond its extraterritorial jurisdiction if an owner of land that is located wholly or partly outside the extraterritorial jurisdiction elects to exclude some or all of the landowner's property within a proposed service area in accordance with TWC, §13.246(h). This subsection does not apply to a transfer of a certificate as approved by the commission.

(3) Paragraph (2) of this subsection does not apply to an extension of extraterritorial jurisdiction in Cameron, Fannin, Grayson, Guadalupe, Hidalgo, Willacy, or Wilson Counties.

(4) To the extent of a conflict between this subsection and TWC, §13.245, TWC, §13.245 prevails.

(d) Area within municipality.

(1) If an area is within the boundaries of a municipality, all retail public utilities certified or entitled to certification under this chapter to provide service or operate facilities in that area may continue and extend service in its area of public convenience and necessity within the area under the rights granted by its certificate and this chapter, unless the municipality exercises its power of eminent domain to acquire the property of the retail public utility under this subsection. Except as provided by TWC, §13.255, a municipally owned or operated utility may not provide retail water and sewer utility service within the area

certificated to another retail public utility without first having obtained from the commission a CCN that includes the areas to be served.

(2) This subsection may not be construed as limiting the power of municipalities to incorporate or extend their boundaries by annexation, or as prohibiting any municipality from levying taxes and other special charges for the use of the streets as are authorized by Texas Tax Code, §182.025.

(3) In addition to any other rights provided by law, a municipality with a population of more than 500,000 may exercise the power of eminent domain in the manner provided by Texas Property Code, Chapter 21, to acquire a substandard water or sewer system if all the facilities of the system are located entirely within the municipality's boundaries. The municipality shall pay just and adequate compensation for the property. In this subsection, substandard water or sewer system means a system that is not in compliance with the municipality's standards for water and wastewater service.

(A) A municipality shall notify the commission no later than seven days after filing an eminent domain lawsuit to acquire a substandard water or sewer system and also notify the commission no later than seven days after acquiring the system.

(B) With the notification of filing its eminent domain lawsuit, the municipality, in its sole discretion, shall either request that the commission cancel the CCN of the acquired system or transfer the certificate to the municipality and the commission shall take such requested action upon notification of acquisition of the system.

§24.106. Notice and Mapping Requirements for Certificate of Convenience and Necessity Applications.

(a) If an application for issuance or amendment of a certificate of public convenience and necessity (CCN) is filed, the applicant will prepare a notice or notices, as prescribed in the commission's application form, which will include the following:

(1) all information outlined in the Administrative Procedure Act, Texas Government Code, Chapter 2001;

(2) all information stipulated in the commission's instructions for completing an application for a CCN; and

(3) a statement that persons who wish to intervene or comment upon the action sought file a request with the commission, within 30 days of mailing or publication of notice, whichever occurs later.

(b) After reviewing and, if necessary, modifying the proposed notice, the commission will send the notice to the applicant for publication and/or mailing.

(1) For applications for issuance of a new CCN, the applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are within five miles of the requested service area boundaries, and any city with an extraterritorial jurisdiction that overlaps the proposed service area boundaries. Applicants are also required to provide notice to the county judge of each county and to each groundwater conservation district that is wholly or partly included in the area proposed to be certified.

(2) For applications for an amendment of a CCN, the applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are within two miles of the requested service area boundaries, and any city with an extraterritorial jurisdiction that overlaps the proposed service area boundaries. If decertification or dual certification is being requested, the applicant shall provide notice by certified mail to the current CCN holder. Applicants are also required to provide notice to the county judge of each county and to each ground-

water conservation district that is wholly or partly included in the area proposed to be certified.

(3) Except as otherwise provided by this subsection, in addition to the notice required by subsection (a) of this section, the applicant shall mail notice to each owner of a tract of land that is at least 25 acres and is wholly or partially included in the area proposed to be certified. Notice required under this subsection must be mailed by first class mail to the owner of the tract according to the most current tax appraisal rolls of the applicable central appraisal district at the time the commission received the application for the certificate or amendment. Good faith efforts to comply with the requirements of this subsection shall be considered adequate mailed notice to landowners. Notice under this subsection is not required for a matter filed with the commission under:

(A) TWC, §13.248 or §13.255; or

(B) TWC, Chapter 65.

(4) Applicants previously exempted for operations or extensions in progress as of September 1, 1975, must provide individual mailed notice to all current customers. The notice must contain the information required in the application.

(5) Utilities that are required to possess a certificate but that are currently providing service without a certificate must provide individual mailed notice to all current customers. The notice must contain the current rates, the effective date those rates were instituted, and any other information required in the application.

(6) Within 30 days of the date of the notice, the applicant shall submit to the commission an affidavit specifying the persons to whom notice was provided and the date of that notice.

(c) The applicant shall publish the notice in a newspaper having general circulation in the county or counties where a CCN is being requested, once each week for two consecutive weeks beginning with the week after the proposed notice is approved by the commission. Proof of publication in the form of a publisher's affidavit shall be filed with the commission within 30 days of the last publication date. The affidavit shall state with specificity each county in which the newspaper is of general circulation.

(d) The commission may require the applicant to deliver notice to other affected persons or agencies.

(e) In this section, utility service provider means a retail public utility other than a district subject to TWC, §49.452.

(f) A utility service provider shall:

(1) record in the real property records of each county in which the service area, or a portion of the service area is located, a certified copy of the map of the CCN and of any amendment to the certificate as contained in the commission's records, and a boundary description of the service area by:

(A) a metes and bounds survey certified by a licensed state land surveyor or a registered professional land surveyor;

(B) the Texas State Plane Coordinate System;

(C) verifiable landmarks, including a road, creek, or railroad line; or

(D) if a recorded plat of the area exists, lot and block number; and

(2) submit to the commission evidence of the recording.

(g) The recording required by this section must be completed not later than the 31st day after the date a utility service provider re-

ceives a final order from the commission granting an application for a new certificate or for an amendment to a certificate that results in a change in the utility service provider's service area.

(h) The recording required by this section for holders of certificates of public convenience and necessity already in existence as of September 1, 2005 must be completed not later than January 1, 2007.

§24.107. Action on Applications.

(a) The commission may conduct a public hearing on any application.

(b) The commission may take action on an application at a regular meeting without holding a public hearing if 30 days after the required mailed or published notice has been issued, whichever occurs later, no hearing has been requested.

(c) The commission may take action on an application which is uncontested at the end of the 30 day protest period following mailed or published notice or for which all protests are subsequently withdrawn.

(d) If a hearing is requested, the application will be processed in accordance with Chapter 22 of this title (relating to Procedural Rules).

§24.109. Report of Sale, Merger, Etc.; Investigation; Disallowance of Transaction.

(a) On or before the 120th day before the effective date of any sale, acquisition, lease, rental, merger, or consolidation of any water or sewer system required by law to possess a certificate of public convenience and necessity, the utility or water supply or sewer service corporation shall file a written application with the commission and give public notice of the action. The notification shall be on the form required by the commission and the comment period will not be less than 30 days. Public notice may be waived by the commission for good cause shown. The 120-day period begins on the last date of whichever of the following events occur:

(1) the date the applicant files an application under this section;

(2) if mailed notice is required, the last date the applicant mailed the required notice as stated in the applicant's affidavit of notice; or

(3) if newspaper notice is required, the last date of the publication of the notice in the newspaper as stated in the affidavit of publication.

(b) A person purchasing or acquiring the water or sewer system must demonstrate adequate financial, managerial, and technical capability for providing continuous and adequate service to the requested area and any areas currently certificated to the person.

(c) If the person purchasing or acquiring the water or sewer system cannot demonstrate adequate financial capability, the commission may require that the person provide financial assurance to ensure continuous and adequate utility service is provided. The commission shall set the amount of financial assurance. The form of the financial assurance must be as specified in 30 TAC Chapter 37, Subchapter O (relating to Financial Assurance for Public Drinking Water Systems and Utilities). The obligation to obtain financial assurance under this chapter does not relieve an applicant from any requirements to obtain financial assurance in satisfaction of another state agency's rules.

(d) The commission shall, with or without a public hearing, investigate the sale, acquisition, lease, rental, merger or consolidation to determine whether the transaction will serve the public interest.

(e) Prior to the expiration of the 120-day notification period, the commission shall either approve the sale administratively or require

a public hearing to determine if the transaction will serve the public interest. The commission may require a hearing if:

(1) the application filed with the commission or the public notice was improper;

(2) the person purchasing or acquiring the water or sewer system has not demonstrated adequate financial, managerial, and technical capability for providing continuous and adequate service to the service area being acquired and to any areas currently certificated to that person;

(3) the person or an affiliated interest of the person purchasing or acquiring the water or sewer system has a history of:

(A) noncompliance with the requirements of the commission or the Texas Department of State Health Services; or

(B) continuing mismanagement or misuse of revenues as a utility service provider;

(4) the person purchasing or acquiring the water or sewer system cannot demonstrate the financial ability to provide the necessary capital investment to ensure the provision of continuous and adequate service to the customers of the water or sewer system;

(5) it is in the public interest to investigate the following factors:

(A) whether the seller has failed to comply with a commission order;

(B) the adequacy of service currently provided to the area;

(C) the need for additional service in the requested area;

(D) the effect of approving the transaction on the utility or water supply or sewer service corporation, the person purchasing or acquiring the water or sewer system, and on any retail public utility of the same kind already serving the proximate area;

(E) the ability of the person purchasing or acquiring the water or sewer system to provide adequate service;

(F) the feasibility of obtaining service from an adjacent retail public utility;

(G) the financial stability of the person purchasing or acquiring the water or sewer system, including, if applicable, the adequacy of the debt-equity ratio of the person purchasing or acquiring the water or sewer system if the transaction is approved;

(H) the environmental integrity; and

(I) the probable improvement of service or lowering of cost to consumers in that area resulting from approving the transaction.

(f) Unless the commission requires that a public hearing be held, the sale, acquisition, lease, or rental or merger or consolidation may be completed as proposed:

(1) at the end of the 120-day period;

(2) or may be completed at any time after the utility or water supply or sewer service corporation receives notice that a hearing will not be requested.

(g) Within 30 days after the actual effective date of the transaction, the utility or water supply or sewer service corporation must file a signed contract, bill of sale, or other appropriate documents as evidence that the transaction has been made final and documentation that customer deposits have been transferred or refunded to the customer with interest as required by these rules.

(h) If a hearing is requested or if the utility or water supply or sewer service corporation fails to make the application as required or to provide public notice, the sale, acquisition, lease, merger, consolidation, or rental may not be completed unless the commission determines that the proposed transaction serves the public interest.

(i) A sale, acquisition, lease, or rental of any water or sewer system, required by law to possess a certificate of public convenience and necessity that is not completed in accordance with the provisions of the TWC, §13.301 is void.

(j) The requirements of the TWC, §13.301 do not apply to:

- (1) the purchase of replacement property;
- (2) a transaction under the TWC, §13.255; or
- (3) foreclosure on the physical assets of a utility.

(k) If a utility facility or system is sold and the facility or system was partially or wholly constructed with customer contributions in aid of construction derived from specific surcharges approved by the regulatory authority over and above revenues required for normal operating expenses and return, the utility may not sell or transfer any of its assets, its certificate of convenience and necessity or controlling interest in an incorporated utility, unless the utility provides to the purchaser or transferee before the date of the sale or transfer a written disclosure relating to the contributions. The disclosure must contain, at a minimum, the total dollar amount of the contributions and a statement that the contributed property or capital may not be included in invested capital or allowed depreciation expense by the regulatory authority in rate-making proceedings.

(l) A utility or a water supply or sewer service corporation that proposes to sell, assign, lease, or rent its facilities shall notify the other party to the transaction of the requirements of this section before signing an agreement to sell, assign, lease, or rent its facilities.

§24.110. Foreclosure and Bankruptcy.

(a) A utility that receives notice that all or a portion of the utility's facilities or property used to provide utility service are being posted for foreclosure shall notify the commission in writing of that fact not later than the tenth day after the date on which the utility receives the notice.

(b) A person other than a financial institution that forecloses on facilities used to provide utility services shall not charge or collect rates for providing utility service unless the person has a completed application for a certificate of convenience and necessity or to transfer the current certificate of convenience and necessity on file with the commission within 30 days after the foreclosure is completed.

(c) A financial institution that forecloses on a utility or on any part of the utility's facilities or property that are used to provide utility service is not required to provide the 120-day notice prescribed by TWC, §13.301, but shall provide written notice to the commission before the 30th day preceding the date on which the foreclosure is completed.

(d) The financial institution may operate the utility for an interim period not to exceed 12 months before transferring or otherwise obtaining a certificate of convenience and necessity unless the commission in writing extends the time period. A financial institution that operates a utility during an interim period under this subsection is subject to each commission rule to which the utility was subject and in the same manner.

(e) Not later than the 48th hour after the hour in which a utility files a bankruptcy petition, the utility shall report this fact to the commission in writing.

§24.111. Purchase of Voting Stock in Another Utility.

(a) A utility may not purchase voting stock in and a person may not acquire a controlling interest in a utility doing business in this state unless the utility or person files a written application with the commission not later than the 61st day before the date on which the transaction is to occur. A controlling interest is defined as a person or a combination of a person and other family members possessing at least 50% of the voting stock of the utility; or a person that controls at least 30% of the stock and is the largest stockholder.

(b) A person acquiring a controlling interest in a utility may be required to demonstrate adequate financial, managerial, and technical capability for providing continuous and adequate service to the requested area and any areas currently certificated to the person.

(c) If the person acquiring a controlling interest cannot demonstrate adequate financial capability, the commission may require that the person provide financial assurance to ensure continuous and adequate utility service is provided. The commission shall set the amount of financial assurance. The form of the financial assurance must be as specified in 30 TAC Chapter 37, Subchapter O (relating to Financial Assurance for Public Drinking Water Systems and Utilities). The obligation to obtain financial assurance under this chapter does not relieve an applicant from any requirements to obtain financial assurance in satisfaction of another state agency's rules.

(d) The commission may require a public hearing on the transaction if a criterion prescribed by §24.110 of this title (relating to Foreclosure and Bankruptcy) applies.

(e) Unless the commission requires that a public hearing be held, the purchase or acquisition may be completed as proposed:

(1) at the end of the 60 day period; or

(2) at any time after the commission notifies the person or utility that a hearing will not be requested.

(f) The utility or person must notify the commission within 30 days after the date that the transaction is completed.

(g) If a hearing is required or if the person or utility fails to make the application to the commission as required, the purchase or acquisition may not be completed unless the commission determines that the proposed transaction serves the public interest. A purchase or acquisition that is not completed in accordance with the provisions of this section is void.

§24.112. Transfer of Certificate of Convenience and Necessity.

(a) Effective date of transfer. A certificate is issued in personam, continues in force until further order of the commission, and may be transferred only by the approval of the commission. Any attempted transfer is not effective for any purpose until actually approved by the commission.

(b) Sale, assignment, or lease of certificate of convenience and necessity. Except as provided by the TWC, §13.255, a utility or a water supply or sewer service corporation may not sell, assign, or lease a certificate of public convenience and necessity or any right obtained under a certificate unless the commission has determined that the purchaser, assignee, or lessee is capable of rendering adequate and continuous service to every consumer within the certificated area, after considering the factors under the TWC, §13.246(c). The sale, assignment, or lease shall be on the conditions prescribed by the commission.

(c) Notice of proposed sale, acquisition, lease, rental, merger, or consolidation and transfer of a certificate of convenience and necessity.

(1) Unless notice is waived by the commission for good cause shown, mailed notice shall be given to customers of the water or sewer system to be sold, acquired, leased or rented or merged or consolidated and other affected parties as determined by the commission on the form prescribed by the commission and shall include the following:

(A) the name and business address of the currently certificated retail public utility and the retail public utility which will acquire the facilities or certificate;

(B) a description of the service area of the retail public utility being transferred;

(C) the anticipated effect of the acquisition or transfer on the operation or the rates and services provided to customers being transferred;

(D) and a statement that persons who wish to comment upon the action sought should file comments with the commission at the commission's mailing address: Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days of mailing or publication of notice, whichever occurs later.

(2) The commission may require the applicant to publish notice once each week for two consecutive weeks in a newspaper of general circulation in the area in which the retail public utility being transferred is located and publication may be allowed in lieu of individual notice as required in this subsection.

(3) The applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are within two miles of the requested service area boundaries, and any city with an extraterritorial jurisdiction which overlaps the proposed service area boundaries.

(4) If the commission does not require a hearing, the commission may approve the transfer by order at a regular meeting of the commission.

(5) The commission may approve a sale, acquisition, lease or rental, or merger or consolidation and/or transfer of a certificate of convenience and necessity if it determines that the transaction is in the public interest after considering:

(A) if notice has been properly given;

(B) if the retail public utility which will acquire the facilities or certificate is capable of rendering adequate and continuous service to every consumer within the certificated area, after considering the factors set forth in the TWC, §13.246(c). The commission may refuse to approve a sale, acquisition, lease, rental, merger, or consolidation and/or transfer where conditions of a judicial decree, compliance agreement or other enforcement order have not been substantially met;

(C) the experience of the person purchasing or acquiring the water or sewer system as a utility service provider;

(D) the history of the person or an affiliated interest of the person in complying with the requirements of the commission, the TCEQ, or the Texas Department of State Health Services of properly managing or using revenues as a utility service provider; or

(E) the ability of the person purchasing or acquiring the water or sewer system to provide the necessary capital investment to ensure the provision of continuous and adequate service to the customers of the water or sewer system.

(d) Reporting of customer deposits. Within 30 days after the sale or transfer of any utility or operating units thereof, the seller shall file with the commission, under oath, in addition to other information, a list showing the names and addresses of all customers served by such utility or unit who have to their credit a deposit, the date such deposit was made, the amount thereof, and the unpaid interest thereon. All such deposits shall be refunded to the customers or transferred to the new owner, with all accrued interest.

(e) Expiration of commission's approval for sale. The commission's approval of a sale expires one year from the date of the commission's written approval of the sale. If the sale has not been consummated within that period and unless the applicant has requested and received an extension from the commission, the approval is void and the applicant must reapply for approval of the sale. The commission will review the application as though it was being filed for the first time (de novo).

§24.113. Revocation or Amendment of Certificate.

(a) A certificate or other order of the commission does not become a vested right and the commission at any time after notice and hearing may revoke or amend any certificate of public convenience and necessity (CCN) with the written consent of the certificate holder or if it finds that:

(1) the certificate holder has never provided, is no longer providing service, is incapable of providing service, or has failed to provide continuous and adequate service in the area or part of the area covered by the certificate;

(2) in an affected county, the cost of providing service by the certificate holder is so prohibitively expensive as to constitute denial of service, provided that, for commercial developments or for residential developments started after September 1, 1997, in an affected county, the fact that the cost of obtaining service from the currently certificated retail public utility makes the development economically unfeasible does not render such cost prohibitively expensive in the absence of other relevant factors;

(3) the certificate holder has agreed in writing to allow another retail public utility to provide service within its service area, except for an interim period, without amending its certificate;

(4) the certificate holder has failed to file a cease and desist action under TWC, §13.252 within 180 days of the date that it became aware that another retail public utility was providing service within its service area, unless the certificate holder demonstrates good cause for its failure to file such action within the 180 days; or

(5) in an area certificated to a municipality outside the municipality's extraterritorial jurisdiction, the municipality has not provided service to the area on or before the fifth anniversary of the date the CCN was granted for the area, except that an area that was transferred to a municipality on approval of the commission and in which the municipality has spent public funds may not be revoked or amended under this paragraph.

(b) As an alternative to decertification under subsection (a) of this section, the owner of a tract of land that is at least 50 acres and that is not in a platted subdivision actually receiving water or sewer service may petition the commission under this subsection for expedited release of the area from a CCN so that the area may receive service from another retail public utility. The fact that a certificate holder is a borrower under a federal loan program is not a bar to a request under this subsection for the release of the petitioner's land and the receipt of services from an alternative provider. On the day the petitioner submits the petition to the commission, the petitioner shall send, via certified mail, a copy of the petition to the certificate holder, who may submit

information to the commission to controvert information submitted by the petitioner. The petitioner must demonstrate that:

(1) a written request for service, other than a request for standard residential or commercial service, has been submitted to the certificate holder, identifying:

(A) the area for which service is sought shown on a map with descriptions according to §24.105(a)(2)(A) - (G) of this title (relating to Contents of Certificate of Convenience and Necessity Applications);

(B) the time frame within which service is needed for current and projected service demands in the area;

(C) the level and manner of service needed for current and projected service demands in the area;

(D) the approximate cost for the alternative provider to provide the service at the same level and manner that is requested from the certificate holder;

(E) the flow and pressure requirements and specific infrastructure needs, including line size and system capacity for the required level of fire protection requested; and

(F) any additional information requested by the certificate holder that is reasonably related to determination of the capacity or cost for providing the service;

(2) the certificate holder has been allowed at least 90 calendar days to review and respond to the written request and the information it contains;

(3) the certificate holder:

(A) has refused to provide the service;

(B) is not capable of providing the service on a continuous and adequate basis within the time frame, at the level, at the approximate cost that the alternative provider is capable of providing for a comparable level of service, or in the manner reasonably needed or requested by current and projected service demands in the area; or

(C) conditions the provision of service on the payment of costs not properly allocable directly to the petitioner's service request, as determined by the commission; and

(4) the alternate retail public utility from which the petitioner will be requesting service possesses the financial, managerial, and technical capability to provide continuous and adequate service within the time frame, at the level, at the cost, and in the manner reasonably needed or requested by current and projected service demands in the area. An alternate retail public utility is limited to:

(A) an existing retail public utility; or

(B) a district proposed to be created under Texas Constitution, Article 16, §59 or Article 3, §52. If an area is decertificated under a petition filed in accordance with subsection (d) of this section in favor of such a proposed district, the commission may order that final decertification is conditioned upon the final and unappealable creation of the district and that prior to final decertification the duty of the certificate holder to provide continuous and adequate service is held in abeyance.

(c) A landowner is not entitled to make the election described in subsections (b) or (r) of this section but is entitled to contest under subsection (a) of this section the involuntary certification of its property in a hearing held by the commission if the landowner's property is located:

(1) within the boundaries of any municipality or the extraterritorial jurisdiction of a municipality with a population of more than 500,000 and the municipality or retail public utility owned by the municipality is the holder of the certificate; or

(2) in a platted subdivision actually receiving water or sewer service.

(d) Within 60 calendar days from the date the commission determines the petition filed under subsection (b) of this section to be administratively complete, the commission shall grant the petition unless the commission makes an express finding that the petitioner failed to satisfy the elements required in subsection (b) of this section and supports its finding with separate findings and conclusions for each element based solely on the information provided by the petitioner and the certificate holder. The commission may grant or deny a petition subject to terms and conditions specifically related to the service request of the petitioner and all relevant information submitted by the petitioner and the certificate holder. In addition, the commission may require an award of compensation as otherwise provided by this section.

(e) Texas Government Code, Chapter 2001, does not apply to any petition filed under subsection (b) of this section. The decision of the commission on the petition is final after any reconsideration authorized by applicable procedural rules and may not be appealed.

(f) Upon written request from the certificate holder, the commission may cancel the certificate of a utility or water supply corporation authorized by rule to operate without a CCN under TWC, §13.242(c).

(g) If the certificate of any retail public utility is revoked or amended, the commission may require one or more retail public utilities to provide service in the area in question. The order of the commission shall not be effective to transfer property.

(h) A retail public utility may not in any way render retail water or sewer service directly or indirectly to the public in an area that has been decertified under this section unless the retail public utility, or a petitioner under subsection (r) of this section, provides compensation for any property that the commission determines is rendered useless or valueless to the decertified retail public utility as a result of the decertification.

(i) The determination of the monetary amount of compensation, if any, shall be determined at the time another retail public utility seeks to provide service in the previously decertified area and before service is actually provided but no later than the 90th calendar day after the date on which a retail public utility notifies the commission of its intent to provide service to the decertified area.

(j) The monetary amount shall be determined by a qualified individual or firm serving as independent appraiser agreed upon by the decertified retail public utility and the retail public utility seeking to serve the area. The determination of compensation by the independent appraiser shall be binding on the commission. The costs of the independent appraiser shall be borne by the retail public utility seeking to serve the area.

(1) If the retail public utilities cannot agree on an independent appraiser within ten calendar days after the date on which the retail public utility notifies the commission of its intent to provide service to the decertified area, each retail public utility shall engage its own appraiser at its own expense, and each appraisal shall be submitted to the commission within 60 calendar days after the date on which the retail public utility notified the commission of its intent to provide service to the decertified area.

(2) After receiving the appraisals, the commission or executive director shall appoint a third appraiser who shall make a determination of the compensation within 30 days after the commission receives the appraisals. The determination may not be less than the lower appraisal or more than the higher appraisal. Each retail public utility shall pay one-half of the cost of the third appraisal.

(k) For the purpose of implementing this section, the value of real property owned and utilized by the retail public utility for its facilities shall be determined according to the standards set forth in Texas Property Code, Chapter 21, governing actions in eminent domain and the value of personal property shall be determined according to the factors in this subsection. The factors ensuring that the compensation to a retail public utility is just and adequate shall include: the amount of the retail public utility's debt allocable for service to the area in question; the value of the service facilities of the retail public utility located within the area in question; the amount of any expenditures for planning, design, or construction of service facilities that are allocable to service to the area in question; the amount of the retail public utility's contractual obligations allocable to the area in question; any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification; the impact on future revenues lost from existing customers; necessary and reasonable legal expenses and professional fees; and other relevant factors.

(l) As a condition to decertification or single certification under TWC, §13.254 or §13.255, and on request by a retail public utility that has lost certificated service rights to another retail public utility, the commission may order:

(1) the retail public utility seeking to provide service to a decertified area to serve the entire service area of the retail public utility that is being decertified; and

(2) the transfer of the entire CCN of a partially decertified retail public utility to the retail public utility seeking to provide service to the decertified area.

(m) The commission shall order service to the entire area under subsection (l) of this section if the commission finds that the decertified retail public utility will be unable to provide continuous and adequate service at an affordable cost to the remaining customers.

(n) The commission shall require the retail public utility seeking to provide service to the decertified area to provide continuous and adequate service to the remaining customers at a cost comparable to the cost of that service to its other customers and shall establish the terms under which the service must be provided. The terms may include:

(1) transferring debt and other contract obligations;

(2) transferring real and personal property;

(3) establishing interim service rates for affected customers during specified times; and

(4) other provisions necessary for the just and reasonable allocation of assets and liabilities.

(o) The retail public utility seeking decertification shall not charge the affected customers any transfer fee or other fee to obtain service other than the retail public utility's usual and customary rates for monthly service or the interim rates set by the commission, if applicable.

(p) The commission shall not order compensation to the decertified retail public utility if service to the entire service area is ordered under this section.

(q) Within ten calendar days after receipt of notice that a decertification process has been initiated, a retail public utility with outstanding debt secured by one or more liens shall:

(1) submit to the commission a written list with the names and addresses of the lienholders and the amount of debt; and

(2) notify the lienholders of the decertification process and request that the lienholder provide information to the commission sufficient to establish the amount of compensation necessary to avoid impairment of any debt allocable to the area in question.

(r) As an alternative to decertification under subsection (a) of this section and expedited release under subsection (b) of this section, the owner of a tract of land that is at least 25 acres and that is not receiving water or sewer service may petition for expedited release of the area from a CCN and is entitled to that release if the landowner's property is located in Atascosa, Bandera, Bastrop, Bexar, Blanco, Brazoria, Burnet, Caldwell, Chambers, Collin, Comal, Dallas, Denton, Ellis, Fort Bend, Galveston, Guadalupe, Harris, Hays, Johnson, Kaufman, Kendall, Liberty, Montgomery, Parker, Rockwall, Smith, Tarrant, Travis, Waller, Williamson, Wilson, or Wise County.

(s) On the same day the petitioner submits the petition to the commission, the petitioner shall send, via certified mail, a copy of the petition to the CCN holder. The CCN holder may submit a response to the commission. The commission shall grant a petition received under subsection (r) of this section not later than the 60th calendar day after the date the landowner files the petition. The commission may not deny a petition received under subsection (r) of this section based on the fact that a certificate holder is a borrower under a federal loan program. The commission may require an award of compensation by the petitioner to a decertified retail public utility that is the subject of a petition filed under subsection (r) of this section as otherwise provided by this section. An award of compensation is governed by subsections (h) - (k) of this section.

(t) If a certificate holder has never made service available through planning, design, construction of facilities, or contractual obligations to serve the area a petitioner seeks to have released under subsection (b) of this section, the commission is not required to find that the proposed alternative provider is capable of providing better service than the certificate holder, but only that the proposed alternative provider is capable of providing the requested service.

(u) Subsection (t) of this section does not apply in Cameron, Fannin, Grayson, Guadalupe, Hidalgo, Willacy, or Wilson Counties.

(v) A certificate holder that has land removed from its certificated service area in accordance with this section may not be required, after the land is removed, to provide service to the removed land for any reason, including the violation of law or commission rules by a water or sewer system of another person.

§24.114. Requirement to Provide Continuous and Adequate Service.

(a) Any retail public utility which possesses or is required by law to possess a certificate of convenience and necessity or a person who possesses facilities used to provide utility service must provide continuous and adequate service to every customer and every qualified applicant for service whose primary point of use is within the certificated area and may not discontinue, reduce or impair utility service except for:

(1) nonpayment of charges for services provided by the certificate holder or a person who possesses facilities used to provide utility service;

(2) nonpayment of charges for sewer service provided by another retail public utility under an agreement between the retail pub-

lic utility and the certificate holder or a person who possesses facilities used to provide utility service or under a commission order;

(3) nonuse; or

(4) other similar reasons in the usual course of business without conforming to the conditions, restrictions, and limitations prescribed by the commission.

(b) After notice and hearing, the commission may:

(1) order any retail public utility that is required by law to possess a certificate of public convenience and necessity or any retail public utility that possesses a certificate of public convenience and necessity and is located in an affected county as defined in TWC, §16.341, to:

(A) provide specified improvements in its service in a defined area if:

(i) service in that area is inadequate as set forth in §24.93 and §24.94 of this title (relating to Adequacy of Water Utility Service; and Adequacy of Sewer Service); or

(ii) is substantially inferior to service in a comparable area; and

(iii) it is reasonable to require the retail public utility to provide the improved service; or

(B) develop, implement, and follow financial, managerial, and technical practices that are acceptable to the commission to ensure that continuous and adequate service is provided to any areas currently certificated to the retail public utility if the retail public utility has not provided continuous and adequate service to any of those areas and, for a utility, to provide financial assurance of the retail public utility's ability to operate the system in accordance with applicable laws and rules as specified in 30 TAC Chapter 37, Subchapter O (relating to Financial Assurance for Public Drinking Water Systems and Utilities), or as specified by the commission. The obligation to obtain financial assurance under this chapter does not relieve an applicant from any requirements to obtain financial assurance in satisfaction of another state agency's rules;

(2) order two or more public utilities or water supply or sewer service corporations to establish specified facilities for interconnecting service after TCEQ approves the interconnecting service pursuant to 30 TAC Chapter 290 (relating to Public Drinking Water) or 30 TAC Chapter 217 (relating to Design Criteria for Domestic Wastewater Systems);

(3) order a public utility or water supply or sewer service corporation that has not demonstrated that it can provide continuous and adequate service from its drinking water source or sewer treatment facility to obtain service sufficient to meet its obligation to provide continuous and adequate service on at least a wholesale basis from another consenting utility service provider; or

(4) issue an emergency order, with or without a hearing, under §24.14 of this title (relating to Emergency Orders).

(c) If the commission has reason to believe that improvements and repairs to a water or sewer service system are necessary to enable a retail public utility to provide continuous and adequate service in any portion of its service area and the retail public utility has provided financial assurance under Texas Health and Safety Code, §341.0355, or under this chapter, the commission, after providing to the retail public utility notice and an opportunity to be heard by the commissioners at a commission meeting, may:

(1) immediately order specified improvements and repairs to the water or sewer system, the costs of which may be paid by the financial assurance in an amount determined by the commission not to exceed the amount of the financial assurance. The order requiring the improvements may be an emergency order if it is issued after the retail public utility has had an opportunity to be heard by the commissioners at a commission meeting; and

(2) require a retail public utility to obligate additional money to replace the financial assurance used for the improvements.

§24.115. *Cessation of Operations by a Retail Public Utility.*

(a) Any retail public utility which possesses or is required to possess a certificate of convenience and necessity desiring to discontinue, reduce or impair utility service, except under the conditions listed in the TWC, §13.250(b), must file a petition with the commission which sets out:

(1) the action proposed by the retail public utility;

(2) the proposed effective date of the actions which must be at least 120 days after the petition is filed with the commission;

(3) a concise statement of the reasons for proposing the action; and

(4) the area affected by the action, including maps as described by §24.106(f)(1) of this title (relating to Notice and Mapping Requirements for Certificate of Convenience and Necessity Applications).

(b) The retail public utility shall submit a proposed notice to be provided to customers of the utility and other affected parties which will include the following:

(1) the name and business address of the retail public utility which seeks to cease operations;

(2) a description of the service area of the retail public utility involved;

(3) the anticipated effect of the cessation of operations on the rates and services provided to the customers; and a statement that persons who wish to intervene or comment upon the action sought should file a request with the commission at the commission's mailing address: Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 within 30 days of mailing or publication of notice, whichever occurs later.

(c) After review by the commission, the applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service within two miles of the petitioner's service area and any city whose extraterritorial jurisdiction overlaps the applicant's service area, and to the customers of the applicant proposing to cease operations.

(d) The applicant may be required by the commission to publish notice once each week for two consecutive weeks in a newspaper of general circulation in the county of operation which shall include, in addition to the information specified in subsection (b) of this section:

(1) the sale price of the facilities;

(2) the name and mailing address of the owner of the retail public utility; and

(3) the business telephone of the retail public utility.

(e) The commission may require the applicant to deliver notice to other affected persons or agencies.

(f) If, 30 days after the required mailed or published notice has been issued, whichever occurs later, no hearing is requested, the commission may consider the application for final decision without further hearing.

(g) If a hearing is requested, the application will be processed in accordance with Chapter 22 of this title (relating to Procedural Rules).

(h) In no circumstance may a retail public utility which possesses or is required to possess a certificate of convenience and necessity, a person who possesses facilities used to provide utility service, or a water utility or water supply corporation with less than 15 connections that is operating without a certificate of convenience and necessity pursuant to §24.103 of this title (relating to Certificates Not Required) cease operations without commission authorization.

(i) In determining whether to grant authorization to the retail public utility for discontinuation, reduction, or impairment of utility service, the commission shall consider, but is not limited to, the following factors:

(1) the effect on the customers and landowners;
(2) the costs associated with bringing the system into compliance;

(3) the applicant's diligence in locating alternative sources of service;

(4) the applicant's efforts to sell the system, such as running advertisements, contacting similar adjacent retail public utilities, or discussing cooperative organization with the customers;

(5) the asking price for purchase of the system as it relates to the undepreciated original cost of the system for ratemaking purposes;

(6) the relationship between the applicant and the original developer of the area served;

(7) the availability of alternative sources of service, such as adjacent retail public utilities or groundwater; and

(8) the feasibility of customers and landowners obtaining service from alternative sources, considering the costs to the customer, quality of service available from the alternative source, and length of time before full service can be provided.

(j) If a utility does abandon operation of its facilities without commission authorization, the commission may appoint a temporary manager to take over operations of the facilities to ensure continuous and adequate service.

§24.116. Exclusiveness of Certificates.

Any certificate granted under this subchapter shall not be construed to vest exclusive service or property rights in and to the area certificated. The commission may grant, upon finding that the public convenience and necessity requires additional certification to another retail public utility or utilities, additional certification to any other retail public utility or utilities to all or any part of the area previously certificated pursuant to this chapter.

§24.117. Contracts Valid and Enforceable.

(a) Contracts between retail public utilities designating areas to be served and customers to be served by those retail public utilities, when approved by the commission after notice and hearing, are valid and enforceable and are incorporated into the certificates of public convenience and necessity. Nothing in this provision negates the requirements of TWC, §13.301.

(b) Retail public utilities may request approval of contracts by filing a written request with the commission including:

(1) maps of the area to be transferred;

(2) a copy of the executed contract or agreement;

(3) if applicable, an affidavit that notice has been provided under TWC, §13.301; and

(4) any other information requested by the commission.

§24.118. Contents of Request for Commission Order Under the Texas Water Code, §13.252.

If a retail public utility in constructing or extending a line, plant or system interferes or attempts to interfere with the operation of a line, plant, or system of any other retail public utility, or furnishes, makes available, renders, or extends retail water or sewer utility service to any portion of the service area of another retail public utility that has been granted or is not required to possess a certificate of public convenience and necessity, the commission may issue an order prohibiting the construction, extension, or provision of service, or prescribing terms and conditions for locating the line, plant, or system affected or for the provision of service. A request for commission order shall include the following:

(1) the name and business address of the retail public utility making the request;

(2) the name and business address of the retail public utility which is to be the subject of the order;

(3) a description of the alleged interference;

(4) a map showing the service area of the requesting utility which clearly shows the location of the alleged interference;

(5) copies of any other information or documentation which would support the position of the requesting utility; and

(6) other information as the commission may require.

§24.119. Filing of Maps.

With applications to obtain or amend a certificate of convenience and necessity, each public utility and water supply or sewer service corporation shall file with the commission a map or maps of the area or areas being requested in the application showing all its facilities and illustrating separately facilities for production, transmission, and distribution of its services, and each certificated retail public utility shall file with the commission a map or maps showing any facilities, customers, or area currently being served outside its certificated areas. Facilities shall be shown on United States Geological Survey 7.5"-minute series maps, subdivision plats, engineering planning maps, or other large scale maps. A color code may be used to distinguish the types of facilities indicated. The location of any such facility shall be described with such exactness that the facility can be located "on the ground" from the map or in supplementary data with reference to physical landmarks where necessary to show its actual location.

§24.120. Single Certification in Incorporated or Annexed Areas.

(a) In the event that an area is incorporated or annexed by a municipality, either before or after the effective date of this section, the municipality and a retail public utility that provides water or sewer service to all or part of the area under a certificate of convenience and necessity may agree in writing that all or part of the area may be served by a municipally owned utility, by a franchised utility, or by the retail public utility. In this section, the phrase franchised utility means a retail public utility that has been granted a franchise by a municipality to provide water or sewer service inside municipal boundaries. The

agreement may provide for single or dual certification of all or part of the area, for the purchase of facilities or property, and for such other or additional terms that the parties may agree on. If a franchised utility is to serve the area, the franchised utility shall also be a party to the agreement. The executed agreement shall be filed with the commission, and the commission, on receipt of the agreement, shall incorporate the terms of the agreement into the respective certificates of convenience and necessity of the parties to the agreement.

(b) If an agreement is not executed within 180 days after the municipality, in writing, notifies the retail public utility of its intent to provide service to the incorporated or annexed area, and if the municipality desires and intends to provide retail utility service to the area, the municipality, prior to providing service to the area, shall file an application with the commission to grant single certification to the municipally owned water or sewer utility or to a franchised utility. If an application for single certification is filed, the commission shall fix a time and place for a hearing and give notice of the hearing to the municipality and franchised utility, if any, and notice of the application and hearing to the retail public utility. Within ten calendar days after receipt of notice that a decertification process has been initiated, a retail public utility with outstanding debt secured by one or more liens shall:

(1) submit to the commission a written list with the names and addresses of the lienholders and the amount of debt; and

(2) notify the lienholders of the decertification process and request that the lienholder provide information to the commission sufficient to establish the amount of compensation necessary to avoid impairment of any debt allocable to the area in question.

(c) The commission shall grant single certification to the municipality. The commission shall also determine whether single certification as requested by the municipality would result in property of a retail public utility being rendered useless or valueless to the retail public utility, and shall determine in its order the monetary amount that is adequate and just to compensate the retail public utility for such property. If the municipality in its application has requested the transfer of specified property of the retail public utility to the municipality or to a franchised utility, the commission shall also determine in its order the adequate and just compensation to be paid for such property under the provisions of this section, including an award for damages to property remaining in the ownership of the retail public utility after single certification. The order of the commission shall not be effective to transfer property. A transfer of property may only be obtained under this section by a court judgment rendered under TWC, §13.255(d) or (e). The grant of single certification by the commission shall go into effect on the date the municipality or franchised utility, as the case may be, pays adequate and just compensation in accordance with court order, or pays an amount into the registry of the court or to the retail public utility under TWC, §13.255(f). If the court judgment provides that the retail public utility is not entitled to any compensation, the grant of single certification shall go into effect when the court judgment becomes final. The municipality or franchised utility must provide to each customer of the retail public utility being acquired an individual written notice within 60 days after the effective date for the transfer specified in the court judgment. The notice must clearly advise the customer of the identity of the new service provider, the reason for the transfer, the rates to be charged by the new service provider, and the effective date of those rates.

(d) In the event the final order of the commission is not appealed within 30 days, the municipality may request the district court of Travis County to enter a judgment consistent with the order of the commission.

(e) Any party that is aggrieved by a final order of the commission under this section may file an appeal with the district court of Travis County within 30 days after the order becomes final.

(f) Transfer of property shall be effective on the date the judgment becomes final. However, after the judgment of the court is entered, the municipality or franchised utility may take possession of condemned property pending appeal if the municipality or franchised utility pays the retail public utility or pays into the registry of the court, subject to withdrawal by the retail public utility, the amount, if any, established in the court's judgment as just and adequate compensation. To provide security in the event an appellate court, or the trial court in a new trial or on remand, awards compensation in excess of the original award, the municipality or franchised utility, as the case may be, shall deposit in the registry of the court an additional sum in the amount of the award, or a surety bond in the same amount issued by a surety company qualified to do business in this state, conditioned to secure the payment of an award of damages in excess of the original award of the trial court. In the event the municipally owned utility or franchised utility takes possession of property or provides utility service in the singly certificated area pending appeal, and a court in a final judgment in an appeal under this section holds that the grant of single certification was in error, the retail public utility is entitled to seek compensation for any damages sustained by it in accordance with subsection (g) of this section.

(g) For the purpose of implementing this section, the value of real property owned and utilized by the retail public utility for its facilities shall be determined according to the standards in Texas Property Code, Chapter 21, governing actions in eminent domain; the value of personal property shall be determined according to the factors in this subsection. The factors ensuring that the compensation to a retail public utility is just and adequate shall, at a minimum, include: impact on the existing indebtedness of the retail public utility and its ability to repay that debt; the value of the service facilities of the retail public utility located within the area in question; the amount of any expenditures for planning, design, or construction of service facilities outside the incorporated or annexed area that are allocable to service to the area in question; the amount of the retail public utility's contractual obligations allocable to the area in question; any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the single certification; the impact on future revenues lost from existing customers; necessary and reasonable legal expenses and professional fees; factors relevant to maintaining the current financial integrity of the retail public utility; and other relevant factors.

(h) The total compensation to be paid to a retail public utility under subsections (g) and (m) of this section must be determined not later than the 90th calendar day after the date on which the commission determines that the municipality's application is administratively complete.

(i) A municipality or a franchised utility may dismiss an application for single certification without prejudice at any time before a judgment becomes final provided the municipality or the franchised public utility has not taken physical possession of property of the retail public utility or made payment for such right under TWC, §13.255(f).

(j) In the event that a municipality files an application for single certification on behalf of a franchised utility, the municipality shall be joined in such application by such franchised utility, and the franchised utility shall make all payments required in the court's judgment to adequately and justly compensate the retail public utility for any taking or damaging of property and for the transfer of property to such franchised utility.

(k) This section shall apply only in a case where:

(1) the retail public utility that is authorized to serve in the certificated area that is annexed or incorporated by the municipality is a nonprofit water supply or sewer service corporation, a special utility district under TWC, Chapter 65, or a fresh water supply district under TWC, Chapter 53; or

(2) the retail public utility that is authorized to serve in the certificated area that is annexed or incorporated by the municipality is a retail public utility, other than a nonprofit water supply or sewer service corporation, and whose service area is located entirely within the boundaries of a municipality with a population of 1.7 million or more according to the most recent federal census.

(l) The following conditions apply when a municipality or franchised utility makes an application to acquire the service area or facilities of a retail public utility described in subsection (k)(2) of this section:

(1) the commission or court must determine that the service provided by the retail public utility is substandard or its rates are unreasonable in view of the reasonable expenses of the utility;

(2) if the municipality abandons its application, the court or the commission is authorized to award to the retail public utility its reasonable expenses related to the proceeding, including attorney fees; and

(3) unless otherwise agreed by the retail public utility, the municipality must take the entire utility property of the retail public utility in a proceeding under this section.

(m) For an area incorporated by a municipality, the compensation provided under subsection (g) of this section shall be determined by a qualified individual or firm to serve as independent appraiser, which shall be selected by the affected retail public utility, and the costs of the appraiser shall be paid by the municipality. For an area annexed by a municipality, the compensation provided under subsection (g) of this section shall be determined by a qualified individual or firm to which the municipality and the retail public utility agree to serve as independent appraiser. If the retail public utility and the municipality are unable to agree on a single individual or firm to serve as the independent appraiser before the 11th day after the date the retail public utility or municipality notifies the other party of the impasse, the retail public utility and municipality each shall appoint a qualified individual or firm to serve as independent appraiser. On or before the tenth business day after the date of their appointment, the independent appraisers shall meet to reach an agreed determination of the amount of compensation. If the appraisers are unable to agree on a determination before the 16th business day after the date of their first meeting under this subsection, the retail public utility or municipality may petition the commission or a person the commission designates for the purpose to appoint a third qualified independent appraiser to reconcile the appraisals of the two originally appointed appraisers. The determination of the third appraiser may not be less than the lesser or more than the greater of the two original appraisals. The costs of the independent appraisers for an annexed area shall be shared equally by the retail public utility and the municipality. The determination of compensation under this subsection is binding on the commission.

(n) The commission shall deny an application for single certification by a municipality that fails to obtain a finding from TCEQ that it will demonstrate compliance with the TCEQ's minimum requirements for public drinking water systems, pursuant to 30 TAC Chapter 290, Subchapter D (relating to Rules and Regulations for Public Water Systems).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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For further information, please call: (512) 936-7223



SUBCHAPTER H. UTILITY SUBMETERING AND ALLOCATION

16 TAC §§24.121 - 24.125, 24.127

This new subchapter is proposed under H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session, which grants the Public Utility Commission of Texas the authority to propose rules beginning September 1, 2013 related to functions to be transferred to the Public Utility Commission of Texas as of September 1, 2014. Specifically, Texas Water Code (TWC), §§5.507 - 5.508, and Chapter 13 provide the commission the authority to engage in the economic regulation of water and wastewater utilities, and provide the substantive basis to conduct the regulation. This new subchapter implements substantive rules pursuant to TWC, Chapter 13 and §§5.507 - 5.508, 11.041, 12.013.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session.

§24.121. General Rules and Definitions.

(a) Purpose and scope. The provisions of this subchapter are intended to establish a comprehensive regulatory system to assure that the practices involving submetered and allocated billing of dwelling units and multiple use facilities for water and sewer utility service are just and reasonable and include appropriate safeguards for tenants.

(b) Application. The provisions of this subchapter apply to apartment houses, condominiums, multiple use facilities, and manufactured home rental communities billing for water and wastewater utility service on a submetered or allocated basis.

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

(1) Allocated utility service--Water or wastewater utility service that is master metered to an owner by a retail public utility and allocated to tenants by the owner.

(2) Apartment house--A building or buildings containing five or more dwelling units that are occupied primarily for nontransient use, including a residential condominium whether rented or owner occupied, and if a dwelling unit is rented, having rental paid at intervals of one month or longer.

(3) Customer service charge--A customer service charge is a rate that is not dependent on the amount of water used through the master meter.

(4) Dwelling unit--One or more rooms in an apartment house or condominium, suitable for occupancy as a residence, and containing kitchen and bathroom facilities; a unit in a multiple use

facility; or a manufactured home in a manufactured home rental community.

(5) Dwelling unit base charge--A flat rate or fee charged by a retail public utility for each dwelling unit recorded by the retail public utility.

(6) Master meter--A meter used to measure, for billing purposes, all water usage of an apartment house, condominium, multiple use facility, or manufactured home rental community, including common areas, common facilities, and dwelling units.

(7) Manufactured home rental community--A property on which spaces are rented for the occupancy of manufactured homes for nontransient residential use and for which rental is paid at intervals of one month or longer.

(8) Multiple use facility--A commercial or industrial park, office complex, or marina with five or more units that are occupied primarily for nontransient use and are rented at intervals of one month or longer.

(9) Occupant--A tenant or other person authorized under a written agreement to occupy a dwelling.

(10) Owner--The legal titleholder of an apartment house, a manufactured home rental community, or a multiple use facility; a condominium association; or any individual, firm, or corporation that purports to be the landlord of tenants in an apartment house, manufactured home rental community, or multiple use facility.

(11) Point-of-use submeter--A device located in a plumbing system to measure the amount of water used at a specific point of use, fixture, or appliance, including a sink, toilet, bathtub, or clothes washer.

(12) Submetered utility service--Water utility service that is master metered for the owner by the retail public utility and individually metered by the owner at each dwelling unit; wastewater utility service based on submetered water utility service; water utility service measured by point-of-use submeters when all of the water used in a dwelling unit is measured and totaled; or wastewater utility service based on total water use as measured by point-of-use submeters.

(13) Tenant--A person who owns or is entitled to occupy a dwelling unit or multiple use facility unit to the exclusion of others and, if rent is paid, who is obligated to pay for the occupancy under a written or oral rental agreement.

(14) Utility service--For purposes of this subchapter, utility service includes only drinking water and wastewater.

§24.122. Owner Registration and Records.

(a) Registration. An owner who intends to bill tenants for submetered or allocated utility service or who changes the method used to bill tenants for utility service shall register with the commission in a form prescribed by the commission.

(b) Water quantity measurement. Except as provided by subsections (c) and (d) of this section, a manager of a condominium or the owner of an apartment house, manufactured home rental community, or multiple use facility, on which construction began after January 1, 2003, shall provide for the measurement of the quantity of water, if any, consumed by the occupants of each unit through the installation of:

(1) submeters, owned by the property owner or manager, for each dwelling unit or rental unit; or

(2) individual meters, owned by the retail public utility, for each dwelling unit or rental unit.

(c) Plumbing system requirement. An owner of an apartment house on which construction began after January 1, 2003, and that provides government assisted or subsidized rental housing to low or very low income residents shall install a plumbing system in the apartment house that is compatible with the installation of submeters for the measurement of the quantity of water, if any, consumed by the occupants of each unit.

(d) Installation of individual meters. On the request by the property owner or manager, a retail public utility shall install individual meters owned by the utility in an apartment house, manufactured home rental community, multiple use facility, or condominium on which construction began after January 1, 2003, unless the retail public utility determines that installation of meters is not feasible. If the retail public utility determines that installation of meters is not feasible, the property owner or manager shall install a plumbing system that is compatible with the installation of submeters or individual meters. A retail public utility may charge reasonable costs to install individual meters.

(e) Records. The owner shall make the following records available for inspection by the tenant or the commission or commission staff at the on-site manager's office during normal business hours in accordance with subsection (g) of this section. The owner may require that the request by the tenant be in writing and include:

(1) a current and complete copy of TWC, Chapter 13, Subchapter M;

(2) a current and complete copy of this subchapter;

(3) a current copy of the retail public utility's rate structure applicable to the owner's bill;

(4) information or tips on how tenants can reduce water usage;

(5) the bills from the retail public utility to the owner;

(6) for allocated billing:

(A) the formula, occupancy factors, if any, and percentages used to calculate tenant bills;

(B) the total number of occupants or equivalent occupants if an equivalency factor is used under §24.124(e)(2) of this title (relating to Charges and Calculations); and

(C) the square footage of the tenant's dwelling unit or rental space and the total square footage of the apartment house, manufactured home rental community, or multiple use facility used for billing if dwelling unit size or rental space is used;

(7) for submetered billing:

(A) the calculation of the average cost per gallon, liter, or cubic foot;

(B) if the unit of measure of the submeters or point-of-use submeters differs from the unit of measure of the master meter, a chart for converting the tenant's submeter measurement to that used by the retail public utility;

(C) all submeter readings; and

(D) all submeter test results;

(8) the total amount billed to all tenants each month;

(9) total revenues collected from the tenants each month to pay for water and wastewater service; and

(10) any other information necessary for a tenant to calculate and verify a water and wastewater bill.

(f) Records retention. Each of the records required under subsection (e) of this section shall be maintained for the current year and the previous calendar year, except that all submeter test results shall be maintained until the submeter is permanently removed from service.

(g) Availability of records.

(1) If the records required under subsection (e) of this section are maintained at the on-site manager's office, the owner shall make the records available for inspection at the on-site manager's office within three days after receiving a written request.

(2) If the records required under subsection (e) of this section are not routinely maintained at the on-site manager's office, the owner shall provide copies of the records to the on-site manager within 15 days of receiving a written request from a tenant or the commission or commission staff.

(3) If there is no on-site manager, the owner shall make copies of the records available at the tenant's dwelling unit at a time agreed upon by the tenant within 30 days of the owner receiving a written request from the tenant.

(4) Copies of the records may be provided by mail if post-marked by midnight of the last day specified in paragraph (1), (2), or (3) of this subsection.

§24.123. Rental Agreement.

(a) Rental agreement content. The rental agreement between the owner and tenant shall clearly state in writing:

(1) the tenant will be billed by the owner for submetered or allocated utility services, whichever is applicable;

(2) which utility services will be included in the bill issued by the owner;

(3) any disputes relating to the computation of the tenant's bill or the accuracy of any submetering device will be between the tenant and the owner;

(4) the average monthly bill for all dwelling units in the previous calendar year and the highest and lowest month's bills for that period;

(5) if not submetered, a clear description of the formula used to allocate utility services;

(6) information regarding billing such as meter reading dates, billing dates, and due dates;

(7) the period of time by which owner will repair leaks in the tenant's unit and in common areas, if common areas are not submetered;

(8) the tenant has the right to receive information from the owner to verify the utility bill; and

(9) for manufactured home rental communities, the service charge percentage that will be billed to tenants.

(b) Requirement to provide rules. At the time a rental agreement is discussed, the owner shall provide a copy of this subchapter or a copy of the rules to the tenant to inform the tenant of his rights and the owner's responsibilities under this subchapter.

(c) Tenant agreement to billing method changes. An owner shall not change the method by which a tenant is billed unless the tenant has agreed to the change by signing a lease or other written agreement. The owner shall provide notice of the proposed change at least 35 days prior to implementing the new method.

(d) Change from submetered to allocated billing. An owner shall not change from submetered billing to allocated billing, except after receiving written approval from the commission after a demonstration of good cause and if the rental agreement requirements under subsections (a), (b), and (c) of this section have been met. Good cause may include:

(1) equipment failures; or

(2) meter reading or billing problems that could not feasibly be corrected.

(e) Waiver of tenant rights prohibited. A rental agreement provision that purports to waive a tenant's rights or an owner's responsibilities under this subchapter is void.

§24.124. Charges and Calculations.

(a) Prohibited charges. Charges billed to tenants for submetered or allocated utility service may only include bills for water or wastewater from the retail public utility and must not include any fees billed to the owner by the retail public utility for any deposit, disconnect, reconnect, late payment, or other similar fees.

(b) Dwelling unit base charge. If the retail public utility's rate structure includes a dwelling unit base charge, the owner shall bill each dwelling unit for the base charge applicable to that unit. The owner may not bill tenants for any dwelling unit base charges applicable to unoccupied dwelling units.

(c) Customer service charge. If the retail public utility's rate structure includes a customer service charge, the owner shall bill each dwelling unit the amount of the customer service charge divided by the total number of dwelling units, including vacant units, that can receive service through the master meter serving the tenants.

(d) Calculations for submetered utility service. The tenant's submetered charges must include the dwelling unit base charge and customer service charge, if applicable, and the gallonage charge and must be calculated each month as follows:

(1) water utility service: the retail public utility's total monthly charges for water service (less dwelling unit base charges or customer service charges, if applicable), divided by the total monthly water consumption measured by the retail public utility to obtain an average water cost per gallon, liter, or cubic foot, multiplied by the tenant's monthly consumption or the volumetric rate charged by the retail public utility to the owner multiplied by the tenant's monthly water consumption;

(2) wastewater utility service: the retail public utility's total monthly charges for wastewater service (less dwelling unit base charges or customer service charges, if applicable), divided by the total monthly water consumption measured by the retail public utility, multiplied by the tenant's monthly consumption or the volumetric wastewater rate charged by the retail public utility to the owner multiplied by the tenant's monthly water consumption;

(3) service charge for manufactured home rental community or the owner or manager of apartment house: a manufactured home rental community or apartment house may charge a service charge in an amount not to exceed 9% of the tenant's charge for submetered water and wastewater service, except when:

(A) the resident resides in a unit of an apartment house that has received an allocation of low income housing tax credits under Texas Government Code, Chapter 2306, Subchapter DD; or

(B) the apartment resident receives tenant-based voucher assistance under United States Housing Act of 1937 Section 8, (42 United States Code, §1437f); and

(4) final bill on move-out for submetered service: if a tenant moves out during a billing period, the owner may calculate a final bill for the tenant before the owner receives the bill for that period from the retail public utility. If the owner is billing using the average water or wastewater cost per gallon, liter, or cubic foot as described in paragraph (1) of this subsection, the owner may calculate the tenant's bill by calculating the tenant's average volumetric rate for the last three months and multiplying that average volumetric rate by the tenant's consumption for the billing period.

(e) Calculations for allocated utility service.

(1) Before an owner may allocate the retail public utility's master meter bill for water and sewer service to the tenants, the owner shall first deduct:

(A) dwelling unit base charges or customer service charge, if applicable; and

(B) common area usage such as installed landscape irrigation systems, pools, and laundry rooms, if any, as follows:

(i) if all common areas are separately metered or submetered, deduct the actual common area usage;

(ii) if common areas that are served through the master meter that provides water to the dwelling units are not separately metered or submetered and there is an installed landscape irrigation system, deduct at least 25% of the retail public utility's master meter bill;

(iii) if all water used for an installed landscape irrigation system is metered or submetered and there are other common areas such as pools or laundry rooms that are not metered or submetered, deduct at least 5% of the retail public utility's master meter bill; or

(iv) if common areas that are served through the master meter that provides water to the dwelling units are not separately metered or submetered and there is no installed landscape irrigation system, deduct at least 5% of the retail public utility's master meter bill.

(2) To calculate a tenant's bill:

(A) for an apartment house, the owner shall multiply the amount established in paragraph (1) of this subsection by:

(i) the number of occupants in the tenant's dwelling unit divided by the total number of occupants in all dwelling units at the beginning of the month for which bills are being rendered; or

(ii) the number of occupants in the tenant's dwelling unit using a ratio occupancy formula divided by the total number of occupants in all dwelling units at the beginning of the retail public utility's billing period using the same ratio occupancy formula to determine the total. The ratio occupancy formula will reflect what the owner believes more accurately represents the water use in units that are occupied by multiple tenants. The ratio occupancy formula that is used must assign a fractional portion per tenant of no less than that on the following scale:

(I) dwelling unit with one occupant = 1;

(II) dwelling unit with two occupants = 1.6;

(III) dwelling unit with three occupants = 2.2; or

(IV) dwelling unit with more than three occupants = 2.2 + 0.4 per each additional occupant over three; or

(iii) the average number of occupants per bedroom, which shall be determined by the following occupancy formula. The

formula must calculate the average number of occupants in all dwelling units based on the number of bedrooms in the dwelling unit according to the scale below, notwithstanding the actual number of occupants in each of the dwelling unit's bedrooms or all dwelling units:

(I) dwelling unit with an efficiency = 1;

(II) dwelling unit with one bedroom = 1.6;

(III) dwelling unit with two bedrooms = 2.8;

(IV) dwelling unit with three bedrooms = 4 + 1.2 for each additional bedroom; or

(iv) a factor using a combination of square footage and occupancy in which no more than 50% is based on square footage. The square footage portion must be based on the total square footage living area of the dwelling unit as a percentage of the total square footage living area of all dwelling units of the apartment house; or

(v) the individually submetered hot or cold water usage of the tenant's dwelling unit divided by all submetered hot or cold water usage in all dwelling units;

(B) a condominium manager shall multiply the amount established in paragraph (1) of this subsection by any of the factors under subparagraph (A) of this paragraph or may follow the methods outlined in the condominium contract;

(C) for a manufactured home rental community, the owner shall multiply the amount established in paragraph (1) of this subsection by:

(i) any of the factors developed under subparagraph (A) of this paragraph; or

(ii) the area of the individual rental space divided by the total area of all rental spaces; and

(D) for a multiple use facility, the owner shall multiply the amount established in paragraph (1) of this subsection by:

(i) any of the factors developed under subparagraph (A) of this paragraph; or

(ii) the square footage of the rental space divided by the total square footage of all rental spaces.

(3) If a tenant moves in or out during a billing period, the owner may calculate a bill for the tenant. If the tenant moves in during a billing period, the owner shall prorate the bill by calculating a bill as if the tenant were there for the whole month and then charging the tenant for only the number of days the tenant lived in the unit divided by the number of days in the month multiplied by the calculated bill. If a tenant moves out during a billing period before the owner receives the bill for that period from the retail public utility, the owner may calculate a final bill. The owner may calculate the tenant's bill by calculating the tenant's average bill for the last three months and multiplying that average bill by the number of days the tenant was in the unit divided by the number of days in that month.

(f) Conversion to approved allocation method. An owner using an allocation formula other than those approved in subsection (e) of this section shall immediately provide notice as required under §24.123(c) of this title (relating to Rental Agreement) and either:

(1) adopt one of the methods in subsection (e) of this section; or

(2) install submeters and begin billing on a submetered basis; or

(3) discontinue billing for utility services.

§24.125. Billing.

(a) Monthly billing of total charges. The owner shall bill the tenant each month for the total charges calculated under §24.124 of this title (relating to Charges and Calculations). If it is permitted in the rental agreement, an occupant or occupants who are not residing in the rental unit for a period longer than 30 days may be excluded from the occupancy calculation and from paying a water and sewer bill for that period.

(b) Rendering bill.

(1) Allocated bills shall be rendered as promptly as possible after the owner receives the retail public utility bill.

(2) Submeter bills shall be rendered as promptly as possible after the owner receives the retail public utility bill or according to the time schedule in the rental agreement if the owner is billing using the retail public utility's rate.

(c) Submeter reading schedule. Submeters or point-of-use submeters shall be read within three days of the scheduled reading date of the retail public utility's master meter or according to the schedule in the rental agreement if the owner is billing using the retail public utility's rate.

(d) Billing period.

(1) Allocated bills shall be rendered for the same billing period as that of the retail public utility, generally monthly, unless service is provided for less than that period.

(2) Submeter bills shall be rendered for the same billing period as that of the retail public utility, generally monthly, unless service is provided for less than that period. If the owner uses the retail public utility's actual rate, the billing period may be an alternate billing period specified in the rental agreement.

(e) Multi-item bill. If issued on a multi-item bill, charges for submetered or allocated utility service must be separate and distinct from any other charges on the bill.

(f) Information on bill. The bill must clearly state that the utility service is submetered or allocated, as applicable, and must include all of the following:

- (1) total amount due for submetered or allocated water;
- (2) total amount due for submetered or allocated wastewater;
- (3) total amount due for dwelling unit base charge(s) or customer service charge(s) or both, if applicable;
- (4) total amount due for water or wastewater usage, if applicable;
- (5) the name of the retail public utility and a statement that the bill is not from the retail public utility;
- (6) name and address of the tenant to whom the bill is applicable;
- (7) name of the firm rendering the bill and the name or title, address, and telephone number of the firm or person to be contacted in case of a billing dispute; and
- (8) name, address, and telephone number of the party to whom payment is to be made.

(g) Information on submetered service. In addition to the information required in subsection (f) of this section, a bill for submetered service must include all of the following:

(1) the total number of gallons, liters, or cubic feet submetered or measured by point-of-use submeters;

(2) the cost per gallon, liter, or cubic foot for each service provided; and

(3) total amount due for a service charge charged by an owner of a manufactured home rental community, if applicable.

(h) Due date. The due date on the bill may not be less than 16 days after it is mailed or hand delivered to the tenant, unless the due date falls on a federal holiday or weekend, in which case the following work day will be the due date. The owner shall record the date the bill is mailed or hand delivered. A payment is delinquent if not received by the due date.

(i) Estimated bill. An estimated bill may be rendered if a master meter, submeter, or point-of-use submeter has been tampered with, cannot be read, or is out of order; and in such case, the bill must be distinctly marked as an estimate and the subsequent bill must reflect an adjustment for actual charges.

(j) Payment by tenant. Unless utility bills are paid to a third-party billing company on behalf of the owner, or unless clearly designated by the tenant, payment must be applied first to rent and then to utilities.

(k) Overbilling and underbilling. If a bill is issued and subsequently found to be in error, the owner shall calculate a billing adjustment. If the tenant is due a refund, an adjustment must be calculated for all of that tenant's bills that included overcharges. If the overbilling or underbilling affects all tenants, an adjustment must be calculated for all of the tenants' bills. If the tenant was undercharged, and the cause was not due to submeter or point-of-use submeter error, the owner may calculate an adjustment for bills issued in the previous six months. If the total undercharge is \$25 or more, the owner shall offer the tenant a deferred payment plan option, for the same length of time as that of the underbilling. Adjustments for usage by a previous tenant may not be back billed to a current tenant.

(l) Disputed bills. In the event of a dispute between a tenant and an owner regarding any bill, the owner shall investigate the matter and report the results of the investigation to the tenant in writing. The investigation and report must be completed within 30 days from the date the tenant gives written notification of the dispute to the owner.

(m) Late fee. A one-time penalty not to exceed 5% may be applied to delinquent accounts. If such a penalty is applied, the bill must indicate the amount due if the late penalty is incurred. No late penalty may be applied unless agreed to by the tenant in a written lease that states the percentage amount of such late penalty.

§24.127. Submeters or Point-of-Use Submeters and Plumbing Fixtures.

(a) Submeters or point-of-use submeters

(1) Same type submeters or point-of-use submeters required. All submeters or point-of-use submeters throughout a property must use the same unit of measurement, such as gallon, liter, or cubic foot.

(2) Installation by owner. The owner shall be responsible for providing, installing, and maintaining all submeters or point-of-use submeters necessary for the measurement of water to tenants and to common areas, if applicable.

(3) Submeter or point-of-use submeter tests prior to installation. No submeter or point-of-use submeter may be placed in service unless its accuracy has been established. If any submeter or point-of-

use submeter is removed from service, it must be properly tested and calibrated before being placed in service again.

(4) Accuracy requirements for submeters and point-of-use submeters. Submeters must be calibrated as close as possible to the condition of zero error and within the accuracy standards established by the American Water Works Association (AWWA) for water meters. Point-of-use submeters must be calibrated as closely as possible to the condition of zero error and within the accuracy standards established by the American Society of Mechanical Engineers (ASME) for point-of-use and branch-water submetering systems.

(5) Location of submeters and point-of-use submeters. Submeters and point-of-use submeters must be installed in accordance with applicable plumbing codes and AWWA standards for water meters or ASME standards for point-of-use submeters, and must be readily accessible to the tenant and to the owner for testing and inspection where such activities will cause minimum interference and inconvenience to the tenant.

(6) Submeter and point-of-use submeter records. The owner shall maintain a record on each submeter or point-of-use submeter which includes:

- (A) an identifying number;
- (B) the installation date (and removal date, if applicable);
- (C) date(s) the submeter or point-of-use submeter was calibrated or tested;
- (D) copies of all tests; and
- (E) the current location of the submeter or point-of-use submeter.

(7) Submeter or point-of-use submeter test on request of tenant. Upon receiving a written request from the tenant, the owner shall either:

(A) provide evidence, at no charge to the tenant, that the submeter or point-of-use submeter was calibrated or tested within the preceding 24 months and determined to be within the accuracy standards established by the AWWA for water meters or ASME standards for point-of-use submeters; or

(B) have the submeter or point-of-use submeter removed and tested and promptly advise the tenant of the test results.

(8) Billing for submeter or point-of-use submeter test.

(A) The owner may not bill the tenant for testing costs if the submeter fails to meet AWWA accuracy standards for water meters or ASME standards for point-of-use submeters.

(B) The owner may not bill the tenant for testing costs if there is no evidence that the submeter or point-of-use submeter was calibrated or tested within the preceding 24 months.

(C) The owner may bill the tenant for actual testing costs (not to exceed \$25) if the submeter meets AWWA accuracy standards or the point-of-use submeter meets ASME accuracy standards and evidence as described in paragraph (7)(A) of this subsection was provided to the tenant.

(9) Bill adjustment due to submeter or point-of-use submeter error. If a submeter does not meet AWWA accuracy standards or a point-of-use submeter does not meet ASME accuracy standards and the tenant was overbilled, an adjusted bill must be rendered in accordance with §24.125(k) of this title (relating to Billing). The owner may not

charge the tenant for any underbilling that occurred because the submeter or point-of-use submeter was in error.

(10) Submeter or point-of-use submeter testing facilities and equipment. For submeters, an owner shall comply with the AWWA's meter testing requirements. For point-of-use meters, an owner shall comply with ASME's meter testing requirements.

(b) Plumbing fixtures. After January 1, 2003, before an owner of an apartment house, manufactured home rental community, or multiple use facility or a manager of a condominium may implement a program to bill tenants for submetered or allocated water service, the owner or manager shall adhere to the following standards:

(1) Texas Health and Safety Code, §372.002, for sink or lavatory faucets, faucet aerators, and showerheads;

(2) perform a water leak audit of each dwelling unit or rental unit and each common area and repair any leaks found; and

(3) not later than the first anniversary of the date an owner of an apartment house, manufactured home rental community, or multiple use facility or a manager of a condominium begins to bill for submetered or allocated water service, the owner or manager shall:

(A) remove any toilets that exceed a maximum flow of 3.5 gallons per flush; and

(B) install toilets that meet the standards prescribed by Texas Health and Safety Code, §372.002.

(c) Plumbing fixture not applicable. Subsection (b) of this section does not apply to a manufactured home rental community owner who does not own the manufactured homes located on the property of the manufactured home rental community.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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For further information, please call: (512) 936-7223



SUBCHAPTER I. WHOLESALE WATER OR SEWER SERVICE

16 TAC §§24.128 - 24.138

This new subchapter is proposed under H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session, which grants the Public Utility Commission of Texas the authority to propose rules beginning September 1, 2013 related to functions to be transferred to the Public Utility Commission of Texas as of September 1, 2014. Specifically, Texas Water Code (TWC), §§5.507 - 5.508, and Chapter 13 provide the commission the authority to engage in the economic regulation of water and wastewater utilities, and provide the substantive basis to conduct the regulation. This new subchapter implements substantive rules pursuant to TWC, Chapter 13 and §§5.507 - 5.508, 11.041, 12.013.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session.

§24.128. Petition or Appeal Concerning Wholesale Rate.

This subchapter sets forth substantive guidelines and procedural requirements concerning:

(1) a petition to review rates charged for the sale of water for resale filed pursuant to TWC, Chapter 12; or

(2) an appeal pursuant to TWC, §13.043(f) (appeal by retail public utility concerning a decision by a provider of water or sewer service).

§24.129. Definitions.

For purposes of this subchapter, the following definitions apply.

(1) Petitioner--The entity that files the petition or appeal.

(2) Protested rate--The rate demanded by the seller.

(3) Cash Basis calculation of cost of service--A calculation of the revenue requirement to which a seller is entitled to cover all cash needs, including debt obligations as they come due. Basic revenue requirement components considered under the cash basis generally include operation and maintenance expense, debt service requirements, and capital expenditures which are not debt financed. Other cash revenue requirements should be considered where applicable. Basic revenue requirement components under the cash basis do not include depreciation.

(4) Utility Basis calculation of cost of service--A calculation of the revenue requirement to which a seller is entitled which includes a return on investment over and above operating costs. Basic revenue requirement components considered under the utility basis generally include operation and maintenance expense, depreciation, and return on investment.

§24.130. Petition or Appeal.

(a) The petitioner must file a written petition with the commission. The petitioner must serve a copy of the petition on the party against whom the petitioner seeks relief and other appropriate parties.

(b) The petition must clearly state the statutory authority which the petitioner invokes, specific factual allegations, and the relief which the petitioner seeks. The petitioner must attach any applicable contract to the petition.

(c) The petitioner must file an appeal pursuant to TWC, §13.043(f) in accordance with the time frame provided therein.

§24.131. Commission's Review of Petition or Appeal.

(a) When a petition or appeal is filed, the commission shall determine within ten days of the filing of the petition or appeal whether the petition contains all of the information required by this subchapter. For purposes of this section only, the initial review of probable grounds shall be limited to a determination whether the petitioner has met the requirements §24.130 of this title (relating to Petition or Appeal). If the commission determines that the petition or appeal does not meet the requirements of §24.130 of this title, the commission shall inform the petitioner of the deficiencies within the petition or appeal and allow the petitioner the opportunity to correct these deficiencies. If the commission determines that the petition or appeal does meet the requirements of §24.130 of this title, the commission shall forward the petition or appeal to the State Office of Administrative Hearings for an evidentiary hearing.

(b) For a petition or appeal to review a rate that is charged pursuant to a written contract, the commission will forward the petition

or appeal to the State Office of Administrative Hearings to conduct an evidentiary hearing on public interest.

(c) For a petition or appeal to review a rate that is not charged pursuant to a written contract, the commission will forward the petition or appeal to the State Office of Administrative Hearings to conduct an evidentiary hearing on the rate.

(d) If the seller and buyer do not agree that the protested rate is charged pursuant to a written contract, the administrative law judge shall abate the proceedings until the contract dispute over whether the protested rate is part of the contract has been resolved by a court of proper jurisdiction.

§24.132. Evidentiary Hearing on Public Interest.

(a) If the commission forwards a petition to the State Office of Administrative Hearings pursuant to §24.131(a) and (b) of this title (relating to Commission's Review of Petition or Appeal), the State Office of Administrative Hearings shall conduct an evidentiary hearing on public interest to determine whether the protested rate adversely affects the public interest.

(b) Prior to the evidentiary hearing on public interest, discovery shall be limited to matters relevant to the evidentiary hearing on public interest.

(c) The administrative law judge shall prepare a proposal for decision and order with proposed findings of fact and conclusions of law concerning whether the protested rate adversely affects the public interest, and shall submit this recommendation to the commission.

(d) The seller and buyer may agree to consolidate the evidentiary hearing on public interest and the evidentiary hearing on cost of service. If the seller and buyer so agree the administrative law judge shall hold a consolidated evidentiary hearing.

§24.133. Determination of Public Interest.

(a) The commission shall determine the protested rate adversely affects the public interest if after the evidentiary hearing on public interest the commission concludes at least one of the following public interest criteria have been violated:

(1) the protested rate impairs the seller's ability to continue to provide service, based on the seller's financial integrity and operational capability;

(2) the protested rate impairs the purchaser's ability to continue to provide service to its retail customers, based on the purchaser's financial integrity and operational capability;

(3) the protested rate evidences the seller's abuse of monopoly power in its provision of water or sewer service to the purchaser. In making this inquiry, the commission shall weigh all relevant factors. The factors may include:

(A) the disparate bargaining power of the parties, including the purchaser's alternative means, alternative costs, environmental impact, regulatory issues, and problems of obtaining alternative water or sewer service;

(B) the seller's failure to reasonably demonstrate the changed conditions that are the basis for a change in rates;

(C) the seller changed the computation of the revenue requirement or rate from one methodology to another;

(D) where the seller demands the protested rate pursuant to a contract, other valuable consideration received by a party incident to the contract;

(E) incentives necessary to encourage regional projects or water conservation measures;

(F) the seller's obligation to meet federal and state wastewater discharge and drinking water standards;

(G) the rates charged in Texas by other sellers of water or sewer service for resale;

(H) the seller's rates for water or sewer service charged to its retail customers, compared to the retail rates the purchaser charges its retail customers as a result of the wholesale rate the seller demands from the purchaser;

(4) the protested rate is unreasonably preferential, prejudicial, or discriminatory, compared to the wholesale rates the seller charges other wholesale customers.

(b) The commission shall not determine whether the protested rate adversely affects the public interest based on an analysis of the seller's cost of service.

§24.134. Commission Action to Protect Public Interest, Set Rate.

(a) If as a result of the evidentiary hearing on public interest the commission determines the protested rate does not adversely affect the public interest, the commission will deny the petition or appeal by final order. The commission must state in the final order that dismisses a petition or appeal the bases upon which the commission finds the protested rate does not adversely affect the public interest.

(b) If the commission determines the protested rate adversely affects the public interest, the commission will remand the matter to the State Office of Administrative Hearings for further evidentiary proceedings on the rate. The remand order is not a final order subject to judicial review.

(c) No later than 90 days after the petition or appeal is forwarded to the State Office of Administrative Hearings for an evidentiary hearing on the rate pursuant to subsection (b) of this section or §24.131(a) and (c) of this title (relating to Commission's Review of Petition or Appeal), the seller shall file with the commission a cost of service study and other information which supports the protested rate.

(d) Prior to the evidentiary hearing on the rate, discovery shall be limited to matters relevant to the evidentiary hearing on the rate.

(e) The administrative law judge shall prepare a proposal for decision and order with proposed findings of fact and conclusions of law recommending a rate and shall submit this recommendation to the commission. The commission shall set a rate consistent with the ratemaking mandates of TWC, Chapters 12 and 13. If the protested rate was charged pursuant to a written contract, the commission must state in a final order the bases upon which the commission finds the protested rate adversely affects the public interest.

§24.135. Determination of Cost of Service.

(a) The commission shall follow the mandates of the TWC, Chapters 12 and 13, to calculate the annual cost of service. The commission shall rely on any reasonable methodologies set by contract which identify costs of providing service and/or allocate such costs in calculating the cost of service.

(b) When the protested rate was calculated using the cash basis or the utility basis, and the rate which the protested rate supersedes was not based on the same methodology, the commission may calculate cost of service using the superseded methodology unless the seller establishes a reasonable basis for the change in methodologies. Where the protested rate is based in part upon a change in methodologies the seller must show during the evidentiary hearing the calculation of revenue requirements using both the methodology upon which the protested rate is based, and the superseded methodology. When computing revenue requirements using a new methodology, the commission may allow adjustments for past payments.

§24.136. Burden of Proof.

The petitioner shall have the burden of proof in the evidentiary proceedings to determine if the protested rate is adverse to the public interest. The seller of water or sewer service (whether the petitioner or not) shall have the burden of proof in evidentiary proceedings on determination of cost of service.

§24.137. Commission Order to Discourage Succession of Rate Disputes.

(a) If the commission finds the protested rate adversely affects the public interest and sets rates on a cost of service basis, then the commission shall add the following provisions to its order.

(1) If the purchaser files a new petition or appeal, and the commission forwards the petition or appeal to the State Office of Administrative Hearings pursuant to §24.131 of this title (relating to Commission's Review of Petition or Appeal), then the administrative law judge shall set an interim rate immediately. The interim rate shall equal the rate set by the commission in this proceeding where the commission granted the petition or appeal and set a cost of service rate.

(2) The commission shall determine in the proceedings pursuant to the new petition or appeal that the protested rate adversely affects the public interest. The administrative law judge shall not hold an evidentiary hearing on public interest but rather shall proceed with the evidentiary hearing to determine a rate consistent with the ratemaking mandates of the TWC, Chapters 12 and 13.

(b) The effective period for the provisions issued pursuant to subsection (a) of this section shall expire upon the earlier of three years after the end of the test year period, or upon the seller and purchaser entering into a new written agreement for the sale of water or sewer service which supersedes the agreement which was the subject of the proceeding where the commission granted the petition or appeal and set a cost of service rate. The provisions shall be effective in proceedings pursuant to a new petition or appeal if the petition or appeal is filed before the date of expiration.

(c) For purposes of subsection (b) of this section, the "test year period" is the test year used by the commission in the proceeding where the commission granted the petition or appeal and set rates on a cost of service basis.

§24.138. Filing of Rate Data.

(a) For purposes of comparing the rates charged in Texas by providers of water or sewer service for resale, the commission may require each provider of water or sewer service for resale to report the retail and wholesale rates it charges to purchasers.

(b) Within 30 days after receiving a written request from the commission, a provider of water or sewer service for resale shall file a report with the commission. The report must provide the information prescribed in a form prepared by the commission.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER J. ENFORCEMENT, SUPERVISION, AND RECEIVERSHIP

16 TAC §§24.140 - 24.144, 24.146, 24.147

This new subchapter is proposed under H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session, which grants the Public Utility Commission of Texas the authority to propose rules beginning September 1, 2013 related to functions to be transferred to the Public Utility Commission of Texas as of September 1, 2014. Specifically, Texas Water Code (TWC), §§5.507 - 5.508, and Chapter 13 provide the commission the authority to engage in the economic regulation of water and wastewater utilities, and provide the substantive basis to conduct the regulation. This new subchapter implements substantive rules pursuant to TWC, Chapter 13 and §§5.507 - 5.508, 11.041, 12.013.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session.

§24.140. Enforcement Action.

If the commission has reason to believe that the failure of the owner or operator of a water utility to properly operate, maintain, or provide adequate facilities presents an imminent threat to human health or safety, the commission shall immediately:

- (1) notify the utility's representative; and
- (2) initiate enforcement action consistent with:
 - (A) this subchapter; and
 - (B) procedural rules adopted by the commission.

§24.141. Supervision of Certain Utilities.

(a) The commission may place a utility under supervision where:

- (1) the utility has exhibited gross or continuing mismanagement; or
- (2) the utility has exhibited gross or continuing noncompliance with Chapter 13 of the TWC or commission rules; or
- (3) the utility has exhibited noncompliance with commission orders; and
- (4) notice has been provided to the utility advising the utility of the proposed commission action, the reasons for the action and giving the utility an opportunity to request a hearing.

(b) The commission may require the utility to abide by conditions and requirements, including but not limited to:

- (1) management requirements;
- (2) additional reporting requirements;
- (3) restrictions on hiring, salary or benefit increases, capital investment, borrowing, stock issuance or dividend declarations, and liquidation of assets;
- (4) a requirement that the utility place all or part of the utility's funds and revenues into an account in a financial institution approved by the commission and restricting use of funds in that account to reasonable and necessary expenses;
- (5) operational requirements;
- (6) priority order of payments or obligations; and
- (7) limitation of payment for owner's or owner's family member's expenses or salaries or payments to affiliates.

(c) Any utility under supervision may be required to obtain the approval of the commission before taking any action that may be restricted under subsection (b) of this section. If the commission in its order has required prior approval, any action or transaction which occurs without that approval may be voided.

§24.142. Operation of Utility that Discontinues Operation or is Referred for Appointment of a Receiver.

(a) The commission, after providing to the utility notice and an opportunity for a hearing, may authorize a willing person to temporarily manage and operate a utility that:

(1) has discontinued or abandoned operations or the provision of services; or

(2) is being referred to the attorney general for the appointment of a receiver under TWC, §13.412 for:

(A) having expressed an intent to abandon or abandoned operation of its facilities; or

(B) having violated a final order of the commission; or

(C) having allowed any property owned or controlled by it to be used in violation of a final order of the commission.

(b) The commission may appoint a person under this section by emergency order under Chapter 22, Subchapter P of this title (relating to Emergency Orders for Water Utilities). A corporation may be appointed a temporary manager.

(c) Abandonment includes, but is not limited to:

(1) failure to pay a bill or obligation owed to a retail public utility or to an electric or gas utility with the result that the utility service provider has issued a notice of discontinuance of necessary services;

(2) failure to provide appropriate water or wastewater treatment so that a potential health hazard results;

(3) failure to adequately maintain facilities or to provide sufficient facilities resulting in potential health hazards, extended outages, or repeated service interruptions;

(4) failure to provide customers adequate notice of a health hazard or potential health hazard;

(5) failure to secure an alternative available water supply during an outage;

(6) displaying a pattern of hostility toward or repeatedly failing to respond to the commission or the utility's customers; and

(7) failure to provide the commission or its customers with adequate information on how to contact the utility for normal business and emergency purposes.

(d) This section does not affect the authority of the commission to pursue an enforcement claim against a utility or an affiliated interest.

§24.143. Operation of a Utility by a Temporary Manager.

(a) By emergency order under TWC, §5.507 and §13.4132, the commission may appoint a person under Chapter 22, Subchapter P of this title (relating to Emergency Orders for Water Utilities) to temporarily manage and operate a utility that has discontinued or abandoned operations or the provision of services, or which has been or is being referred to the attorney general for the appointment of a receiver under TWC, §13.412.

(b) A person appointed under this section has the powers and duties necessary to ensure the continued operation of the utility and the

provision of continuous and adequate services to customers, including the power and duty to:

- (1) read meters;
- (2) bill for utility services;
- (3) collect revenues;
- (4) disburse funds;
- (5) request rate increases if needed;
- (6) access all system components;
- (7) conduct required sampling;
- (8) make necessary repairs; and
- (9) perform other acts necessary to assure continuous and adequate utility service as authorized by the commission.

(c) Upon appointment by the commission, the temporary manager will post financial assurance with the commission in an amount and type acceptable to the commission. The temporary manager or the executive director may request waiver of the financial assurance requirements or may request substitution of some other form of collateral as a means of ensuring the continued performance of the temporary manager.

(d) The temporary manager shall serve a term of one year, unless:

- (1) specified otherwise by the commission;
- (2) an extension is requested by the commission staff or the temporary manager and granted by the commission;
- (3) the temporary manager is discharged from his responsibilities by the commission; or
- (4) a superseding action is taken by an appropriate court on the appointment of a receiver at the request of the Attorney General.

(e) Within 60 days after appointment, a temporary manager shall return to the commission an inventory of all property received.

(f) Compensation for the temporary manager will come from utility revenues and will be set by the commission at the time of appointment. Changes in the compensation agreement can be approved by the commission.

(g) The temporary manager shall collect the assets and carry on the business of the utility and shall use the revenues and assets of the utility in the best interests of the customers to ensure that continuous and adequate utility service is provided. The temporary manager shall give priority to expenses incurred in normal utility operations and for repairs and improvements made since being appointed temporary manager.

(h) The temporary manager shall report to the commission on a monthly basis. This report shall include:

- (1) an income statement for the reporting period;
- (2) a summary of utility activities such as improvements or major repairs made, number of connections added, and amount of water produced or treated; and
- (3) any other information required by the commission.

(i) During the period in which the utility is managed by the temporary manager, the certificate of convenience and necessity shall remain in the name of the utility owner; however, the temporary manager assumes the obligations for operating within all legal requirements.

§24.144. Fines and Penalties.

(a) Fines and penalties collected under TWC, Chapter 13, from a retail public utility that is not a public utility in other than criminal proceedings shall be paid to the commission and deposited in the general revenue fund.

(b) The commission shall provide a reasonable period for a retail public utility that takes over a nonfunctioning system to bring the nonfunctioning system into compliance with commission rules, during which the commission may not impose a penalty for any deficiency in the system that is present at the time the retail public utility takes over the nonfunctioning system. The commission must consult with the retail public utility before determining the period and may grant an extension of the period for good cause.

§24.146. Municipal Rates for Certain Recreational Vehicle Parks.

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

(1) Nonsubmetered master metered utility service--Potable water service that is master metered but not submetered and wastewater service that is based on master metered potable water service.

(2) Recreational vehicle--Includes a:

(A) house trailer as that term is defined by Texas Transportation Code, §501.002; and

(B) towable recreational vehicle as that term is defined by Texas Transportation Code, §541.201.

(3) Recreational vehicle park--A commercial property on which service connections are made for recreational vehicle transient guest use and for which fees are paid at intervals of one day or longer.

(b) A municipally owned utility that provides nonsubmetered master metered utility service to a recreational vehicle park shall determine the rates for that service on the same basis the utility uses to determine the rates for other commercial businesses, including hotels and motels, that serve transient customers and receive nonsubmetered master metered utility service from the utility.

(c) Notwithstanding any other provision of this chapter, the commission has jurisdiction to enforce this section.

§24.147. Temporary Rates for Services Provided for a Nonfunctioning System.

(a) Notwithstanding other provisions of this chapter, upon sending written notice to the commission, a retail public utility other than a municipally owned utility or a water and sewer utility subject to the original rate jurisdiction of a municipality that takes over the provision of services for a nonfunctioning retail public water or sewer utility service provider may immediately begin charging the customers of the nonfunctioning system a temporary rate to recover the reasonable costs incurred for interconnection or other costs incurred in making services available and any other reasonable costs incurred to bring the nonfunctioning system into compliance with commission rules.

(b) Notice of the temporary rate must be provided to the customers of the nonfunctioning system no later than the first bill which includes the temporary rates.

(c) Within 90 days of receiving notice of the temporary rate increase, the commission will issue an order regarding the reasonableness of the temporary rates. In making the determination, the commission will consider information submitted by the retail public utility taking over the provision of service, the customers of the nonfunctioning system, or any other affected person.

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SUBCHAPTER K. PROVISIONS REGARDING MUNICIPALITIES

16 TAC §§24.150 - 24.153

This new subchapter is proposed under H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session, which grants the Public Utility Commission of Texas the authority to propose rules beginning September 1, 2013 related to functions to be transferred to the Public Utility Commission of Texas as of September 1, 2014. Specifically, Texas Water Code (TWC), §§5.507 - 5.508, and Chapter 13 provide the commission the authority to engage in the economic regulation of water and wastewater utilities, and provide the substantive basis to conduct the regulation. This new subchapter implements substantive rules pursuant to TWC, Chapter 13 and §§5.507 - 5.508, 11.041, 12.013.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, H.B. 1600 and S.B. 567, 83rd Legislature, Regular Session.

§24.150. Jurisdiction of Municipality: Surrender of Jurisdiction.

(a) The governing body of a municipality by ordinance may elect to have the commission exercise exclusive original jurisdiction over the utility rate, operation, and services of utilities, within the incorporated limits of the municipality. The governing body of a municipality that surrenders its jurisdiction to the commission may reinstate its jurisdiction by ordinance at any time after the second anniversary of the date on which the municipality surrendered its jurisdiction to the commission, except that the municipality may not reinstate its jurisdiction during the pendency of a rate proceeding before the commission. The municipality may not surrender its jurisdiction again until the second anniversary of the date on which the municipality reinstates jurisdiction.

(b) The City of Coffee City, a municipality, surrendered its jurisdiction to the commission effective December 4, 1993.

(c) The City of Nolanville, a municipality, surrendered its jurisdiction to the commission effective April 18, 1996.

(d) The City of Aurora, a municipality, surrendered its jurisdiction to the commission effective April 14, 1997.

(e) The City of Arcola, a municipality, surrendered its jurisdiction to the commission effective May 5, 1998.

(f) The City of San Antonio, a municipality, surrendered its jurisdiction over investor owned utilities within its corporate limits, to the commission, effective January 30, 2014.

§24.151. Applicability of Commission Service Rules Within the Corporate Limits of a Municipality.

The commission's rules relating to service and response to requests for service will apply to utilities operating within the corporate limits of a municipality unless the municipality adopts its own rules. These rules include Subchapters E and F of this chapter (relating to Customer Service and Protection and Quality of Service).

§24.152. Notification Regarding Use of Revenue.

At least annually, and before any rate increase, a municipality shall notify in writing each water and sewer retail customer of any service or capital expenditure, not water or sewer related, funded in whole or in part by customer revenue.

§24.153. Fair Wholesale Rates for Wholesale Water Sales to a District.

(a) A municipality that makes a wholesale sale of water to a special district created under §52, Article III, or §59, Article XVI, Texas Constitution, and that operates under Title 4 (General Law Districts), or under Chapter 36 (Groundwater Conservation Districts) shall determine the rates for that sale on the same basis as for other similarly situated wholesale purchasers of the municipality's water.

(b) This section does not apply to a sale of water under a contract executed before September 1, 1997.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER O. UNBUNDLING AND MARKET POWER

DIVISION 2. INDEPENDENT ORGANIZATIONS

16 TAC §25.363

The Public Utility Commission of Texas (commission) proposes amendments to §25.363, relating to ERCOT Budget and Fees. The proposed amendments modify the commission substantive rule relating to the ERCOT budget process to conform to changes made by the Legislature in House Bill (HB) 1600. The amendments are also proposed to conform this rule with current procedures the commission utilizes when interacting with ERCOT regarding governance, budget, and fees. Additional changes are proposed to remove reference to Procedural Rule §22.252 which is proposed for repeal in Project Number 42227. This rule is a competition rule subject to judicial review as specified in PURA §39.001(e). Project Number 41949 is assigned to this proceeding.

Slade Cutter, Rate Regulation Division, has determined that for each year of the first five-year period the proposed section is in

effect there will be no fiscal implications for state or local government as a result of enforcing or administering this section.

Mr. Cutter has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be greater accountability and cost control with respect to the ERCOT, which plays a critical role in the efficient operation of the electricity grid in most of Texas. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. Therefore, no regulatory flexibility analysis is required. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Cutter has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rule-making, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. The request for a public hearing must be received within 30 days after publication.

Comments on the proposed amendments may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, on or before May 12, 2014. Sixteen copies of comments to the proposed amendments are required to be filed pursuant to §22.71(c) of this title. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 41949.

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2013) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically, PURA §39.151, which grants the commission the authority to adopt and enforce rules relating to the reliability of the regional electric network and accounting for the production and delivery of electricity among market participants, and which additionally authorizes the commission to delegate to an independent organization responsibilities for establishing or enforcing such rules. Upon delegation, the commission maintains oversight and review authority over the independent organization. Section 39.151 also provides that an independent organization is directly responsible and accountable to the commission; provides that the commission has complete authority to oversee and investigate the organization's finances, budget, and operations as necessary to ensure the organization's accountability and to ensure that it adequately performs its functions and duties; and requires an independent organization to provide reports and information relating to the independent organization's performance of its functions and relating to the organization's revenues, expenses, and other financial matters. This section also provides that an independent organization certified by the commission shall develop proposed performance measures to track the organization's operations and provides the commission authority to review the organization's performance as part of the

budget review process. In addition, this section permits the commission to prescribe a system of accounts for an independent organization; conduct audits of an independent organization relating to the performance of its functions or its revenues, expenses, and other financial matters; and review the proposed budgets of an independent organization. This section also authorizes the commission to approve and charge a reasonable and competitively neutral rate to cover the independent organization's costs. This section directs the commission to investigate the organization's cost efficiencies, salaries and benefits, and use of debt financing and permits it to require an independent organization to provide any information needed to effectively evaluate the organization's budget and the reasonableness and neutrality of a rate or proposed rate or the effectiveness or efficiency of the organization.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §39.151.

§25.363. *ERCOT Budget and Fees.*

(a) Scope. This section applies to the budget of and all fees and rates levied or charged by the Electric Reliability Council of Texas (ERCOT) in its role as an independent organization under PURA §39.151.

(1) A fee or rate that was in effect on the effective date of this section shall remain in effect and shall not be changed, except as provided in this section.

(2) ERCOT shall not implement any new or modified budget, rate or fee without commission approval, except as otherwise provided by this section.

(3) ERCOT shall not incur expenses or capital outlays in any year that exceed the amounts approved by the commission, except in the case of an emergency that impairs its ability to conduct its functions.

(4) ERCOT shall not incur debt, ~~or~~ defer scheduled principal repayments of debt, ~~or~~ refinance existing debt without commission approval. ERCOT shall seek approval of any loan or agreement to provide a line of credit from a bank or other institution, the issuance of bonds or notes, and any arrangements that would permit it to issue bonds or permit the issuance of bonds on its behalf at a later date. The commission may approve, disapprove, or modify a proposal made pursuant to this paragraph. This paragraph does not require approval of a contract to lease equipment or other property used in normal operations, ~~or~~ approval of a loan or draw on an existing line of credit or other credit arrangement that has been approved by the commission, ~~or~~ renewal of an existing working capital line of credit that has been approved by the commission.

(b) System of accounts and reporting. For the purpose of accounting and reporting to the commission, ERCOT shall maintain its books and records in accordance with Generally Accepted Accounting Principles. ERCOT shall establish a standard chart of accounts and employ it consistently from year to year. The standard chart of accounts shall be used for the purpose of reporting to the commission and shall be consistent with ~~[the fee-filing application approved by the commission and]~~ the long-term operations plan prescribed by §25.362 of this title (relating to Electric Reliability Council of Texas (ERCOT) Governance). The accounts shall show all revenues resulting from the various fees charged by ERCOT and reflect all expenses in a manner that allows the commission to determine the sources of the costs incurred for each major activity conducted by ERCOT. ~~[ERCOT may not change its chart of accounts to be any less detailed than that required in the fee-filing package without prior commission approval.]~~

(c) Allowable expenses. Expenses and capital outlays in the budget shall be based upon ERCOT's expected cost of performing its required functions as described in PURA §39.151(a) and this chapter. To determine whether the costs are reasonable and necessary, the commission may consider the budget justification provided by ERCOT, the ERCOT long-term operations plan, costs incurred by market participants and other independent system operators for similar activities, costs incurred in prior years, capital projects identified in the budget, and to any other information and data considered appropriate by the commission.

(1) (No change.)

(2) Allowable expenses, to the extent they are reasonable and necessary, may include, but are not limited to, the following general categories:

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

(E) Actual expenditures for public service announcements and community education efforts, provided that the total sum of all such items allowed in the cost of service shall not exceed 0.05% of the annual ERCOT revenue requirement or \$50,000, whichever is less.

(3) (No change.)

(d) Budget Submission. ERCOT shall submit its proposed budget for commission review as specified in the commission order approving its previous budget. As part of its application for approval of its proposed budget, ERCOT shall include all information necessary for the commission to evaluate the proposed budget, including all information required under this section. The commission shall provide public notice of ERCOT's proposed budget and allow a reasonable opportunity for the public to comment on the ERCOT's proposed budget. The review and approval of a proposed budget or a proceeding to authorize and set the range for the amount of the fee under this section is not a contested case for purposes of Chapter 2001 of the Texas Government Code.

(e) [(d)] Commission review and action. The ERCOT annual budget and any change in the system administration fee are subject to review either annually or biennially by the commission. Prior to the submission of a proposed budget or change in the system administration fee to the governing board for its approval, ERCOT shall consult with commission staff designated by the executive director in connection with the development of the budget and shall provide to the staff information concerning budget strategies, staffing requirements, categories of expenses, capital outlays, exceptional expenses and capital items, and proposals to incur additional debt. ERCOT shall file with the commission its board-approved budget, budget strategies, and staffing needs, with a justification for all expenses, capital outlays, additional debt, and staffing requirements. The commission may approve, disapprove, [rejeet] or modify any item included in the proposed budget and budget strategies. After approving ERCOT's budget, the commission shall authorize ERCOT to charge a system administration fee, within a range determined by the commission, that is reasonable and competitively neutral, to fund ERCOT's budget. ERCOT shall closely match actual revenues generated by the system administration fee and other sources of revenue with revenue necessary to fund the budget, taking into account the effect of a fee change on market participants and consumers, to ensure that the budget year does not end with a surplus or insufficient funds. ERCOT shall file with the commission, upon request, a report comparing actual expenditures with budgeted expenditures. Such reports shall be filed at least once per year.

(f) [(e)] Performance measures. ERCOT shall develop proposed performance measures to track its operations. Such measures

shall be submitted for commission review and approval at the time ERCOT submits its proposed budget. ERCOT shall provide an explanation for any performance measure whose value for any of the preceding three calendar years was not within 5% of the commission-approved target. The commission will review ERCOT's performance as part of the budget review process. The commission shall prepare a report evaluating ERCOT's performance at the time the commission approves ERCOT's budget and shall submit the report to the Lieutenant Governor, the Speaker of the House of Representatives, and each house and senate standing committee that has jurisdiction over electric utility issues. [The commission may adopt performance measures to assess ERCOT's fiscal and operating performance.]

(g) [(f)] User Fees. ERCOT may charge reasonable user fees for services provided by ERCOT to any market participant or other entity. User fees do not include the system administration fee and the ERCOT nodal implementation surcharge. A new or revised user fee may be approved by the ERCOT governing board, without the filing of an application under §22.252 of this title (relating to Approval of ERCOT Fees and Rates). Any affected entity, including the commission staff and the public counsel, may file an appeal of the establishment or revision of a user fee, in accordance with §22.251 of this title (relating to Review of Electric Reliability Council of Texas (ERCOT) Conduct), except that the provisions of §22.251(c) of this title (which requires the use of Section 20 of the ERCOT Protocols (Alternative Dispute Resolution Procedures), or Section 21 of the Protocols (Process for Protocol Revision), or other Applicable ERCOT Procedures) shall not apply.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 45. MARKETING PRACTICES SUBCHAPTER C. STANDARDS OF IDENTITY FOR MALT BEVERAGES

16 TAC §45.73

The Texas Alcoholic Beverage Commission (commission) proposes amendments to §45.73, relating to Labels: General, to state the purpose of and authority for the section, to delete references to special or private brands, to prohibit labels indicating that the beverage is owned or licensed by or exclusively used by a retailer, and to define the word "exclusively" as used in this section.

The amendments attempt to further clarify the commission's interpretation of Alcoholic Beverage Code §102.07 and §102.15, which prohibit brewers and manufacturers from furnishing anything of value to retailers of their products. The commission believes that a malt beverage label that is identified with a specific retailer under certain circumstances (outlined in the section as it

would be amended) is a form of advertising for the retailer. Brewers and manufacturers cannot provide advertising for a specific retailer because it is a thing of value to the retailer.

Section 45.73 was also reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for re-adoption each of its rules. The commission has determined that the need for the section continues to exist but that it should be amended to provide clearer guidance about prohibited activities.

Martin Wilson, Assistant General Counsel, has determined that for each year of the first five years that the proposed amendments will be in effect, there will be no fiscal impact on state or local government attributable to the amendments.

The proposed amendments will have no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Mr. Wilson has determined that for each year of the first five years that the proposed amendments will be in effect, the public will benefit because the section will provide clearer up-front guidance to the regulated community, thereby reducing uncertainty.

Comments on the proposed amendments may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127 or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed amendments on Wednesday, April 30, 2014, at 1:30 p.m. in the commission meeting room at the commission's headquarters, which is located at 5806 Mesa Drive in Austin, Texas.

The proposed amendments are authorized by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Alcoholic Beverage Code; and by Government Code §2001.039, which requires the agency to periodically review its rules to determine whether the need for them continues to exist.

The proposed amendments affect Alcoholic Beverage Code §§5.31, 5.38, 101.41, 101.61, 102.07 and 102.15; and Government Code §2001.039.

§45.73. *Label: General.*

(a) The purpose of this section is to implement Alcoholic Beverage Code §101.67 (Prior Approval of Malt Beverages) and §101.41 (Containers, Packaging, and Dispensing Equipment of Beer: Labels), pursuant to the requirements of Alcoholic Beverage Code §5.38 (Quality and Purity of Beverages) and the authority of Alcoholic Beverage Code §5.31 (General Powers and Duties). This section applies the prohibitions in Alcoholic Beverage Code §102.07(a)(3) and §102.15(a)(1) in the labelling context.

(b)[(a)] [Marking, branding and labeling:] It shall be unlawful for any person to transport, sell, or possess for the purpose of sale in this state any malt beverage, directly or indirectly, or through an affiliate, or remove from customs custody any malt beverage in containers unless such malt beverages are packaged, and such packages are marked, branded, and labeled in conformity with this subchapter.

(c) [(b)] Alteration of labels.

(1) It shall be unlawful for any person to alter, mutilate, destroy, obliterate, or remove any mark, brand, or label upon malt beverages held for sale, except as authorized by law; provided, that the administrator may, upon written application, permit additional labeling or relabeling of malt beverages in containers if, in his judgment, the facts show that such additional labeling or relabeling is for the purpose of compliance with the requirements of this subchapter or of law.

(2) Application for permission to relabel shall be accompanied by two complete sets of the old labels and two complete sets of any proposed labels, together with a statement of the reasons for relabeling, the quantity and the location of the malt beverages, and the name and address of the person by whom they will be relabeled.

(d) [(e)] Only a brewer's or non-resident brewer's permittee, [or] a manufacturer's or non-resident manufacturer's licensee, or a brewpub licensee may apply for and receive label approval on beer, ale, or malt liquor.

(e) [(d)] No application for a label filed by a brewer's or non-resident brewer's permittee or a manufacturer's or non-resident manufacturer's licensee shall be approved which:

(1) indicates by any statement, design, device, or representation that the malt beverage is [a special or private brand] brewed or bottled for any retailer permittee or licensee or any private club registration permittee; [or that]

(2) includes the name, tradename, or trademark of any retailer permittee or licensee or any private club registration permittee; or [-]

(3) indicates by any statement, design, device, or representation that the malt beverage is owned or licensed by, or is exclusively used by any retailer permittee or licensee or any private club registration permittee.

(f) [(e)] The sale of a brand of malt beverages by a brewer's or non-resident brewer's permittee or a manufacturer's or non-resident manufacturer's licensee exclusively to the holder of a license or permit authorizing the retail sale or service of malt beverages, or exclusively to other such licensees or permittees under the same ownership, control, or management, to the exclusion of other such licensees or permittees generally is specifically prohibited. [Any such exclusive sale of a brand shall constitute the sale of a special or private brand and the label approval for any such label shall be cancelled and withdrawn.]

(g) As used in this section, the term exclusively shall mean, with respect to the item referenced, all or substantially all of such item, and the term exclusion shall mean, with respect to the licensees or permittees referenced, all or substantially all of such licensees or permittees.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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16 TAC §45.82

The Texas Alcoholic Beverage Commission (commission) proposes amendments to §45.82, relating to Prohibited Practices, to delete references to special or private brands, to prohibit labels indicating that the beverage is owned or licensed by or exclusively used by a retailer, and to define the word "exclusively" as used in this section.

The amendments attempt to further clarify the commission's interpretation of Alcoholic Beverage Code §102.07 and §102.15, which prohibit brewers and manufacturers from furnishing anything of value to retailers of their products. The commission believes that a malt beverage label that is identified with a specific retailer under certain circumstances (outlined in the section as it would be amended) is a form of advertising for the retailer. Brewers and manufacturers cannot provide advertising for a specific retailer because it is a thing of value to the retailer.

Section 45.82 was also reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for reoption each of its rules. The commission has determined that the need for the section continues to exist but that it should be amended to provide clearer guidance about prohibited activities.

Martin Wilson, Assistant General Counsel, has determined that for each year of the first five years that the proposed amendments will be in effect, there will be no fiscal impact on state or local government attributable to the amendments.

The proposed amendments will have no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Mr. Wilson has determined that for each year of the first five years that the proposed amendments will be in effect, the public will benefit because the section will provide clearer up-front guidance to the regulated community, thereby reducing uncertainty.

Comments on the proposed amendments may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127 or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed amendments on Wednesday, April 30, 2014, at 1:30 p.m. in the commission meeting room at the commission's headquarters, which is located at 5806 Mesa Drive in Austin, Texas.

The proposed amendments are authorized by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Alcoholic Beverage Code; and by Government Code §2001.039, which requires the agency to periodically review its rules to determine whether the need for them continues to exist.

The proposed amendments affect Alcoholic Beverage Code §§5.31, 5.38, 101.41, 101.61, 102.07, and 102.15; and Government Code §2001.039.

§45.82. Prohibited Practices.

(a) Statements on labels. Containers of malt beverages, or any labels on such containers, or any carton, case, or individual covering of such containers, used for sale at retail, or any written, printed, graphic

or other matter accompanying such containers to the consumer shall not contain the following:

(1) any statement that is false or untrue in any particular, or that, irrespective of falsity, directly or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific, or technical matter tends to create a misleading impression;

(2) any statement that is disparaging of a competitor's products;

(3) any statement, design, device, or representation which is obscene or indecent;

(4) any statement, design, device, or representation of or relating to analyses, standards, or tests, irrespective of falsity, which the administrator finds to be likely to mislead the consumer;

(5) any statement, design, device or representation of or relating to any guaranty, irrespective of falsity, which the administrator finds to be likely to mislead the consumer;

(6) a trade name or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, or any graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely to falsely lead the consumer to believe that the product has been endorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization; provided, that this subsection shall not apply to the use of the name of any person engaged in business as a producer, importer, bottler, wholesaler, distributor, retailer, or warehouseman, of malt beverages, nor to the use by any person of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, provided such trade or brand name was used by him or his predecessors in interest prior to August 29, 1935;

(7) any statement, design, device, or representation that:

(A) the malt beverage is [~~a special or private brand~~] brewed or bottled for any retail licensee or permittee or private club registration permittee; [~~or that~~]

(B) includes the name, tradename or trademark of any retail licensee or permittee or private club registration permittee; or [-]

(C) the malt beverage is owned or licensed by or exclusively used by any retail licensee or permittee or private club registration permittee where exclusively shall mean, with respect to the item referenced, all or substantially all of such item.

(b) Simulation of government stamps. No label shall be of such design as to resemble or simulate a stamp of the United States government or of any state or foreign government. No label, other than stamps authorized or required by the United States government or any state or foreign government, shall state or indicate that the malt beverage contained in the labeled container is brewed, made, bottled, labeled, sold under, or in accordance with any municipal, state, federal, or foreign government authorization, law, or regulation, unless such statement is required or specifically authorized by federal or state law or regulations of the foreign country in which such malt beverages were produced. If the foreign municipal or state government permit number is stated upon a label, it shall not be accompanied by an additional statement relating thereto, unless required by the law of that state or foreign municipality.

(c) Use of word "bonded," etc. The words "bonded," "bottled in bond," "aged in bond," "bonded age," "bottled under customs supervision," or phrases containing these or synonymous terms which im-

ply governmental supervision over production, bottling, or packaging, shall not be used on any label for malt beverages.

(d) Statements, seals, flags, coats of arms, crests, and other insignia. Statements, seals, flags, coats of arms, crests, or other insignia, or graphic, or pictorial or emblematic representations thereof, likely to mislead the consumer to believe that the product has been endorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, the government, organization, family, or individual with whom such statement, seal, flag, coat of arms, crest, or insignia is associated, are prohibited on any label of malt beverages.

(e) Curative and therapeutic effects. Labels shall not contain any statement, design, or device representing that the use of any malt beverage has curative or therapeutic effects, if such statement is untrue in any particular or tends to create a misleading impression.

(f) Coverings, cartons, cases. Individual coverings, cartons, cases, or other wrappers of containers of malt beverages, used for sale at retail, or any written, printed, graphic, or other matter accompanying the container shall not contain any statement, or any graphic, pictorial, or emblematic representation, or other matter, which is prohibited from appearing on any label or container of malt beverage. It shall be unlawful for any retailer to affix to any carton or case any paper or sticker bearing any painted, printed, or other graphic matter whatsoever; and it shall be unlawful for any retailer to paint, imprint, or otherwise impose any wording, lettering, picture, or design of any character whatsoever on any carton or case.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



16 TAC §45.94

The Texas Alcoholic Beverage Commission (commission) proposes new §45.94, relating to Verification Regarding Use of Facilities, to implement the requirements of Alcoholic Beverage Code §102.22, relating to Verification of Use of Facilities.

Alcoholic Beverage Code §102.22(a) requires that a person who holds a Alcoholic Beverage Code Chapter 12 or 13 permit or a Alcoholic Beverage Code Chapter 62 or 63 license must annually verify to the commission that a brewing or manufacturing facility owned or controlled by that person "is not used to produce malt beverages primarily for a specific retailer or the retailer's affiliates." Alcoholic Beverage Code §102.22(b) requires the commission to adopt a form for the verification.

The proposed new section would require that the Alcoholic Beverage Code §102.22 verification be filed on or before September 1 of each year by each permittee and licensee required to do so by that section of the Alcoholic Beverage Code. The new section also provides that the commission will promulgate a form requiring the verification as stated in Alcoholic Beverage Code §102.22.

Martin Wilson, Assistant General Counsel, has determined that for each year of the first five years that the proposed new section will be in effect, there will be no fiscal impact on state or local government.

The proposed new section will have no fiscal or regulatory impact (beyond the impact of Alcoholic Beverage Code §102.22 itself) on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Mr. Wilson has determined that for each year of the first five years that the proposed new section will be in effect, the public will benefit because the form of the verification required by Alcoholic Beverage Code §102.22 will be clear.

Comments on the proposed new section may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127 or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed new section on Wednesday, April 30, 2014, at 1:30 p.m. in the commission meeting room at the commission's headquarters, which is located at 5806 Mesa Drive in Austin, Texas.

The proposed new section is authorized by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Alcoholic Beverage Code; and §102.22, which requires the commission to adopt a form.

The proposed new section affects Alcoholic Beverage Code Chapters 12, 13, 62, and 63 and §5.31 and §102.22.

§45.94. Verification Regarding Use of Facilities.

On or before September 1 of each year, each holder of a permit issued under Alcoholic Beverage Code Chapter 12 or 13 or a license issued under Alcoholic Beverage Code Chapter 62 or 63 shall verify to the commission, on a form promulgated by the commission, that no brewing or manufacturing facility owned or controlled by the permit or license holder is used to produce malt beverages primarily for a specific Texas retailer or the retailer's Texas affiliates.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Martin Wilson

Assistant General Counsel

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16 TAC §45.95

The Texas Alcoholic Beverage Commission (commission) proposes new §45.95, relating to Agreements Between Manufacturers or Brewers and Retailers, to require the filing of such agreements unless exempted by the section.

The proposed new section is based on the understanding that agreements between the manufacturing and retail tiers are generally prohibited unless otherwise allowed. Alcoholic Beverage Code §102.07 provides that brewers may arrange certain promotional activities with retailers and it is understood that these arrangements may be pursuant to an agreement between the parties. The Alcoholic Beverage Code does not otherwise appear to allow agreements between brewers or manufacturers and Texas retailers.

While it is true that the general prohibition on inter-tier agreements that are not specifically authorized applies to all segments of the alcoholic beverage industry, it is also true that the commission has limited resources and must prioritize its workload. Malt beverage distributors have requested (by submitting and supporting a similar provision in a petition for rulemaking) that the commission require the filing of agreements between brewers or manufacturers and retailers. The underlying concern is that if producers and retailers are able to agree on certain terms regarding the retailer's sale of a product, the middle tier distributors can effectively be squeezed from both above and below in the supply chain, thereby reducing their independence. If middle-tier members are marginalized, the three-tier system of alcoholic beverage regulation that is inherent in the Alcoholic Beverage Code is threatened.

The commission has not received a similar indication of interest in imposing a similar filing requirement from or regarding other segments of the industry. The commission can investigate specific complaints on an individual basis in any segment of the industry. Given the commission's restricted resources and the heightened concerns expressed in the malt beverage segment of the industry, the commission chooses to impose the filing requirement in this section only to that segment of the industry.

If the parties that are required to file their agreements believe that there are lawful agreements between producers and retailers other than the ones exempted from the filing requirement in the proposed new section, the commission believes it is appropriate for the commission to review such agreements. Before agreeing that there may be other lawful agreements, the commission believes it should review the actual documents. As the commission gains more knowledge and understanding from its review of the filed agreements, it can do a better job assessing the appropriate degree of regulation that is appropriate and where lines should be drawn.

The proposed new section requires the filing by September 1, 2015 of all agreements, other than those specifically exempted, that are in effect on August 31, 2015. After September 1, 2015, new agreements would have to be filed within 30 days. Agreements that are not in writing must be summarized in writing and the summary must be filed. Finally, the agreements and summaries would be considered public records under Alcoholic Beverage Code §5.48 and thereby be shielded from disclosure under the terms of that provision.

By delaying the initial filing requirement until September 1, 2015, the commission does not imply that there may be unlawful agreements until that date. If the commission becomes aware of illegal arrangements or activity before or after September 1, 2015, this section would not restrict the remedies available to the commission. Specifically, the commission would use its authority under Alcoholic Beverage Code §5.32 to get documents or other information necessary for its investigation.

Martin Wilson, Assistant General Counsel, has determined that for each year of the first five years that the proposed new section will be in effect, there will be no fiscal impact on state or local government.

The proposed new section might have a fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. Since the commission believes that agreements other than those exempted are not lawful, it is operating under the assumption that no such agreements exist. If the commission is incorrect in that assumption, it currently has no way to determine how many exist and who may have them. The commission specifically requests comments regarding the costs associated with complying with this section if it is ultimately adopted.

There is no anticipated negative impact on local employment.

Mr. Wilson has determined that for each year of the first five years that the proposed new section will be in effect, the public will benefit because the commission will obtain knowledge that will allow it to appropriately focus its efforts to enforce the Alcoholic Beverage Code's restrictions on inter-tier relationships.

Comments on the proposed new section may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127 or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed new section on Wednesday, April 30, 2014, at 1:30 p.m. in the commission meeting room at the commission's headquarters, which is located at 5806 Mesa Drive in Austin, Texas.

The proposed new section is authorized by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Alcoholic Beverage Code; and §5.32, which authorizes the commission to require the regulated community to provide information and documents to the commission.

The proposed new section affects Alcoholic Beverage Code Chapters 12, 13, 62 and 63; and §§1.03, 5.31, 5.32, 5.48, 6.03, 102.01, 102.07, 102.11, 102.12, 102.13, 102.14, 102.15 and 102.16.

§45.95. Agreements Between Manufacturers or Brewers and Retailers.

(a) This section is adopted under the authority of Alcoholic Beverage Code §5.31(a) and §5.32 in furtherance of its responsibilities under Alcoholic Beverage Code §5.31(b)(1), (3), (4) and (7), and as an exercise of the police power of the state under Alcoholic Beverage Code §1.03 for protection of the public welfare of the people of this state, as articulated by the legislature as a matter of public policy in Alcoholic Beverage Code §6.03(i). It is both necessary and an administratively efficient means under Alcoholic Beverage Code §5.31(a) for the commission to inspect, supervise and regulate the alcoholic malt beverage business and to enforce Alcoholic Beverage Code §§102.01, 102.07, 102.11, 102.12, 102.13, 102.14, 102.15 and 102.16. The section is limited to malt beverage producers and retailers because the commission received a specific request for such a rule from malt beverage distributors to give the commission information necessary to proactively investigate possible violations of Alcoholic Beverage Code

Chapter 102 rather than waiting to respond to complaints. In order to prioritize and maximize the use of its limited resources, the commission chooses to gather the information required by this section from that segment of the industry, since there has been an expression of concern from and regarding that segment.

(b) By September 1, 2015, each holder of a permit or license issued under Alcoholic Beverage Code Chapter 12, 13, 62 or 63 shall file with the commission a copy of any agreement (except those described in subsection (d) of this section) dated before August 31, 2015, and still in force on September 1, 2015, between the brewer or manufacturer or its affiliates and the holder of any permit or license in Texas authorizing the retail sale of malt beverages or its affiliates in Texas.

(c) For any agreement (except those described in subsection (d) of this section) dated on or after September 1, 2015 between a holder of a permit or license issued under Alcoholic Beverage Code Chapter 12, 13, 62 or 63 or its affiliates and the holder of any permit or license in Texas authorizing the retail sale of malt beverages or its affiliates in Texas, the brewer or manufacturer shall file the agreement with the commission within 30 calendar days of the date the parties enter into it.

(d) The agreements described in this subsection are not subject to the filing requirements of subsection (b) or (c) of this section:

(1) agreements related to lawful promotional activities authorized by Alcoholic Beverage Code §102.07 or §102.15; and

(2) agreements previously provided to the commission.

(e) If any agreement that is required to be filed by this section is not in writing, the oral agreement must be summarized in writing by the brewer or manufacturer and the summary filed with the commission on the date that the agreement would be due if it were written. If any of the items listed in this subsection as a minimum requirement of the summary is not applicable to the oral agreement, that fact must be noted in the summary. The summary must include, at a minimum:

(1) the date of the agreement;

(2) the parties to the agreement;

(3) the term of the agreement, including any conditions that apply to its renewability and to its termination prior to the end of the agreed term; and

(4) the duties and obligations of the parties to the contract.

(f) An agreement or summary filed under this section is a private record under Alcoholic Beverage Code §5.48.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Martin Wilson

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Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



16 TAC §45.96

The Texas Alcoholic Beverage Commission (commission) proposes new §45.96, relating to Brewpubs, to define labeling requirements and to clarify authorized activities.

The proposed new section clarifies that a brewpub is not authorized to provide contract brewing or alternating brewery proprietorship arrangements or engage in such activities because the Alcoholic Beverage Code provides such authority only to holders of permits under Alcoholic Beverage Code Chapter 12 or 13 and of licenses under Alcoholic Beverage Code Chapters 62 and 63.

The proposed new section also clarifies that a brewpub can apply for and receive label approval on malt beverages, which they are already doing under Alcoholic Beverage Code Chapter 74. Before recent amendments to Alcoholic Beverage Code Chapter 74, the commission did not require brewpubs to receive label approval for their products, which could only be sold on their own premises. However, since Alcoholic Beverage Code §§74.08 - 74.10 now authorize brewpubs to sell their products under certain conditions to retailers, distributors and wholesalers, it is incumbent upon the commission under Alcoholic Beverage Code §74.01(a)(1) and §74.06 to apply appropriate labeling requirements. The proposed new section clarifies that a brewpub can use its own name, tradename or trademark to its product, but that it may not use the name, tradename or trademark of another retailer.

Martin Wilson, Assistant General Counsel, has determined that for each year of the first five years that the proposed new section will be in effect, there will be no fiscal impact on state or local government.

The proposed new section will have no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission beyond the impacts already imposed by the Alcoholic Beverage Code. There is no anticipated negative impact on local employment.

Mr. Wilson has determined that for each year of the first five years that the proposed new section will be in effect, the public will benefit because the authorized activities and labeling requirements applicable to brewpubs will be clarified.

Comments on the proposed new section may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127 or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed new section on Wednesday, April 30, 2014, at 1:30 p.m. in the commission meeting room at the commission's headquarters, which is located at 5806 Mesa Drive in Austin, Texas.

The proposed new section is authorized by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

The proposed new section affects Alcoholic Beverage Code Chapters 12, 13, 62 and 63; and §§5.31, 74.01, 74.06 and 74.08 - 74.10.

§45.96. Brewpubs.

(a) The purpose of this section is to implement Alcoholic Beverage Code §§5.39 (Regulation of Liquor Containers), 74.01 (Authorized Activities), 74.06 (Quality Standards), and 101.67 (Prior Approval of Malt Beverages), pursuant to the requirements of Alcoholic Beverage Code §5.38 (Quality and Purity of Beverages) and the authority of Alcoholic Beverage Code §5.31 (General Powers and Duties).

(b) Labels.

(1) It shall be unlawful for any person to transport, sell, or possess for the purpose of sale in this state any malt beverage, directly or indirectly, or through an affiliate, or to remove from customs custody any malt beverage in containers unless such malt beverages are packaged, and such packages are marked, branded, and labeled in conformity with this subchapter.

(2) It shall be unlawful for any person to alter, mutilate, destroy, obliterate, or remove any mark, brand, or label upon malt beverages held for sale, except as authorized by law; provided, that the administrator may, upon written application, permit additional labeling or relabeling of malt beverages in containers if, in his judgment, the facts show that such additional labeling or relabeling is for the purpose of compliance with the requirements of this subchapter or of law.

(3) Application for permission to relabel shall be accompanied by two complete sets of the old labels and two complete sets of any proposed labels, together with a statement of the reasons for relabeling, the quantity and the location of the malt beverages, and the name and address of the person by whom they will be relabeled.

(4) A brewpub licensee may apply for and receive label approval on beer, ale, or malt liquor. The label may contain the brewpub licensee's name, tradename or trademark.

(5) No application for a label filed by a brewpub licensee shall be approved which:

(A) indicates by any statement, design, device, or representation that the malt beverage is brewed or bottled for any retailer permittee or licensee (other than the brewpub licensee label applicant itself) or any private club registration permittee;

(B) includes the name, tradename, or trademark of any retailer permittee or licensee (other than the brewpub licensee label applicant itself) or any private club registration permittee; or

(C) indicates by any statement, design, device, or representation that the malt beverage is owned or licensed by, or is exclusively used by any retailer permittee or licensee (other than the brewpub licensee label applicant itself) or any private club registration permittee.

(c) Authorized Activities.

(1) Nothing in this subchapter or in Alcoholic Beverage Code Chapter 74 authorizes a brewpub licensee to engage in contract brewing or alternating brewery proprietorship arrangements, and its facilities may not be used to provide such arrangements or engage in such activities, which are authorized only for holders of permits under Alcoholic Beverage Code Chapter 12 or 13 and holders of licenses under Alcoholic Beverage Code Chapters 62 and 63.

(2) The sale of a brand of malt beverages by a brewpub licensee exclusively to the holder of a license or permit authorizing the retail sale or service of malt beverages, or exclusively to other retail licensees or permittees under the same ownership, control, or management, to the exclusion of other retail licensees or permittees generally is specifically prohibited.

(3) As used in this section, the term exclusively shall mean, with respect to the item referenced, all or substantially all of such item, and the term exclusion shall mean, with respect to the licensees or permittees referenced, all or substantially all of such licensees or permittees.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER D. ADVERTISING AND PROMOTION--ALL BEVERAGES

16 TAC §45.110

The Texas Alcoholic Beverage Commission (commission) proposes amendments to §45.110, relating to Inducements, to conform subsection (c)(3) to a United States District Court finding that the provision currently in effect is unconstitutional, to cite as examples of unlawful inducements certain malt beverage labels and certain sales of malt beverages, and to add a statutory reference.

In *Authentic Beverages Company, Inc vs Texas Alcoholic Beverage Comm'n*, 835 F. Supp. 2d 227 (W.D. Tex., Dec. 19, 2011), §45.110(c)(3) was declared unconstitutional as a violation of the First Amendment and the commission was enjoined from enforcing it, which the commission has not done since the court's ruling. However, the court's order affirms the commission's authority to prohibit undue collusion, financial or otherwise, among the tiers. Accordingly, the commission proposes amending that paragraph to eliminate the per se prohibition on advertising that benefits a specific retailer, and to replace it with a prohibition on such advertising that is a product of unauthorized activity by and among members of different tiers.

In addition, the proposed amendments add to the list of examples of unlawful inducements in subsection (c) by adding paragraphs (7) and (8), which deal with the use of retailer tradenames and trademarks in malt beverage labels, and with the exclusive sale of malt beverage products to specific retailers.

The commission also proposes to amend subsection (a) to add a statutory reference.

Section 45.110 was also reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for readoption each of its rules. The commission has determined that the need for the section continues to exist but that it should be amended to provide clearer guidance about prohibited activities.

Martin Wilson, Assistant General Counsel, has determined that for each year of the first five years that the proposed amendments will be in effect, there will be no fiscal impact on state or local government attributable to the amendments.

The proposed amendments will have no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Mr. Wilson has determined that for each year of the first five years that the proposed amendments will be in effect, the public will benefit because the section will provide clearer up-front guidance to the regulated community, thereby reducing uncertainty, and will remove an unconstitutional provision.

Comments on the proposed amendments may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127 or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed amendments on Wednesday, April 30, 2014, at 1:30 p.m. in the commission meeting room at the commission's headquarters, which is located at 5806 Mesa Drive in Austin, Texas.

The proposed amendments are authorized by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Alcoholic Beverage Code; and by Government Code §2001.039, which requires the agency to periodically review its rules to determine whether the need for them continues to exist.

The proposed amendments affect Alcoholic Beverage Code §§5.31, 102.04, 102.07, 102.12, 102.15 and 108.06; and Government Code §2001.039.

§45.110. *Inducements.*

(a) General. This section ~~[rule]~~ is enacted pursuant to Alcoholic Beverage Code §§102.04, 102.07, 102.12, 102.15 and 108.06.

(b) Unless otherwise specified, this section [This rule] applies to members of the manufacturing and wholesale tiers for all alcoholic beverages.

(c) Inducements. Notwithstanding any other provision of these rules, practices and patterns of conduct that place retailer independence at risk constitute an illegal inducement as that term is used in the Alcoholic Beverage Code. Examples of unlawful inducements are:

(1) purchasing or renting shelf, floor or warehouse space from or for a retailer;

(2) requiring a retailer to purchase one product in order to be allowed to purchase another product at the same time;

(3) providing or purchasing, in whole or in part, any type of advertising benefitting any specific retailer, if the advertising is a result of unauthorized activity by and among members of one tier and members of another tier that involves financial remuneration, incentive, inducement or compensation;

(4) furnishing food and beverages, entertainment or recreation to retailers or their agents or employees except under the following conditions:

(A) the value of food, beverages, entertainment and recreation shall not exceed \$500.00 [~~\$500~~] per person on any one occasion; and

(B) food, beverages, entertainment and recreation provided may only be consumed or enjoyed in the immediate presence of both the providing upper tier member and the receiving retail tier member; and

(C) in the course of providing food, beverages, entertainment or recreation under this rule, upper tier members may only furnish ground transportation.

(D) food, beverages, recreation and entertainment may also be provided during attendance at a convention, conference, or sim-

ilar event so long as the primary purpose for the attendance of the retailer at such event is not to receive benefits under this section ~~[rule]~~.

(E) each upper tier member shall keep complete and accurate records of all expenses incurred for retailer entertainment for two years.

(5) furnishing of service trailers with equipment to a retailer; ~~[or]~~

(6) furnishing transportation or other things of value to organized groups of retailers. Members of the manufacturing and distribution tiers may advertise in convention programs, sponsor functions or meetings and other participate in meetings and conventions of trade associations of general membership; ~~[-]~~

(7) marking, branding or labeling a malt beverage with:

(A) the tradename or trademark of any retailer permittee or licensee or any private club registration permittee; or

(B) a tradename or trademark that is owned or licensed by, or is exclusively used by any retailer permittee or licensee or any private club registration permittee; or

(8) selling all or substantially all of a brand of malt beverages to:

(A) the holder of a license or permit that authorizes the retail sale or service of malt beverages, to the exclusion of all or substantially all other licensees or permittees who are authorized to sell or serve malt beverages at retail; or

(B) holders of licenses or permits that authorize the retail sale or service of malt beverages and that are under the same ownership, control, or management, to the exclusion of all or substantially all other licensees or permittees who are authorized to sell or serve malt beverages at retail.

(d) Criteria for determining retailer independence. The following criteria shall be used as a guideline in determining whether a practice or pattern of conduct places retailer independence at risk. The following criteria are not exclusive, nor does a practice need to meet all criteria in order to constitute an inducement.

(1) The practice restricts or hampers the free economic choice of a retailer to decide which products to purchase or the quantity in which to purchase them for sale to consumers.

(2) The retailer is obligated to participate in a program offered by a member of the manufacturing or wholesale tier in order to obtain that member's product.

(3) The retailer has a continuing obligation to purchase or otherwise promote the industry member's product.

(4) The retailer has a commitment not to terminate its relationship with a member of the manufacturing or wholesale tier with respect to purchase of that member's products.

(5) The practice involves a member of the manufacturing or wholesale tier in the day-to-day operations of the retailer. For example, the member controls the retailer's decisions on which brand of product to purchase, the pricing of products, or the manner in which the products will be displayed on the retailer's premises.

(6) The practice is discriminatory in that it is not offered to all retailers in the local market on the same terms without business reasons present to justify the difference in treatment.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 26, 2014.

TRD-201401334

Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 206-3489



PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 75. AIR CONDITIONING AND REFRIGERATION

16 TAC §75.110

The Texas Department of Licensing and Regulation (Department) proposes amendments to an existing rule at 16 Texas Administrative Code (TAC) Chapter 75, §75.110, regarding the Air Conditioning and Refrigeration program.

The proposed rule is necessary to update the applicable codes as referenced in the Air Conditioning and Refrigeration Contractors statute and rules. The Texas Commission of Licensing and Regulation (Commission), the Department's governing body, is required by statute to adopt rules for the practice of air conditioning and refrigeration contracting that are at least as strict as the standards provided by the Uniform Mechanical Code and the International Mechanical Code.

The 2009 editions of the Uniform Mechanical Code (UMC), the International Mechanical Code (IMC), the International Residential Code (IRC), and other applicable codes are currently in effect under §75.110. The proposed amendments will adopt the 2012 editions of these codes, with an effective date of January 1, 2015. The 2009 editions will remain in effect through December 31, 2014. All air conditioning and refrigeration work permitted or started prior to January 1, 2015, may be completed in accordance with the 2009 code editions.

A work group of the Air Conditioning and Refrigeration Contractors Advisory Board reviewed the 2009 and 2012 editions of the UMC, the IMC, the IRC, and the International Fuel Gas Code (IFGC) for changes that would impact the industry if the 2012 editions were adopted. The work group members did not find any significant changes in or differences between the 2009 and 2012 codes, nor did the work group members identify any significant costs in adopting the 2012 codes. The work group members noted that many of the changes to the 2012 codes were clarification or style changes. The work group members also stated that some cities had already adopted the 2012 codes.

According to the Department's research, at least 47 cities, including major cities (Houston, Dallas, San Antonio, Amarillo, Waco and Austin), have adopted or are in the process of adopting the 2012 editions of these codes. Based on the work group's findings and the Department's research, the Department has determined that there will be no significant changes or costs in adopting the 2012 codes.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed rule is in effect there will be no foreseeable implications relating to cost or revenues of the

state or local government as a result of enforcing or administering the proposed rule.

Mr. Kuntz also has determined that for each year of the first five-year period the amendments are in effect, the public benefit will be consistency in the health and safety, installation, and maintenance requirements for air conditioning and refrigeration work performed in Texas.

There will be no adverse economic effect on small or micro-businesses or to persons who are required to comply with the rule as proposed.

Since the agency has determined that the proposed rule will have no adverse economic effect on small businesses preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Pauline Easley, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or by facsimile to (512) 475-3032, or electronically to erule.comments@tdlr.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, Chapters 51 and 1302, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 1302. No other statutes, articles, or codes are affected by the proposal.

§75.110. *Applicable Codes.*

(a) (No change.)

(b) The 2009 codes will be in effect through December 31, 2014. All air conditioning and refrigeration work permitted or started prior to January 1, 2015, may be completed in accordance with the 2009 code editions. [Use of these codes will be effective September 1, 2014.]

(c) The commission adopts the following as the applicable codes as referenced in the Act and this chapter:

(1) 2012 edition of the Uniform Mechanical Code; and

(2) 2012 editions of the International Mechanical Code, the International Residential Code, and other applicable codes.

(d) The 2012 codes will be effective January 1, 2015. All air conditioning and refrigeration work started on or after January 1, 2015, must be performed in accordance with the 2012 code editions.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 31, 2014.

TRD-201401415

William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 463-8179



TITLE 22. EXAMINING BOARDS

PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER B. PROFESSIONAL STANDARDS

22 TAC §501.62

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.62, concerning Other Professional Standards.

The amendment to §501.62 will add two additional AICPA standards.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be the identification of the applicable professional standards that licensees are required to adhere to.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on May 12, 2014. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be

impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule, and then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

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

§501.62. *Other Professional Standards.*

A person in the performance of consulting services, accounting and review services, any other attest service, or tax services shall conform to the professional standards applicable to such services. For purposes of this section, such professional standards are considered to be interpreted by:

(1) AICPA issued standards, including but not limited to:

(A) Statements on Standards on Consulting Services (SSCS);

(B) Statements on Standards for Accounting and Review Services (SSARS);

(C) Statements on Standards for Attestation Engagements (SSAE);

(D) Statements on Standards for Tax Services (SSTS);

[øf] (E) Statements on Standards for Financial Planning Services (SSFPS); or

(F) Statements on Standards for Valuation Services (SSVS).

(2) pronouncements by other professional entities having similar national or international authority recognized by the board.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 27, 2014.

TRD-201401343

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 305-7842



CHAPTER 513. REGISTRATION

SUBCHAPTER B. REGISTRATION OF CPA FIRMS

22 TAC §513.10

The Texas State Board of Public Accountancy (Board) proposes an amendment to §513.10, concerning Eligibility for Firm License.

The amendment to §513.10 will clarify that a licensee may not use the CPA title in the name of an unlicensed firm.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be clarification of firm names.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on May 12, 2014. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental, and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

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

§513.10. Eligibility for Firm License.

(a) Except as provided for in §501.81(d) of this title (relating to Firm License Requirements), a firm providing attest services or using the titles CPAs, CPA Firm, Certified Public Accountants, Certified Public Accounting Firm, Auditing Firm, or a variation of any of those titles shall do so only through a licensed firm.

(b) [(a)] To be eligible for a firm license, the firm must show:

(1) that a majority of the ownership of the firm, in terms of both financial interests and voting rights, belongs to individuals who hold certificates issued under this chapter or are licensed as a CPA in another state; and

(2) that all attest services performed in this state are under the supervision of an individual who holds a certificate issued by the board or by another state.

(c) [(b)] Financial interests shall include but shall not be limited to stock shares, capital accounts, capital contributions, and equity interests of any kind. Financial interests also include contractual rights and obligations similar to those of partners, shareholders or other owners of an equity interest in a legal entity.

(d) [(c)] Voting rights shall include but shall not be limited to any right to vote on the firm's ownership, business, partners, shareholders, management, profits, losses and/or equity ownership.

(e) Interpretive comment: A licensee offering non-attest accounting services through an unlicensed firm in accordance with §501.81(d) of this title may not use the CPA designation in the unlicensed firm's name. For example: John Smith may not use the firm name "John Smith, CPA, Tax Services" unless the firm is licensed by the board.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

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For further information, please call: (512) 305-7842



22 TAC §513.15

The Texas State Board of Public Accountancy (Board) proposes an amendment to §513.15, concerning Firm Offices.

The amendment to §513.15 will to clarify that in order to qualify as the resident manager of a CPA firm the resident manager must be a resident of Texas.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to clarify that a resident manager's residency must be a Texas residency.

The probable economic cost to persons required to comply with the amendment will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on May 12, 2014. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

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

§513.15. Firm Offices.

(a) A certified public accountancy firm must hold a license for each office located in Texas.

(b) Each office of a firm must be under the direct supervision of a resident manager who is a resident of Texas. A resident manager may be an owner, member, partner, shareholder, or employee of the firm and must be licensed under the Act.

(c) A resident manager may supervise more than one office provided that the firm's application for issuance or renewal of the firm license or registration identifies each of the offices the resident manager will supervise.

(d) A resident manager is responsible for the supervision of professional services and may be held responsible for the violations of the Act or Rules for the activities of each office under his supervision.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 27, 2014.

TRD-201401345

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 305-7842



CHAPTER 525. CRIMINAL BACKGROUND INVESTIGATIONS

22 TAC §525.3

The Texas State Board of Public Accountancy (Board) proposes new §525.3, concerning Criminal Background Checks.

New §525.3 will allow the Board to require a criminal history background check of Federal Bureau of Investigation (FBI) records databases on all applicants to take the Uniform CPA Examination (UCPAE).

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rule will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rule will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rule will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rule will be none.

Mr. Treacy has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of adoption of the proposed new rule will be to protect the public from the certification of individuals with a criminal history in other states that could evidence a pattern of behavior not conducive to the practice of public accountancy.

The probable economic cost to persons required to comply with the new rule will be none.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

Mr. Treacy has determined that the proposed new rule will not have an adverse economic effect on small businesses because the new rule does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed new rule will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed new rule from any interested person. Comments must be received at the Board no later than noon on May 12, 2014. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rule will have an adverse economic effect on small businesses; if the proposed new rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the new rule, describe and estimate the economic impact of the new rule on small businesses, offer alternative methods of achieving the purpose of the new rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed new rule is to be adopted, and finally describe how the health, safety, environmental, and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The new rule is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

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

§525.3. Criminal Background Checks.

(a) The board may require a Federal Bureau of Investigation criminal history records background check on all applicants to become licensed, registered, or certified in Texas at any stage in the application process.

(b) Applicants required to provide the Federal Bureau of Investigation criminal history records background check will be responsible for the cost of searching the data base.

(c) Applicants will be provided with information on how to obtain the Federal Bureau of Investigation criminal history records background check through the Texas Department of Public Safety, and the Texas Department of Public Safety will provide the records directly to the board.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 27, 2014.

TRD-201401346

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 305-7842



TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

SUBCHAPTER E. NEWBORN SCREENING FOR CRITICAL CONGENITAL HEART DISEASE

25 TAC §§37.75 - 37.79

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes new §§37.75 - 37.79, concerning newborn screening for critical congenital heart disease (CCHD).

BACKGROUND AND PURPOSE

The department administers the Newborn Screening Program, which is designed to screen all newborns in the state for certain genetic or heritable disorders. If identified and treated early, serious problems such as developmental delays, intellectual disability, illness, or death can be prevented or ameliorated. Newborn screening is comprised of screening performed on blood specimens (bloodspot-based newborn screening) as well as screening performed at the point-of-care, which takes place in birthing facilities or hospitals. This subchapter covers point-of-care newborn screening for CCHD.

The new rules are necessary to comply with House Bill 740, 83rd Legislature, Regular Session, 2013, which amended Texas Health and Safety Code, Chapter 33, by adding screening for CCHD. The statute requires the department to establish test procedures and standards of accuracy for screening, and to describe the required reporting of confirmed cases of CCHD to the department. Unlike bloodspot-based screening, the statute does not authorize follow-up by department staff for positive screens or for data collection other than confirmed cases. The new rules will: (1) explain the purpose; (2) provide definitions; (3) outline the exemptions from screening; (4) establish the test procedures and standards of accuracy for screening to be established by the department; and (5) describe required reporting of confirmed cases to the department.

SECTION-BY-SECTION SUMMARY

New §37.75 provides a comprehensive summary of the contents of the subchapter which requires the department to implement newborn screening for CCHD.

New §37.76 defines birthing facility; CCHD; department; echocardiogram; health care practitioner; neonatal intensive care unit; newborn; physician; pulse oximeter; and screening algorithm.

New §37.77 describes exemptions from the requirement to conduct the newborn screening for CCHD. Qualifying exemptions are: (1) the parent declines the screening; (2) the newborn is transferred to another facility before the screening test is performed; (3) the post-natal screening test has previously been completed; (4) the newborn is discharged from the birthing facility not more than 10 hours after birth and a referral for the newborn was made to another birthing facility, physician, or health care provider; (5) the newborn has previously been diagnosed with CCHD; or (6) the newborn has had a post-natal echocardiogram.

New §37.78 sets forth test procedures and standards, and includes when, where, and how screening tests must be performed, unless exempted from the requirements by §37.77.

New §37.79 sets forth who is responsible for reporting, and how reporting to the department is to be conducted for confirmed cases of CCHD.

FISCAL NOTE

Sam Cooper, Director, Specialized Health Services Section, has determined that for each year of the first five years that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Cooper has also determined that there should be no adverse economic impact on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices, beyond what is already required by statute, in order to comply with the sections.

REGULATORY FLEXIBILITY ANALYSIS

Texas Government Code, Chapter 2006, was amended by the House Bill 3430, 80th Legislature, Regular Session, 2007, to require, as part of the rulemaking process, state agencies to prepare a Regulatory Flexibility Analysis that considers alternative methods of achieving the purpose of the rules. There is an exception to this requirement, however. An agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small businesses, would not be protective of the "health, safety and environmental and economic welfare of the state." When the proposed rules are an implementation of legislative directives because of statutory changes, that proposed rule language becomes *per se* consistent with the health, safety, or environmental and economic welfare of the state, and therefore the department need not consider alternative methodologies as part of the preamble small business impact analysis.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact to local employment.

PUBLIC BENEFIT

Mr. Cooper has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. Public benefit anticipated as a result of enforcing or administering the sections is to define how the state administers newborn screening for CCHD for all Texas babies through the addition of test procedures and standards of accuracy, and requirements for reporting confirmed cases to the department. Early detection and timely intervention can decrease morbidity and lead to better outcomes. These proposed rules will improve department operations, provide user-friendly rules for stakeholders, provide for greater department transparency in its processes, and make department actions more predictable for stakeholders. All of this would constitute a public benefit.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and

that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to David R. Martinez, Newborn Screening Unit, Specialized Health Services Section, Division of Family and Community Health Services, Department of State Health Services, Mail Code 1918, P.O. Box 149347, Austin, Texas, 78714-9347, or by email at David.R.Martinez@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The new rules are authorized by Texas Health and Safety Code, §33.002, which requires the department to adopt rules necessary to carry out the program, and by Chapter 33 in general; and Texas Government Code, §531.0055(e), and the Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Texas Health and Safety Code, Chapter 1001.

The new rules affect Texas Health and Safety Code, Chapters 33 and 1001, and Texas Government Code, Chapter 531.

§37.75. Purpose.

This subchapter implements Texas Health and Safety Code, Chapter 33, administered by the Department of State Health Services (department), associated with conducting point-of-care newborn screening for critical congenital heart disease (CCHD). Newborns delivered in the state must be screened at a birthing facility for CCHD as described in this subchapter. This subchapter also defines the test procedures and standards required by the department for each screening test and details reporting and record keeping requirements on confirmed cases.

§37.76. Definitions.

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

(1) Birthing facility--An inpatient or ambulatory health care facility that offers obstetrical or newborn care services. The term includes:

(A) a hospital licensed under Texas Health and Safety Code, Chapter 241, that offers obstetrical services;

(B) a birthing center licensed under Texas Health and Safety Code, Chapter 244;

(C) a children's hospital; or

(D) a facility that provides obstetrical services and is maintained and operated by this state or an agency of this state.

(2) Critical Congenital Heart Disease (CCHD)--An abnormality in the structure or function of the heart that exists at birth, that causes severe, life-threatening symptoms, and requires medical intervention within the first few hours, days, or months of life.

(3) Department--The Department of State Health Services or its successor.

(4) Echocardiogram--An ultrasound test that evaluates the structure and function of the heart.

(5) Health care practitioner--One of the following individuals who is currently licensed and in good standing as indicated:

(A) an advanced practice registered nurse licensed by the Texas Board of Nursing pursuant to Texas Occupations Code, Chapter 301;

(B) a physician assistant licensed by the Texas Physician Assistant Board pursuant to Texas Occupations Code, Chapter 204; or

(C) a midwife licensed by the Texas Midwifery Board pursuant to Texas Occupations Code, Chapter 203.

(6) Neonatal intensive care unit (NICU)--An intensive care unit specializing in the care of ill or premature newborn infants.

(7) Newborn--A child through 30 days of age.

(8) Physician--A person licensed to practice medicine by the Texas Medical Board pursuant to Texas Occupations Code, Chapter 151.

(9) Pulse Oximeter--A U.S. Food and Drug Administration approved instrument used to measure the percentage of hemoglobin in the blood that is saturated with oxygen in neonates.

(10) Screening algorithm--A standardized process and methodology used to conduct newborn screening for CCHD.

§37.77. Exemption from Screen.

The newborn screening test for CCHD referenced in §37.78 of this title (relating to Test Procedures and Standards) is not required for a newborn under the following conditions:

(1) the parent declines the screening;

(2) the newborn is transferred to another facility before the screening test is performed;

(3) the screening test has previously been completed after birth;

(4) the newborn is discharged from the birthing facility not more than 10 hours after birth and a referral for the newborn was made to another birthing facility, physician, or health care provider;

(5) the newborn has previously been diagnosed with CCHD; or

(6) the newborn has had a post-natal echocardiogram.

§37.78. Test Procedures and Standards.

(a) A screening test for CCHD using pulse oximetry must be performed at a birthing facility that provides care to newborn patients

except as described in §37.77 of this title (relating to Exemption from Screen).

(b) Testing procedures must be consistent with the most current published screening algorithm and any other protocol currently posted, linked, or referenced on the department's Newborn Screening website at <http://www.dshs.state.tx.us/newborn/>.

(c) Pulse oximeters used to conduct CCHD newborn screening must meet the standards and accuracy as determined by the Food and Drug Administration for hospital use in newborns.

(d) Newborns in the NICU must receive CCHD screening prior to discharge except as described in §37.77 of this title.

§37.79. Reporting.

(a) A physician, health care practitioner, health authority, birthing facility, or other individual who has the information of a confirmed case of a disorder for which a screening test is required, shall report a confirmed case to the department.

(b) Confirmed case information must be submitted to the department's Newborn Screening Unit using the most current reporting method(s) located on the department's Newborn Screening website at <http://www.dshs.state.tx.us/newborn/>.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 31, 2014.

TRD-201401417

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 776-6972



CHAPTER 133. HOSPITAL LICENSING

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §§133.2, 133.41 and 133.45, concerning the licensing and regulation of hospitals.

BACKGROUND AND PURPOSE

The purpose of the amendments to the hospital licensing rules is to comply with legislative requirements for hospitals passed during the 83rd Legislature, Regular Session, 2013: House Bill (HB) 740, HB 1376, Senate Bill (SB) 793, SB 944, SB 945, and SB 1191. A change in the federal Centers for Medicaid and Medicare "Conditions of Participation" resulted in an additional rule amendment.

House Bill 740 amended Health and Safety Code, Chapter 33, and requires hospitals to provide newborn screening for critical congenital heart disease (CCHD).

Senate Bill 793 amended Health and Safety Code, Chapter 47, to clarify the newborn hearing screening requirements in the hospital.

House Bill 1376 added Subchapter H to Health and Safety Code, Chapter 241, to require that hospital owned and operated free-standing emergency medical care facilities (exempt from licensing requirements of Health and Safety Code Chapter 254) adver-

tise as emergency rooms and prominently display billing notices and information for the public.

Senate Bill 944 requires that the governing bodies of hospitals that have mental health service units adopt, implement, and enforce procedures for criminal background checks on all prospective personnel considered for assignment to that unit, except for persons currently licensed by this state as health professionals.

Senate Bill 945 amended Health and Safety Code, Chapter 241, to require hospitals to adopt, implement and enforce policies requiring that photo identification badges for hospital personnel, meet certain specifications.

Senate Bill 1191 amended Health and Safety Code, Chapter 323, relating to emergency services for sexual assault survivors in an emergency department of a hospital.

One modification was made to maintain hospitals' compliance with all subchapters of Health and Safety Code, Chapter 171.

A change to the federal Centers for Medicaid and Medicare "Conditions of Participation" prompted a rule amendment relating to authentication/signing of physician orders.

SECTION-BY-SECTION SUMMARY

Hospital owned and operated freestanding emergency medical care facilities (exempt from licensing requirements of Texas Health and Safety Code Chapter 254) which advertise as emergency rooms are required to prominently display billing notices and information for the public. In response to HB 1376, the proposed rule amendments add a definition of a freestanding emergency medical care facility for these purposes at §133.2(18); and add language regarding advertising and billing requirements at §133.41(e)(1)(E).

Concerning SB 1191, language is added to §133.41(e)(6) that includes requirements related to forensic evidence collection, stabilization, transfers, other responsibilities and mandatory staff training for care of a sexual assault survivor in an emergency room.

In response to SB 793, an amendment to §133.41(f)(4)(D) clarifies that a hospital may refer a patient to another program for hearing screening without requiring a transfer agreement. The addition of §133.41(f)(4)(D)(iv) exempts the hospital from providing the services if a newborn was discharged not more than 10 hours after birth and a referral was made to another program.

The requirement for hospitals to provide newborn screening for CCHD was added to §133.41(f)(4)(E) to comply with HB 740. The statute requires the department to establish test procedures and standards of accuracy for screening, and to describe the required reporting of confirmed cases of CCHD to the department. The new rules concerning these CCHD procedures and requirements are described in §§37.75 - 37.79 of this title.

Concerning SB 944, language is added to §133.41(f)(7) which requires the governing bodies of hospitals that have mental health service units adopt, implement and enforce procedures for criminal background checks on all prospective personnel considered for assignment to that unit, except for persons currently licensed by this state as health professionals.

In response to SB 945, an amendment to §133.41(f)(9) requires that hospitals adopt, implement and enforce policies requiring that photo identification badges for hospital personnel meet certain specifications.

Amendments to §133.41(j)(7) and (o)(4)(B)(ii) reflect the change in the time limit from 48 to 96 hours for prescribers in hospitals to date, time, and authenticate/sign verbal orders in response to a change to the federal Centers for Medicaid and Medicare "Conditions of Participation."

An amendment to §133.45(g)(1) will ensure compliance with Health and Safety Code, Chapter 171.

FISCAL NOTE

Renee Clack, Section Director, Health Care Quality Section, has determined that for each year of the first five years that the sections will be in effect, there will not be fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Clack also has determined that there will not be an adverse economic impact on small businesses or micro-businesses required to comply with the sections as proposed because this was determined by interpretation of the rules that small business and micro-businesses will not be required to alter their business practices in order to comply with the sections.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Ms. Clack also has determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. Specifically, the rules are expected to positively impact the care provided to patients in Texas hospitals, including newborn infants, sexual assault victims and others in need of emergency medical care.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendments do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Allison J. Hughes, Rules Coordinator, Health Care Quality Section, Division of Regulatory Services, Department of State Health Services, P.O. Box 149347, Mail Code 2822, Austin, Texas 78714-9347, (512) 834-6775 or by email to allison.hughes@dshs.state.tx.us. Comments will be accepted

for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §133.2

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §241.026, concerning rules and minimum standards for the licensing and regulation of hospitals required to obtain a license under this chapter; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendment affects Government Code, Chapter 531; and Health and Safety Code, Chapters 241 and 1001.

§133.2. Definitions.

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

(1) - (17) (No change.)

(18) Freestanding emergency medical care facility--A facility that is structurally separate and distinct from a hospital and receives individuals for the provision of emergency care. The facility is owned and operated by the hospital, and is exempt from the licensing requirements of Texas Health and Safety Code, Chapter 254, under §254.052(7) or (8).

(19) [(48)] General hospital--An establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals requiring diagnosis, treatment, or care for illness, injury, deformity, abnormality, or pregnancy; and

(B) regularly maintains, at a minimum, clinical laboratory services, diagnostic X-ray services, treatment facilities including surgery or obstetrical care or both, and other definitive medical or surgical treatment of similar extent.

(20) [(49)] Governing body--The governing authority of a hospital which is responsible for a hospital's organization, management, control, and operation, including appointment of the medical staff; includes the owner or partners for hospitals owned or operated by an individual or partners.

(21) [(20)] Governmental unit--A political subdivision of the state, including a hospital district, county, or municipality, and any department, division, board, or other agency of a political subdivision.

(22) [(24)] Hospital--A general hospital or a special hospital.

(23) [(22)] Hospital administration--Administrative body of a hospital headed by an individual who has the authority to represent the hospital and who is responsible for the operation of the hospital according to the policies and procedures of the hospital's governing body.

(24) [(23)] Inpatient--An individual admitted for an intended length of stay of 24 hours or greater.

(25) [(24)] Inpatient services--Services provided to an individual admitted to a hospital for an intended length of stay of 24 hours or greater.

(26) [(25)] Intellectual Disability--Significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.

(27) [(26)] Licensed vocational nurse (LVN)--A person who is currently licensed under the Nursing Practice Act by the Board of Nurse Examiners for the State of Texas as a licensed vocational nurse or who holds a valid vocational nursing license with multi-state licensure privilege from another compact state.

(28) [(27)] Licensee--The person or governmental unit named in the application for issuance of a hospital license.

(29) [(28)] Medical staff--A physician or group of physicians and a podiatrist or group of podiatrists who by action of the governing body of a hospital are privileged to work in and use the facilities of a hospital for or in connection with the observation, care, diagnosis, or treatment of an individual who is, or may be, suffering from a mental or physical disease or disorder or a physical deformity or injury.

(30) [(29)] Mental health services--All services concerned with research, prevention, and detection of mental disorders and disabilities and all services necessary to treat, care for, supervise, and rehabilitate persons who have a mental disorder or disability, including persons whose mental disorders or disabilities result from alcoholism or drug addiction.

(31) [(30)] Niche hospital--A hospital that:

(A) classifies at least two-thirds of the hospital's Medicare patients or, if data is available, all patients:

(i) in not more than two major diagnosis-related groups; or

(ii) in surgical diagnosis-related groups.

(B) specializes in one or more of the following areas:

(i) cardiac;

(ii) orthopedics;

(iii) surgery; or

(iv) women's health; and

(C) is not:

(i) a public hospital;

(ii) a hospital for which the majority of inpatient claims are for major diagnosis-related groups relating to rehabilitation, psychiatry, alcohol and drug treatment, or children or newborns; or

(iii) a hospital with fewer than 10 claims per bed per year.

(32) [(34)] Nurse--A registered, vocational, or advanced practice registered nurse licensed by the Texas Board of Nursing or entitled to practice in this state under Occupations Code, Chapters 301, 304, or 305.

(33) [(32)] Outpatient--An individual who presents for diagnostic or treatment services for an intended length of stay of less than 24 hours; provided, however, that an individual who requires continued observation may be considered as an outpatient for a period of time not to exceed a total of 48 hours.

(34) [(33)] Outpatient services--Services provided to patients whose medical needs can be met in less than 24 hours and are provided within the hospital; provided, however, that services that require continued observation may be considered as outpatient services for a period of time not to exceed a total of 48 hours.

(35) [(34)] Owner--One of the following persons or governmental unit which will hold or does hold a license issued under the statute in the person's name or the person's assumed name:

(A) a corporation;

(B) a governmental unit;

(C) a limited liability company;

(D) an individual;

(E) a partnership if a partnership name is stated in a written partnership agreement or an assumed name certificate;

(F) all partners in a partnership if a partnership name is not stated in a written partnership agreement or an assumed name certificate; or

(G) all co-owners under any other business arrangement.

(36) [(35)] Patient--An individual who presents for diagnosis or treatment.

(37) [(36)] Pediatric and adolescent hospital--A general hospital that specializes in providing services to children and adolescents, including surgery and related ancillary services.

(38) [(37)] Person--An individual, firm, partnership, corporation, association, or joint stock company, and includes a receiver, trustee, assignee, or other similar representative of those entities.

(39) [(38)] Physician--A physician licensed by the Texas Medical Board.

(40) [(39)] Physician assistant--A person licensed as a physician assistant by the Texas State Board of Physician Assistant Examiners.

(41) [(40)] Podiatrist--A podiatrist licensed by the Texas State Board of Podiatric Medical Examiners.

(42) [(41)] Practitioner--A health care professional licensed in the State of Texas, other than a physician, podiatrist, or dentist. A practitioner shall practice in a manner consistent with their underlying practice act.

(43) [(42)] Premises--A premises may be any of the following:

(A) a single building where inpatients receive hospital services; or

(B) multiple buildings where inpatients receive hospital services provided that the following criteria are met:

(i) all buildings in which inpatients receive hospital services are subject to the control and direction of the same governing body;

(ii) all buildings in which inpatients receive hospital services are within a 30-mile radius of the primary hospital location;

(iii) there is integration of the organized medical staff of each of the hospital locations to be included under the single license;

(iv) there is a single chief executive officer for all of the hospital locations included under the license who reports directly to the governing body and through whom all administrative authority flows and who exercises control and surveillance over all administrative activities of the hospital;

(v) there is a single chief medical officer for all of the hospital locations under the license who reports directly to the governing body and who is responsible for all medical staff activities of the hospital;

(vi) each hospital location to be included under the license that is geographically separate from the other hospital locations contains at least one nursing unit for inpatients which is staffed and maintains an active inpatient census, unless providing only diagnostic or laboratory services, or a combination of diagnostic or laboratory services, in the building for hospital inpatients; and

(vii) each hospital that is to be included in the license complies with the emergency services standards:

(I) for a general hospital, if the hospital provides surgery or obstetrical care or both; or

(II) for a special hospital, if the hospital does not provide surgery or obstetrical care.

(44) [(43)] Presurvey conference--A conference held with department staff and the applicant or the applicant's representative to review licensure rules and survey documents and provide consultation prior to the on-site licensure inspection.

(45) [(44)] Psychiatric disorder--A clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is typically associated with either a painful syndrome (distress) or impairment in one or more important areas of behavioral, psychological, or biological function and is more than a disturbance in the relationship between the individual and society.

(46) [(45)] Quality improvement--A method of evaluating and improving processes of patient care which emphasizes a multidisciplinary approach to problem solving, and focuses not on individuals, but systems of patient care which might be the cause of variations.

(47) [(46)] Registered nurse (RN)--A person who is currently licensed by the Texas Board of Nursing for the State of Texas as a registered nurse or who holds a valid registered nursing license with multi-state licensure privilege from another compact state.

(48) [(47)] Special hospital--An establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals who are regularly admitted, treated, and discharged and who require services more intensive than room, board, personal services, and general nursing care;

(B) has clinical laboratory facilities, diagnostic X-ray facilities, treatment facilities, or other definitive medical treatment;

(C) has a medical staff in regular attendance; and

(D) maintains records of the clinical work performed for each patient.

(49) [(48)] Stabilize--With respect to an emergency medical condition, to provide such medical treatment of the condition necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or that the woman has delivered the child and the placenta.

(50) [(49)] Surgical technologist--A person who practices surgical technology as defined in Health and Safety Code, Chapter 259.

(51) [(50)] Transfer--The movement (including the discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital, but does not include such a movement of an individual who has been declared dead, or leaves the facility without the permission of any such person.

(52) [(51)] Universal precautions--Procedures for disinfection and sterilization of reusable medical devices and the appropriate use of infection control, including hand washing, the use of protective barriers, and the use and disposal of needles and other sharp instruments as those procedures are defined by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services. This term includes standard precautions as defined by CDC which are designed to reduce the risk of transmission of blood borne and other pathogens in hospitals.

(53) [(52)] Violation--Failure to comply with the licensing statute, a rule or standard, special license provision, or an order issued by the commissioner of state health services (commissioner) or the commissioner's designee, adopted or enforced under the licensing statute. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 31, 2014.

TRD-201401422

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 776-6972



SUBCHAPTER C. OPERATIONAL REQUIREMENTS

25 TAC §133.41, §133.45

STATUTORY AUTHORITY

The amendments are authorized by Health and Safety Code, §241.026, concerning rules and minimum standards for the licensing and regulation of hospitals required to obtain a license under this chapter; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendments affect Government Code, Chapter 531; and Health and Safety Code, Chapters 241 and 1001.

§133.41. *Hospital Functions and Services.*

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

(e) Emergency services. All licensed hospital locations, including multiple-location sites, shall have an emergency suite that complies with §133.161(a)(1)(A) of this title (relating to Requirements

for Buildings in Which Existing Licensed Hospitals are Located) or §133.163(f) of this title, and the following.

(1) Organization. The organization of the emergency services shall be appropriate to the scope of the services offered.

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

(E) Each freestanding emergency medical care facility shall advertise as an emergency room. The facility shall display notice that it functions as an emergency room.

(i) The notice shall explain that patients who receive medical services will be billed according to comparable rates for hospital emergency room services in the same region.

(ii) The notice shall be prominently and conspicuously posted for display in a public area of the facility that is readily available to each patient, managing conservator, or guardian. The postings shall be easily readable and consumer-friendly. The notice shall be in English and in a second language appropriate to the demographic makeup of the community served.

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

(6) Emergency services for survivors of sexual assault. This section does not affect the duty of a health care facility to comply with the requirements of the federal Emergency Medical Treatment and Active Labor Act of 1986 (42 U.S.C. §1395dd) that are applicable to the facility.

(A) The hospital shall develop, implement and enforce policies and procedures to ensure that, except as otherwise provided by subparagraph (C) of this paragraph, after a sexual assault survivor presents to the hospital following a sexual assault, the hospital shall provide [receives one of the following:]

[(+)] the care specified under subparagraph (D) [(+B)] of this paragraph.[: or]

[(ii) stabilization and transfer to a health care facility designated in a community-wide plan as the health care facility for treating sexual assault survivors, where the survivor will receive the care specified under subparagraph (B) of this paragraph.]

(B) A facility that is not a health care facility designated in a community-wide plan as the primary health care facility in the community for treating sexual assault survivors shall inform the survivor that:

(i) the facility is not the designated facility and provide to the survivor the name and location of the designated facility; and

(ii) the survivor is entitled, at the survivor's option:

(I) to receive the care described by subparagraph (D) of this paragraph at that facility, subject to subparagraph (D)(i) of this paragraph; or

(II) to be stabilized and to be transferred to and receive the care described by subparagraph (D) of this paragraph at a health care facility designated in a community-wide plan as the primary health care facility in the community for treating sexual assault survivors.

(C) If a sexual assault survivor chooses to be transferred under subparagraph (B)(ii)(II) of this paragraph, after obtaining the survivor's written, signed consent to the transfer, the facility shall stabilize and transfer the survivor to a health care facility in the community designated in a community-wide plan as the health care facility for treating

sexual assault survivors, where the survivor will receive the care specified under subparagraph (D) of this paragraph.

(D) [~~(B)~~] A hospital providing care to a sexual assault survivor shall provide the survivor with the following:

(i) subject to subparagraph (G) of this paragraph, a forensic medical examination in accordance with Government Code, Chapter 420, Subchapter B, when the examination has been requested by a law enforcement agency under Code of Criminal Procedure, Article 56.06, or is conducted under Code of Criminal Procedure, Article 56.065. If a sexual assault survivor is age 18 or older and has not reported the assault to a law enforcement agency, a hospital shall provide this forensic medical examination, when the sexual assault survivor has arrived at the facility not later than 96 hours after the time the assault occurred and has consented to the examination;

(ii) a private area, if available, to wait or speak with the appropriate medical, legal, or sexual assault crisis center staff or volunteer until a physician, nurse, or physician assistant is able to treat the survivor;

(iii) access to a sexual assault program advocate, if available, as provided by Code of Criminal Procedure, Article 56.045;

(iv) the information form required by Health and Safety Code, §323.005;

(v) a private treatment room, if available;

(vi) if indicated by the history of contact, access to appropriate prophylaxis for exposure to sexually transmitted infections; and

(vii) the name and telephone number of the nearest sexual assault crisis center.

(E) [~~(C)~~] The hospital must obtain documented consent before providing the forensic medical examination and treatment.

(F) [~~(D)~~] Upon request, the hospital shall submit to the department its plan for the provision of service to sexual assault survivors. The plan must describe how the hospital will ensure that the services required under subparagraph (D) [~~(B)~~] of this paragraph will be provided.

(i) The hospital shall submit the plan by the 60th day after the department makes the request.

(ii) The department will approve or reject the plan not later than the 120th day following the submission of the plan.

(iii) If the department is not able to approve the plan, the department will return the plan to the hospital and will identify the specific provisions of statutes or rules with which the hospital's plan failed to comply.

(iv) The hospital shall correct and resubmit the plan to the department for approval not later than the 90th day after the plan is returned to the hospital.

(G) A person may not perform a forensic examination on a sexual assault survivor unless the person has the basic training described by Health and Safety Code, §323.0045, or the equivalent education and training.

(H) Basic Sexual Assault Forensic Evidence Collection Training.

(i) A person who performs a forensic examination on a sexual assault survivor must have at least basic forensic evidence collection training or the equivalent education.

(ii) A person who completes a continuing medical or nursing education course in forensic evidence collection that is approved or recognized by the appropriate licensing board is considered to have basic sexual assault forensic evidence training for purposes of this chapter.

(iii) Each health care facility that has an emergency department and that is not a health care facility designated in a community-wide plan as the primary health care facility in the community for treating sexual assault survivors shall develop a plan to train personnel on sexual assault forensic evidence collection.

(I) Sexual Assault Survivors Who Are Minors. This chapter does not affect participating entities of children's advocacy centers under Family Code, Chapter 264, Subchapter E, or the working protocols set forth by their multidisciplinary teams to ensure access to specialized medical assessments for sexual assault survivors who are minors. To the extent of a conflict with Family Code, Chapter 264, Subchapter E, that subchapter controls.

(f) Governing body.

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

(4) Responsibilities relating to the medical staff.

(A) - (C) (No change.)

(D) In hospitals that provide obstetrical services, the governing body shall ensure that the hospital implements a newborn audiological screening program, consistent with the requirements of Health and Safety Code, Chapter 47 (Hearing Loss in Newborns), and performs, either directly or through a referral to another program [~~transfer agreement~~], audiological screenings for the identification of hearing loss on each newborn or infant born at the facility before the newborn or infant is discharged. These audiological screenings are required to be performed on all newborns or infants before discharge from the facility unless:

(i) (No change.)

(ii) the newborn or infant requires emergency transfer to a tertiary care facility prior to the completion of the screening; [~~or~~]

(iii) the screening previously has been completed; or[-]

(iv) the newborn was discharged from the facility not more than 10 hours after birth and a referral for the newborn was made to another program.

(E) In hospitals that provide obstetrical services, the governing body shall adopt, implement, and enforce policies and procedures related to the testing of any newborn for critical congenital heart disease (CCHD) that may present themselves at birth. The facility shall implement testing programs for all infants born at the facility for CCHD. In the event that a newborn is presented at the emergency room following delivery at a birthing center or a home birth that may or may not have been assisted by a midwife, the facility shall ascertain if any testing for CCHD had occurred and, if not, shall provide the testing necessary to make such determination. The rules concerning the CCHD procedures and requirements are described in §§37.75 - 37.79 of this title.

(F) [~~(E)~~] The governing body shall determine, in accordance with state law and with the advice of the medical staff, which categories of practitioners are eligible candidates for appointment to the medical staff.

(i) In considering applications for medical staff membership and privileges or the renewal, modification, or revocation of medical staff membership and privileges, the governing body must ensure that each physician, podiatrist, and dentist is afforded procedural due process.

(I) If a hospital's credentials committee has failed to take action on a completed application as required by subclause (VIII) of this clause, or a physician, podiatrist, or dentist is subject to a professional review action that may adversely affect his medical staff membership or privileges, and the physician, podiatrist, or dentist believes that mediation of the dispute is desirable, the physician, podiatrist, or dentist may require the hospital to participate in mediation as provided in Civil Practice and Remedies Code (CPRC), Chapter 154. The mediation shall be conducted by a person meeting the qualifications required by CPRC §154.052 and within a reasonable period of time.

(II) Subclause (I) of this clause does not authorize a cause of action by a physician, podiatrist, or dentist against the hospital other than an action to require a hospital to participate in mediation.

(III) An applicant for medical staff membership or privileges may not be denied membership or privileges on any ground that is otherwise prohibited by law.

(IV) A hospital's bylaw requirements for staff privileges may require a physician, podiatrist, or dentist to document the person's current clinical competency and professional training and experience in the medical procedures for which privileges are requested.

(V) In granting or refusing medical staff membership or privileges, a hospital may not differentiate on the basis of the academic medical degree held by a physician.

(VI) Graduate medical education may be used as a standard or qualification for medical staff membership or privileges for a physician, provided that equal recognition is given to training programs accredited by the Accreditation Council for Graduate Medical Education and by the American Osteopathic Association.

(VII) Board certification may be used as a standard or qualification for medical staff membership or privileges for a physician, provided that equal recognition is given to certification programs approved by the American Board of Medical Specialties and the Bureau of Osteopathic Specialists.

(VIII) A hospital's credentials committee shall act expeditiously and without unnecessary delay when a licensed physician, podiatrist, or dentist submits a completed application for medical staff membership or privileges. The hospital's credentials committee shall take action on the completed application not later than the 90th day after the date on which the application is received. The governing body of the hospital shall take final action on the application for medical staff membership or privileges not later than the 60th day after the date on which the recommendation of the credentials committee is received. The hospital must notify the applicant in writing of the hospital's final action, including a reason for denial or restriction of privileges, not later than the 20th day after the date on which final action is taken.

(ii) The governing body is authorized to adopt, implement and enforce policies concerning the granting of clinical privileges to advanced practice nurses and physician assistants, including policies relating to the application process, reasonable qualifications for privileges, and the process for renewal, modification, or revocation of privileges.

(I) If the governing body of a hospital has adopted, implemented and enforced a policy of granting clinical privileges to advanced practice nurses or physician assistants, an individual advanced practice nurse or physician assistant who qualifies for privileges under that policy shall be entitled to certain procedural rights to provide fairness of process, as determined by the governing body of the hospital, when an application for privileges is submitted to the hospital. At a minimum, any policy adopted shall specify a reasonable period for the processing and consideration of the application and shall provide for written notification to the applicant of any final action on the application by the hospital, including any reason for denial or restriction of the privileges requested.

(II) If an advanced practice nurse or physician assistant has been granted clinical privileges by a hospital, the hospital may not modify or revoke those privileges without providing certain procedural rights to provide fairness of process, as determined by the governing body of the hospital, to the advanced practice nurse or physician assistant. At a minimum, the hospital shall provide the advanced practice nurse or physician assistant written reasons for the modification or revocation of privileges and a mechanism for appeal to the appropriate committee or body within the hospital, as determined by the governing body of the hospital.

(III) If a hospital extends clinical privileges to an advanced practice nurse or physician assistant conditioned on the advanced practice nurse or physician assistant having a sponsoring or collaborating relationship with a physician and that relationship ceases to exist, the advanced practice nurse or physician assistant and the physician shall provide written notification to the hospital that the relationship no longer exists. Once the hospital receives such notice from an advanced practice nurse or physician assistant and the physician, the hospital shall be deemed to have met its obligations under this section by notifying the advanced practice nurse or physician assistant in writing that the advanced practice nurse's or physician assistant's clinical privileges no longer exist at that hospital.

(IV) Nothing in this clause shall be construed as modifying Subtitle B, Title 3, Occupations Code, Chapter 204 or 301, or any other law relating to the scope of practice of physicians, advanced practice nurses, or physician assistants.

(V) This clause does not apply to an employer-employee relationship between an advanced practice nurse or physician assistant and a hospital.

(G) [~~F~~] The governing body shall ensure that the hospital complies with the requirements concerning physician communication and contracts as set out in Health and Safety Code, §241.1015 (Physician Communication and Contracts).

(H) [~~G~~] The governing body shall ensure the hospital complies with the requirements for reporting to the Texas Medical Board the results and circumstances of any professional review action in accordance with the Medical Practice Act, Occupations Code, §160.002 and §160.003.

(I) [~~H~~] The governing body shall be responsible for and ensure that any policies and procedures adopted by the governing body to implement the requirements of this chapter shall be implemented and enforced.

(5) - (6) (No change.)

(7) Services. The governing body shall be responsible for all services furnished in the hospital, whether furnished directly or under contract. The governing body shall ensure that services are provided in a safe and effective manner that permits the hospital to comply with applicable rules and standards. At hospitals that have a mental

health service unit, the governing body shall adopt, implement, and enforce procedures for the completion of criminal background checks on all prospective employees that would be considered for assignment to that unit, except for persons currently licensed by this state as health professionals.

(8) (No change.)

(9) Photo identification badge. The governing body shall adopt a policy requiring employees, physicians, contracted employees, and individuals in training who provide direct patient care at the hospital to wear a photo identification badge during all patient encounters, unless precluded by adopted isolation or sterilization protocols. The badge must be of sufficient size and worn in a manner to be visible and must clearly state:

(A) at minimum the individual's first or last name;

(B) the department of the hospital with which the individual is associated;

(C) the type of license held by the individual, if applicable under Title 3, Occupations Code; and

(D) the provider's status as a student, intern, trainee, or resident, if applicable.

(g) - (i) (No change.)

(j) Medical record services. The hospital shall have a medical record service that has administrative responsibility for medical records. A medical record shall be maintained for every individual who presents to the hospital for evaluation or treatment.

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

(7) All verbal orders must be dated, timed, and authenticated within 96 [48] hours by the prescriber or another practitioner who is responsible for the care of the patient and has been credentialed by the medical staff and granted privileges which are consistent with the written orders.

(A) - (C) (No change.)

(8) - (12) (No change.)

(k) - (n) (No change.)

(o) Nursing services. The hospital shall have an organized nursing service that provides 24-hour nursing services as needed.

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

(4) Drugs and biologicals. Drugs and biologicals shall be prepared and administered in accordance with federal and state laws, the orders of the individuals granted privileges by the medical staff, and accepted standards of practice.

(A) (No change.)

(B) All orders for drugs and biologicals shall be in writing, dated, timed, and signed by the individual responsible for the care of the patient as specified under subsection (f)(6)(A) of this section. When telephone or verbal orders must be used, they shall be:

(i) (No change.)

(ii) dated, timed, and authenticated within 96 [48] hours by the prescriber or another practitioner who is responsible for the care of the patient and has been credentialed by the medical staff and granted privileges which are consistent with the written orders; and

(iii) (No change.)

(C) (No change.)

(5) - (8) (No change.)

(p) - (y) (No change.)

§133.45. *Miscellaneous Policies and Protocols.*

(a) - (f) (No change.)

(g) Abortion. A hospital that performs abortions shall adopt, implement and enforce policies to:

(1) ensure compliance with HSC, Chapter 171[; Subchapters A and B (relating to Abortion and Informed Consent)];

(2) (No change.)

(h) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 31, 2014.

TRD-201401423

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 776-6972



TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 11. CONTRACTS

SUBCHAPTER D. RESOLUTION OF CONTRACT CLAIMS

30 TAC §11.102

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes to amend §11.102.

Background and Summary of the Factual Basis for the Proposed Rule

The commission is proposing this rulemaking to amend an existing rule pertaining to a sovereign immunity for state related breach of contract for engineering, architectural, or construction services or for material related to those professional services.

House Bill (HB) 586, 83rd Legislature, effective September 1, 2013, added Chapter 114 to the Texas Civil Practice and Remedies Code.

Texas Civil Practice and Remedies Code, §114.001 defines "adjudication," "contract subject to this chapter," and "state agency."

Texas Civil Practice and Remedies Code, §114.002 applies only to a claim for breach of a written contract for engineering, architectural, or construction services or for materials related to engineering, architectural, or construction services brought by a party to the written contract.

Texas Civil Practice and Remedies Code, §114.003 provides that a state agency that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to Texas Civil Practice and Remedies Code, Chapter 114 waives

sovereign immunity to suit for the purpose of adjudicating a claim for breach of an express provision of the contract, subject to the terms and conditions of Texas Civil Practice and Remedies Code, Chapter 114.

Texas Civil Practice and Remedies Code, §114.004 provides that the total amount of money awarded in an adjudication brought against a state agency for breach of an express provision of a contract subject to Texas Civil Practice and Remedies Code, Chapter 114 is limited to the following: 1) the balance due and owed by the state agency under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration if the contract expressly provides for that compensation; 2) the amount owed for written change orders or additional work required to carry out the contract; 3) reasonable and necessary attorney's fees based on an hourly rate that are equitable and just if the contract expressly provides for that recovery; and 4) interest at the rate specified by the contract or, if a rate is not specified, the rate for post judgment interest under Texas Finance Code, §304.003(c) (relating to providing that the post judgment interest rate is the prime rate as published by the Board of Governors of the Federal Reserve System on the date of computation or 5%, whichever is more, or 15% a year if the prime rate as published by the Board of Governors of the Federal Reserve System is more than 15%), but not to exceed 10%. This section also prohibits damages awarded in an adjudication brought against a state agency arising under a contract subject to Texas Civil Practice and Remedies Code, Chapter 114 from including consequential damages, exemplary damages, or damages for unabsorbed home office overhead.

Texas Civil Practice and Remedies Code, §114.005 provides that adjudication procedures, including requirements for serving notices or engaging in alternative dispute resolution proceedings before bringing a suit or an arbitration proceeding, that are stated in the contract subject to Texas Civil Practice and Remedies Code, Chapter 114 or that are established by the state agency and expressly incorporated into the contract are enforceable, except to the extent those procedures conflict with the terms of Texas Civil Practice and Remedies Code, Chapter 114.

Texas Civil Practice and Remedies Code, §114.006 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not waive a defense or a limitation on damages available to a party to a contract, other than a bar against suit based on sovereign immunity.

Texas Civil Practice and Remedies Code, §114.007 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not waive sovereign immunity to suit in federal court.

Texas Civil Practice and Remedies Code, §114.008 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not waive sovereign immunity to a claim arising from a cause of action for negligence, fraud, tortious interference with a contract, or any other tort.

Texas Civil Practice and Remedies Code, §114.009 provides that Texas Civil Practice and Remedies Code, Chapter 114 does not apply to an employment contract between a state agency and an employee of that agency.

Texas Civil Practice and Remedies Code, §114.010 authorizes a suit under Texas Civil Practice and Remedies Code, Chapter 114 to be brought in a district court in a county in which the events or omissions giving rise to the claim occurred, or a county in which the principal office of the state agency is located.

Texas Civil Practice and Remedies Code, §114.011 prohibits satisfaction and payment of any judgment under Texas Civil Practice and Remedies Code, Chapter 114 from being paid from funds appropriated to the state agency from general revenue unless the funds are specifically appropriated for that purpose. It provides that property of the state or any agency, department, or office of the state is not subject to seizure, attachment, garnishment, or any other creditors' remedy to satisfy a judgment taken under Texas Civil Practice and Remedies Code, Chapter 114.

Texas Civil Practice and Remedies Code, §114.012 provides that the remedy provided by Texas Civil Practice and Remedies Code, Chapter 114 is an alternative to the remedy provided by Texas Government Code, Chapter 2260 (Resolution of Certain Contract Claims Against the State). It requires a party claiming breach of an express provision of the contract to elect to pursue the remedy provided by Texas Civil Practice and Remedies Code, Chapter 114 or the remedy provided by Texas Government Code, Chapter 2260. The election is binding and is prohibited from being revoked.

Texas Civil Practice and Remedies Code, §114.013 requires each state agency, before January 1 of each even-numbered year, to report to the governor, the comptroller of public accounts of the State of Texas, and each house of the legislature the cost of defense to the state agency and the office of the attorney general in an adjudication brought against the agency under a contract subject to Texas Civil Practice and Remedies Code, Chapter 114. The report must include the amount claimed in any adjudication pending on the date of the report.

HB 586, 83rd Legislature, effective September 1, 2013, amends Texas Government Code, §2260.002, by adding subsection (3), which exempts a claim for breach of contract to which Texas Civil Practice and Remedies Code, Chapter 114 applies from the remedy authorized under Texas Government Code, Chapter 2260.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission also proposes to amend 30 TAC Chapter 14, Grants.

Section Discussion

§11.102, Applicability

The commission proposes to amend §11.102 by adding subsection (b)(9) to reflect the exemption of sovereign immunity for state related breach of contract for engineering, architectural, or construction services or for material related to those professional services as authorized under Texas Civil Practice and Remedies Code, Chapter 114 or the Texas Government Code.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst in the Chief Financial Officer Division, has determined that, for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rule would update Chapter 11 as required by HB 586, 83rd Legislature. The proposed rule would allow the agency to be sued for a breach of contract for engineering, architectural, construction services, or for materials related to these professional services if claims (exclusive of prejudgment interest, penalties, costs, expenses, and attorney fees) are \$250,000 or more. The proposed rule would implement the requirements of HB 586 some of which include: definitions of terms; limitations

on adjudicated awards; limitations on remedies; and reporting requirements.

The agency solicits contracts for engineering, architectural, and construction services, primarily related to remediation activities (such as Superfund and petroleum storage tank sites) and related site construction activities. In the past five years, contractors filed two claims for \$250,000 or more, but neither of these claims went to the administrative hearing phase. The agency follows state law and state purchasing guidelines when it enters into contracts. The agency also complies with state law and regulations when paying vendors and only withholds payment in accordance with the express contract terms. Therefore, the agency does not anticipate committing a breach of contract. For these reasons, the proposed rule is not expected to have a fiscal impact on the agency.

The proposed rule would not have a fiscal impact on a unit of local government since the proposed rule does not waive sovereign immunity for a local government and have no effects on agency contracts with governmental entities.

Public Benefits and Costs

Ms. Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law.

The proposed rule would not have a significant fiscal impact on individuals or large businesses that are vendors of engineering, architectural, and construction services to the agency. The agency, since it complies with all state purchasing laws and regulations and all state payment laws and regulations, does not anticipate breaching any contract or losing a suit for breach of contract. In the event that individuals and businesses providing these services prevail in a breach of contract suit for claims of \$250,000 or more, those individuals and businesses could experience significant, beneficial fiscal impacts under the proposed rule.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses that are vendors of engineering, architectural, and construction services to the agency. The proposed rule would allow providers of these services to sue the agency if the agency commits a breach of contract and if claims total \$250,000 or more. The agency does not anticipate breaching any contract terms or losing a suit for breach of contract.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to comply with state law and does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed amendment in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed amendment is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule." The intent of the proposed rulemaking is to make §11.102 conform to Texas Civil Practice and Remedies Code, Chapter 114. The changes are not expressly to protect the environment and reduce risks to human health and environment.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed amendment and assessed whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this amendment is to make §11.102 conform to Texas Civil Practice and Remedies Code, Chapter 114. Promulgation and enforcement of this proposed amendment would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, there are no burdens imposed on private real property.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4) relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the amendment is consistent with CMP goals and policies because the rulemaking is a fee rule, which is a procedural mechanism for paying for commission programs; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendment will not violate (exceed) any standards identified in the applicable CMP goals and policies.

The commission determined that the proposed amendment will not affect any coastal natural resource areas because the rule only affects counties outside the CMP area and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on May 6, 2014, at 10 a.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open dis-

cussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-051-011-AS. The comment period closes May 12, 2013. Copies of the proposed rule-making can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Greg Yturralde, Revenue Operation Manager, at (512) 239-2446.

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state.

The proposed amendment implements requirements in House Bill 586, 83rd Legislature, 2013.

§11.102. *Applicability.*

(a) This chapter does not apply to an action of the agency for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute.

(b) This chapter does not apply to contracts:

- (1) between the agency and the federal government or its agencies, another state, or another nation;
- (2) between the agency and another unit of state government;
- (3) between the agency and a local governmental body, or a political subdivision of another state;
- (4) between a subcontractor and a contractor;
- (5) subject to the Transportation Code, §201.112;
- (6) within the exclusive jurisdiction of state or local regulatory bodies;
- (7) within the exclusive jurisdiction of federal courts or regulatory bodies; [or]
- (8) for grants of funds from the agency to grantees or sub-grantees; or[-]
- (9) for engineering, architectural, or construction services or for materials related to engineering, architectural, or construction services brought by a party to the written contract, in which the amount in controversy is not less than \$250,000.

(c) This subchapter applies to claims for breach of contract against the agency asserted by a contractor under Texas Government Code, Chapter 2260 and to counterclaims of the agency. No employee or agent of the commission is authorized to waive the requirements of

this subchapter nor the sovereign immunity of the agency, whether by means of acceptance of goods and services or otherwise.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 28, 2014.

TRD-201401408

David Timberger

Director, General Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 239-2141



CHAPTER 14. GRANTS

30 TAC §14.9

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes to amend §14.9.

Background and Summary of the Factual Basis for the Proposed Rule

The commission is proposing this rulemaking to amend an existing rule pertaining to a state funded grant opportunity notification.

House Bill (HB) 1487, 83rd Legislature, effective September 1, 2013, added §403.0245 to the Texas Government Code. Texas Government Code, §403.0245 requires the commission to post notices of state-funded grant opportunities of \$25,000 or more on the public website. It also requires the commission to provide a link to the Texas Comptroller of Public Accounts (Comptroller) website through a central Internet portal.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission also proposes to amend 30 TAC Chapter 11, Contracts.

Section Discussion

§14.9, *Notices*

The commission proposes to amend §14.9 by adding subsection (f) to the rule to reflect the new requirement to make grant awards in excess of \$25,000 available to the public on the agency's generally accessible Internet website and to state the purpose for which the grant was awarded.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst in the Chief Financial Officer Division, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

Per the requirements of HB 1487, 83rd Legislature, the proposed rule amends Chapter 14 to require the notification of grants of \$25,000 or more on the agency's generally accessible public website and provide a link to the Comptroller's website through a central Internet portal, currently known as the Texas Marketplace.

The agency has used currently available resources to establish the required webpage and Internet link, and the proposed rule has not had a significant fiscal impact on the agency.

The proposed rule is not expected to have a significant fiscal impact for local governments. However, it may result in easier access to information for grants of \$25,000 or more. The agency does not anticipate that there will be a significant increase in grant applications since information on grant opportunities (though not as consolidated as per the proposed rule) is currently communicated via other means and funding is limited to predetermined amounts.

Public Benefits and Costs

Ms. Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law and greater transparency and communication regarding grant information.

The proposed rule would not have a significant direct fiscal impact on individuals or businesses, but eligible entities may apply for additional grant funds because information of state-funded grants of \$25,000 or more would be easier to find. The proposed rule requires the posting of state-funded grants of \$25,000 or more on the agency's generally accessible public website and the provision of a link to the Comptroller's website through a central Internet portal.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses under the proposed rule. The proposed rule provides additional communication regarding state-funded grants of \$25,000 or more and may lead more small businesses to apply for state-funded grants.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed amendment in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed amendment is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule". The intent of the proposed rulemaking is to make certain information easily available to the public. The changes are not expressly to protect the environment and reduce risks to human health and environment.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed amendment and assessed whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this amendment

is to make certain information easily available to the public. Promulgation and enforcement of this proposed amendment would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, there are no burdens imposed on private real property.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the amendment is consistent with CMP goals and policies because the rulemaking is a fee rule, which is a procedural mechanism for paying for commission programs; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendment will not violate (exceed) any standards identified in the applicable CMP goals and policies.

The commission determined that the amendment will not affect any coastal natural resource areas because the rule only affects counties outside the CMP area and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on May 6, 2014, at 10 a.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-051-011-AS. The comment

period closes May 12, 2014. Copies of the proposed rule-making can be obtained from the commission's Website at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Greg Yturralde, Revenue Operation Manager, at (512) 239-1951.

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state.

The proposed amendment implements House Bill 1487, 83rd Legislature, 2013.

§14.9. Notices.

(a) The executive director shall publish on the state electronic business daily, commonly known as the Texas Marketplace, information regarding any solicitation related to a grant or series of grants, any of which is reasonably expected to exceed \$25,000, to be awarded under this chapter.

(b) The notice will indicate either that the executive director is seeking proposals or applications from potential grant recipients, or that one or more direct awards is anticipated, in accordance with §14.8 of this title (relating to Direct Award).

(c) If one or more direct awards is anticipated, the notice will identify the recipients selected to receive a direct award and will describe the objective and amount of each proposed award.

(d) Following recipient selection and final grant award, except in the case of a previously noted direct award, the executive director shall file a second notice in the state's electronic business daily identifying the successful recipients and indicating the amount of each awarded grant.

(e) In addition, the executive director may publish or broadcast information concerning a grant or grants in any publication, website [web site], or other forum.

(f) The executive director shall make available to the public on the agency's generally accessible Internet website the purpose for which any grant with a value greater than \$25,000 was awarded.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 28, 2014.

TRD-201401409

David Timberger

Director, General Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 239-2141



CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes amendments to §§114.301, 114.306, 114.307, and 114.309; and the repeal of §114.304.

The repeal of §114.304 and amended §114.307 and §114.309 are proposed to be submitted to the United States Environmen-

tal Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

The current state regulations for the Regional Low Reid Vapor Pressure (RVP) Gasoline Program, as specified under the Chapter 114 gasoline volatility rules in §114.301, prohibit the sale of all gasoline from gasoline-dispensing facilities that has a RVP greater than 7.8 pounds per square inch (psi) within the 95 central and eastern Texas counties affected by these regulations from June 1 through October 1 of each year. This prohibition applies to all other affected entities in the affected 95 counties from May 1 through October 1 of each year. Low RVP gasoline is refined to have a lower evaporation rate and lower volatility than conventional gasoline. Low RVP gasoline reduces the evaporative emissions generated during vehicle refueling and therefore decreases the emissions of volatile organic compounds (VOC) and other ozone-forming emissions. Reducing emissions of VOC benefits the regional 95-county area and the rest of the state and assists in the attainment and maintenance of the National Ambient Air Quality Standard (NAAQS) for ozone. These rules also prohibit the increased use of methyl-tertiary-butyl-ether (MTBE) in gasoline to comply with the low RVP gasoline requirements during the period of May 1 through October 1 each year over that used in the period May 1 through October 1, 1998, on an average per gallon basis.

The Regional Low RVP Gasoline Program rules, as specified in §114.304, also require all gasoline producers and importers that supply gasoline to the affected counties to register with the TCEQ. In addition, all registered gasoline producers and importers are required, as specified in §114.306, to submit an annual report certifying that the use of MTBE in the gasoline supplied to the affected counties, from May 1 through October 1 of the current reporting year, has not increased on an average per gallon basis from that used during the period of May 1 through October 1, 1998.

The following 95 Texas counties, as specified in §114.309, are affected by the Regional Low RVP Gasoline Program regulations: Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Augustine, San Jacinto, San Patricio, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

The use of MTBE as an oxygenate for compliance with federal reformulated gasoline (RFG) regulations and as a gasoline octane enhancing additive was common when the Regional Low RVP Gasoline Program regulations in Chapter 114 were originally adopted in July 1999. Concerns over the potential MTBE contamination of groundwater and surface water led the commission to adopt the MTBE prohibition specified in §114.301(c) in April 2000 to prevent gasoline producers from increasing the use of MTBE in gasoline to conform to the low RVP requirements.

The gasoline producer and importer registration requirements in §114.304 and the annual reporting requirements specified in §114.306(c) were also adopted in April 2000 to enhance the enforceability of the MTBE prohibition specified in §114.301(c). The EPA approved the Low RVP Gasoline Program rules in Chapter 114 as a SIP control strategy for the one-hour ozone NAAQS in the Houston-Galveston-Brazoria and Dallas-Fort Worth nonattainment areas in the April 26, 2001, issue of the *Federal Register* (66 FR 20927).

Subsequently, with the passage of the Energy Policy Act in 2005, the federal regulations requiring the use of oxygenates, such as MTBE, in RFG were repealed and a new federal renewable fuel standard requiring the use of ethanol in gasoline was enacted. As a result, gasoline producers began to blend ethanol into gasoline to meet the new federal renewable fuel standard, and MTBE was effectively removed from general use as a gasoline additive by the gasoline refining industry, primarily due to growing concerns over the MTBE contamination of groundwater and surface water. Samples of gasoline collected statewide in 2011 for a summer fuel field study conducted by the TCEQ showed only trace amounts of MTBE in some samples, i.e., less than 0.1% by volume, while every gasoline sample collected contained ethanol ranging from 1.99% to 9.44% by volume.

The proposed amendments to the Regional Low RVP Gasoline Program rules would remove obsolete requirements that provide no benefit to the state and are no longer necessary for the implementation and enforcement of the primary gasoline volatility control requirements of the rule. In addition, the proposal would provide regulatory consistency between the Chapter 114 gasoline volatility requirements and the El Paso Low RVP Gasoline requirements, specified in the 30 Texas Administrative Code (TAC) Chapter 115 regulations in §§115.252, 115.253, 115.255 - 115.257, and 115.259, which do not prohibit the use of MTBE and do not require registration and annual reporting.

Section 110(l) Anti-backsliding Demonstration

The proposed amendments to the Regional Low RVP Gasoline Program rules are also proposed as revisions to the Texas SIP. The EPA approved the Regional Low RVP Gasoline Program rules effective May 29, 2001, but specifically did not address the MTBE prohibition requirement of the Regional Low RVP Gasoline Program rules since the commission did not submit that requirement as a SIP revision. The EPA generally approved the registration and recordkeeping and certification requirements. Federal Clean Air Act (FCAA), §110(l) requires that the EPA not approve revisions to the SIP, if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the FCAA. The commission has reviewed the proposed amendments to the Regional Low RVP Gasoline Program rules and determined that the amendments would not interfere with attainment or maintenance of the one-hour ozone NAAQS, since the federal regulations requiring the use of oxygenates, such as MTBE, in RFG were repealed in 2005. Additionally, MTBE has effectively been replaced with ethanol as a gasoline additive by the gasoline refining industry due to concerns with water contamination and for compliance with federal renewable fuel requirements. The repeal of the registration requirements, which were originally adopted to enhance enforcement regarding the MTBE prohibition, is not expected to impact the purpose of the Regional Low RVP Gasoline Program since those rules remain intact. Similarly, the proposed amendments to §§114.306, 114.307, and

114.309 involve minor administrative clarifications necessary for consistency. The Regional Low RVP Gasoline Program rules remain in place as an effective means to provide continued emissions reductions of VOC to assist in attainment and maintenance of the one-hour ozone NAAQS primarily within the 95 county region where the rules apply but also having potential additional benefits throughout the state.

Section by Section Discussion

§114.301, Control Requirements for Reid Vapor Pressure

The proposal would amend §114.301 to delete subsection (c) to remove the prohibition on the increased use of MTBE in gasoline to conform to the low RVP gasoline requirements specified in subsection (a). The prohibition on increased use of MTBE is no longer necessary since the federal regulations requiring the use of oxygenates, such as MTBE, in RFG were repealed in 2005. Also, MTBE has effectively been replaced with ethanol as a gasoline additive by the gasoline refining industry, due to concerns with water contamination and for compliance with federal renewable fuel requirements. In addition, the proposed amendment would provide regulatory consistency with the El Paso Low RVP Gasoline requirements, specified in the Chapter 115 regulations in §§115.252, 115.253, 115.255 - 115.257, and 115.259, which do not contain a prohibition on the increased use of MTBE to comply with the rules.

§114.304, Registration of Gasoline Producers and Importers

The proposal would repeal §114.304 to remove the requirement for gasoline producers and importers that supply gasoline to the affected counties to register with the TCEQ for consistency with the proposed changes to §114.301, since these requirements were adopted by the commission in April 2000 to enhance the enforceability of the MTBE prohibition specified in §114.301(c). Repealing the registration requirements specified in this section would relieve gasoline producers and importers affected by these regulations from an administrative requirement that is no longer necessary for the implementation of the low RVP gasoline rules. Repealing this section would also provide regulatory consistency with the El Paso Low RVP Gasoline requirements, specified in Chapter 115 regulations in §§115.252, 115.253, 115.255 - 115.257, and 115.259, which do not contain registration requirements.

§114.306, Recordkeeping, Reporting, and Certification Requirements

The proposal would amend §114.306 to delete subsection (c) to remove the reporting and certification requirements regarding the annual report on the use of MTBE in the gasoline, as needed for consistency with the proposed changes to §114.301. Removing the reporting and certification requirements specified in this subsection would relieve gasoline producers affected by these regulations from an administrative requirement that is no longer necessary for the implementation of the Chapter 114 low RVP gasoline rules. In addition, removing this subsection would provide regulatory consistency with the El Paso Low RVP Gasoline requirements, specified in the Chapter 115 regulations in §§115.252, 115.253, 115.255 - 115.257, and 115.259, which do not contain reporting requirements. The proposal would also amend §114.306 to make clarifying changes to the section heading as needed for accuracy and consistency with the proposed changes to the section.

§114.307, Exemptions

The proposal would amend §114.307 to make non-substantive clarifying changes as needed for accuracy and consistency with the proposed changes to §114.306.

§114.309, Affected Counties

The proposal would amend §114.309 to make non-substantive clarifying changes as needed for accuracy and consistency with the proposed changes to §114.306.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst in the Chief Financial Officer Division, has determined that, for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rules. The proposed rules would remove oxygenate requirements that became obsolete with the passage of the Energy Policy Act of 2005.

The proposed amendments to the Regional Low RVP Gasoline Program rules would remove obsolete requirements that provide no benefit to the state and are no longer necessary for the implementation and enforcement of the primary gasoline volatility control requirements of the rule by repealing §114.304 and by amending §§114.301, 114.306, 114.307, and 114.309. Specifically, the proposed rulemaking would remove the prohibition on the increased use of MTBE in gasoline to conform to the low RVP gasoline requirements; remove the registration requirements for gasoline producers and importers that supply low RVP gasoline to the affected counties; remove the annual reporting and certification requirements on the use of MTBE in low RVP gasoline; and make other non-substantive clarifying changes as needed for accuracy and consistency.

Since the proposed rules remove obsolete regulations regarding the use of oxygenates and do not affect agency revenue or costs, the proposed rules have no fiscal impact on the agency. Also, other state agencies and units of local government will not be fiscally impacted by the proposed rules.

Public Benefits and Costs

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be greater consistency with federal regulations and clarity regarding applicable rules for gasoline volatility.

The proposed rules would not have a fiscal impact for individuals or businesses since they repeal obsolete requirements for gasoline volatility controls and associated reporting that the agency no longer needs.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules repeal obsolete gasoline volatility regulations.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules comply with federal regulations and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Additionally, the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rulemaking would amend §§114.301, 114.306, 114.307, and 114.309; and would repeal §114.304. The revisions to Chapter 114 would remove the existing prohibition on the increased use of MTBE in gasoline and the registration and reporting requirements that have become effectively obsolete due to the passing of the Energy Policy Act in 2005, which effectuated a phase-out of the use of MTBE as an oxygenate for low RVP fuel. Requiring gasoline producers to register, document, and report use of MTBE is no longer necessary. While the proposed rulemaking addresses revisions to the low emission fuels requirements associated with gasoline volatility that are specifically intended to protect the environment or reduce risks to human health from environmental exposure, the proposed rulemaking is not expected to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state since the revisions are to address federal requirements associated with the phase-out of the use of MTBE as an oxygenate for low RVP fuel.

The proposed rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region of the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter (42 USC, Chapter 85). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or

appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These rules are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 concluding that "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, the impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a) because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the

agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of these rules is to remove the existing prohibition on the increased use of MTBE in gasoline, which has effectively been ended by the Energy Policy Act of 2005, and address other administrative requirements for consistency. Requiring gasoline producers to register, document, and report use of MTBE is therefore simply no longer necessary. As discussed elsewhere in this preamble, the amendments to §§114.301, 114.306, 114.307, and 114.309, and the repeal of §114.304, amount to an administrative clean-up to remove outdated and no longer necessary rules and requirements. Additionally, even if the proposed rulemaking was a major environmental rule, the proposed rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this proposed rulemaking. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b) because the proposed rulemaking does not meet the definition of a "major environmental rule," nor does it meet any of the four applicability criteria for a major environmental rule.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The specific purpose of the proposed rulemaking is to remove outdated and obsolete portions of the low RVP fuel standards. The proposed rules would substantially advance this stated purpose by: removing the prohibition on the increased use of MTBE in gasoline to conform to the low RVP gasoline requirements; removing the registration requirements for gasoline producers and importers that supply low RVP gasoline to the affected counties; removing the annual reporting and certification requirements on the use of MTBE in low RVP gasoline; and by making other non-substantive clarifying changes as needed for accuracy and consistency.

Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law. With the passage of the Energy Policy Act in 2005, the federal regulations requiring the use of oxygenates, such as MTBE, in RFG were repealed and a new federal renewable fuel standard requiring the use of ethanol in gasoline was enacted. As a result, gasoline producers began to blend ethanol into gasoline to meet the new federal renewable fuel standard, and MTBE was effectively removed from general use as a gasoline additive by the gasoline refining industry. The proposed rules constitute an "action reasonably taken" to provide administrative conformity with the Energy Policy Act's repeal of the requirements for the use of oxygenates in fuel, as the proposed rules will simply do away with reporting and registration requirements that are no longer necessary due the passage of the Energy Policy Act in 2005. Consequently, the proposed rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4).

Nevertheless, the commission further evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a "taking" under Texas Government Code, Chapter 2007. Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. These proposed rules would simply remove obsolete requirements that provide no benefit to the state and are no longer necessary for the implementation and enforcement of the primary gasoline volatility control requirements of the rule.

In addition, because the subject proposed regulations do not provide more stringent requirements they do not burden, restrict, or limit an owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these rules will not constitute a taking under the Texas Government Code, Chapter 2007. For these reasons, Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. 31 TAC §505.11(b)(2) applies only to air pollutant emissions, on-site sewage disposal systems, and underground storage tanks. 31 TAC §505.11(b)(4) applies to all other actions. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council Advisory Committee and determined that the revisions are consistent with CMP goals and policies because the proposed rulemaking is to remove outdated and obsolete portions of the low RVP fuel standards; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation

and enforcement of the revisions will not violate (exceed) any standards identified in the applicable CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 114 does not contain applicable requirements under 30 TAC Chapter 122, Federal Operating Permits; therefore, owners or operators subject to the Federal Operating Permit Program will not be required to revise their operating permits, consistent with the revision process in Chapter 122, to include the revised Chapter 114 requirements for each emission unit at their sites affected by the revisions to Chapter 114.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on May 8, 2014, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2014-002-114-AI. The comment period closes May 12, 2014. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Morris Brown, Air Quality Division, at (512) 239-1438.

SUBCHAPTER H. LOW EMISSION FUELS DIVISION 1. GASOLINE VOLATILITY

30 TAC §§114.301, 114.306, 114.307, 114.309

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.103, concerning Rules; TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §28.011, concerning Underground Water: Regulation, which provides the commission with the authority to adopt and enforce rules to protect and preserve underground water quality. The amendments are also proposed under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property;

THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §382.202, concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to establish vehicle fuel content standards after January 1, 2004.

The amendments implement THSC, §§382.002, 382.011, 382.012, 382.017, and 382.202.

§114.301. Control Requirements for Reid Vapor Pressure.

(a) In the counties listed in §114.309 of this title (relating to Affected Counties), no person shall sell, offer for sale, supply, offer for supply, dispense, transfer, allow the transfer, place, store, or hold in any stationary tank, reservoir, or other container any gasoline with a Reid vapor pressure greater than 7.8 pounds per square inch, on a per gallon basis, which may ultimately be used to power a gasoline engine in the affected counties according to the schedule in subsection (b) of this section.

(b) Beginning May 1, 2000, all adjustments in the operation of affected facilities and all transfers or alterations of gasoline not meeting the requirements of this section must be completed as necessary to conform with the provisions of subsection (a) of this section during the following periods of each calendar year:

- (1) June 1 through October 1 of each year for gasoline dispensing facilities; and
- (2) May 1 through October 1 of each year for all other affected facilities.

~~[(c) No producer shall increase the use of methyl-tertiary-butyl-ether in gasoline on an average per gallon basis during the period of May 1 through October 1 of any calendar year over that used in the period May 1 through October 1, 1998 to conform with subsection (a) of this section.]~~

§114.306. Recordkeeping[, Reporting, and Certification] Requirements.

(a) The owner or operator of any gasoline storage vessel, gasoline terminal, or gasoline bulk plant subject to the provisions of §114.301 of this title (relating to Control Requirements for Reid Vapor Pressure) shall maintain records of the Reid vapor pressure of all gasoline stored or transferred during the compliance period. All records shall be maintained for two years and be made available for review by the executive director, United States Environmental Protection Agency (EPA), and local air pollution control agencies. Records do not have to be stored on-site, but must be made available for inspection at the site within five business days.

(b) All parties in the distribution chain (producers, importers, terminals, pipelines, truckers, rail carriers, and retail fuel dispensing outlets) subject to the provisions of §114.301 of this title must maintain copies or records of product transfer documents for a minimum of two years and shall upon request, make such copies or records available to representatives of the commission, EPA, or local air pollution agency having jurisdiction in the area. The product transfer documents must contain, at a minimum, the following information:

- (1) the date of transfer;
- (2) the name and address of the transferor;
- (3) the name and address of the transferee;

~~[(4) in the case of transferors or transferees who are producers or importers, the registration number of those persons as assigned by the commission under §114.304 of this title (relating to Registration of Gasoline Producers and Importers);]~~

~~(4) [(5)] the volume of gasoline being transferred;~~
~~(5) [(6)] the location of the gasoline at the time of transfer;~~
and

~~(6) [(7)] the following certification statement: "This product complies with the requirements for Reid vapor pressure specified in Title 30 Texas Administrative Code, §114.301 and may be used in any Texas county requiring gasoline with a maximum RVP of 7.8 pounds per square inch."~~

~~[(c) Each producer and importer subject to the provisions of §114.301 of this title shall submit to the executive director, or his designated representative, by November 30 of each year, a report which includes a quantification of the total gallons of gasoline and the total gallons of MTBE contained in gasoline for which the transfer documents contain the statement in subsection (b)(7) of this section during the periods May 1 through October 1 of 1998 and May 1 through October 1 of the current calendar year. The certifying report shall attest that all information contained in the report is true and accurate and is based on knowledge of the certifying official. The report must also include either:]~~

~~[(1) a certification statement that the use of MTBE in gasoline for which the transfer documents contain the statement in subsection (b)(7) of this section during the period May 1 through October 1 of the current calendar year has not increased on an average per gallon basis over that in the period May 1 through October 1, 1998; or]~~

~~[(2) if the average per gallon use of MTBE during the period May 1 through October 1 of the current calendar year exceeds the average per gallon use of MTBE during the period May 1 through October 1, 1998, documentation and explanation of the basis for the increased use in a manner sufficient to demonstrate that the producer or importer did not increase the use of MTBE during the period covered by the certification to conform with §114.301(a) of this title.]~~

§114.307. Exemptions.

(a) The following uses are exempt from §§114.301, 114.305, and 114.306 of this title (relating to Control Requirements for Reid Vapor Pressure; Approved Test Methods; and Recordkeeping[, Reporting, and Certification] Requirements):

- (1) any stationary tank, reservoir, or other container:
 - (A) used exclusively for the fueling of implements of agriculture; or
 - (B) with a nominal capacity of 500 gallons (1,893 liters) or less; and
- (2) all gasoline solely intended for use as aviation gasoline ("av-gas").

(b) Any gasoline that is either in a research, development, or test status; or is sold to petroleum, automobile, engine, or component manufacturers for research, development, or test purposes; or any gasoline to be used by, or under the control of petroleum, additive, automobile, engine, component manufacturers for research, development, or test purposes; or any independent research laboratories or academic institutions for use in research, development, or testing of petroleum, additive, automobile, engine, component products, is exempt from the provisions of this division (relating to Gasoline Volatility), provided that:

(1) the gasoline is kept segregated from non-exempt product, and the person possessing the product maintains documentation identifying the product as research, development, or testing fuel, as applicable, and stating that it is to be used only for research, development, or testing purposes; and

(2) the gasoline is not sold, dispensed, or transferred, or offered for sale, dispensing, or transfer from a retail fuel dispensing facility. It shall also not be sold, dispensed, or transferred, or offered for sale, dispensing, or transfer from a wholesale purchaser-consumer facility, unless such facility is associated with fuel, automotive, or engine research, development, or testing.

(c) Any gasoline that is refined, sold, dispensed, transferred, or offered for sale, dispensing, or transfer as competition racing fuel is exempted from the provisions of this division, provided that:

(1) the fuel is kept segregated from non-exempt fuel, and the party possessing the fuel for the purposes of refining, selling, dispensing, transferring, or offering for sale, dispensing, or transfer as competition racing fuel maintains documentation identifying the product as racing fuel, restricted for non-highway use in competition racing motor vehicles or engines;

(2) each pump stand at a regulated facility, from which the fuel is dispensed, is labeled with the applicable fuel identification and use restrictions described in paragraph (1) of this subsection; and

(3) the fuel is not sold, dispensed, transferred, or offered for sale, dispensing, or transfer for highway use in a motor vehicle.

(d) The owner or operator of a retail fuel dispensing outlet is exempt from all requirements of §114.306 of this title, except §114.306(b) of this title.

(e) Gasoline that does not meet the requirements of §114.301 of this title is not prohibited from being transferred, placed, stored, and/or held within the affected counties so long as it is not ultimately used to power:

(1) a gasoline-powered spark-ignition engine in a motor vehicle in the counties listed in §114.309 of this title (relating to Affected Counties), except for that used in conjunction with purposes stated in subsections (a) - (c) of this section; or

(2) a gasoline-powered spark-ignition engine in non-road equipment in the counties listed in §114.309 of this title, except for that used in conjunction with purposes stated in subsections (a) - (c) of this section.

§114.309. Affected Counties.

All affected persons in the following counties shall be in compliance with [§]§114.301 and §§114.305 [114.304] - 114.307 of this title (relating to Control Requirements for Reid Vapor Pressure; [~~Registration of Gasoline Producers and Importers;~~] Approved Test Methods; Recordkeeping[; Reporting, and Certification] Requirements; and Exemptions) no later than the dates specified in §114.301(b) of this title: Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Augustine, San Jacinto, San Patricio, [~~San Augustine;~~] Shelby, Smith,

Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 28, 2014.

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 239-2141



30 TAC §114.304

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

Statutory Authority

The repeal is proposed under Texas Water Code (TWC), §5.103, concerning Rules; TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §28.011, concerning Underground Water: Regulation, which provides the commission with the authority to adopt and enforce rules to protect and preserve underground water quality. The repeal is also proposed under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §382.202, concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to establish vehicle fuel content standards after January 1, 2004.

The proposed repeal implements THSC, §§382.002, 382.011, 382.012, 382.017, and 382.202.

§114.304. Registration of Gasoline Producers and Importers.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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CHAPTER 115. CONTROL OF AIR POLLUTION FROM VOLATILE ORGANIC COMPOUNDS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§115.10, 115.221, 115.222, 115.224 - 115.227, and 115.229.

If adopted, the commission will submit the amendments to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

Stage I vapor recovery for filling of gasoline storage tanks at gasoline dispensing facilities (GDF) is a reasonably available control technology (RACT) requirement for ozone nonattainment areas required under §182 of the Federal Clean Air Act (FCAA) and the Control Techniques Guideline documents for RACT issued by the EPA. The commission's Stage I rules are included in Chapter 115, Control of Air Pollution from Volatile Organic Compounds, Subchapter C, Volatile Organic Compound Transfer Operations, Division 2, Filling of Gasoline Storage Vessels (Stage I) for Motor Vehicle Fuel Dispensing Facilities. In addition to fulfilling FCAA RACT requirements for nonattainment areas, the commission adopted rule revisions to the Chapter 115 Stage I rules in 1999 implementing the Stage I vapor recovery option of the Texas Clean Air Strategy (TCAS) for certain ozone attainment counties. The revisions were one element of the new TCAS, which included a variety of options that affected areas could implement to meet the National Ambient Air Quality Standard (NAAQS) for ground level ozone. The purpose of the strategy was to reduce overall background levels of ozone in order to assist in keeping ozone attainment areas and near-nonattainment areas in compliance with the federal ozone standards. It was also to help the ozone nonattainment areas move closer to ultimately reaching attainment with the ozone NAAQS.

The effectiveness of Stage I vapor recovery rules relies on the captured vapors being: 1) effectively contained within the gasoline tank truck during transit; and 2) controlled when the transport vessel is refilled at a gasoline terminal or gasoline bulk plant. Otherwise, the emissions captured at the GDF will simply be emitted at a location other than the gasoline station resulting in no reductions in volatile organic compounds (VOC) despite the Stage I requirements.

The Stage I vapor recovery rules apply to GDFs that have installed Stage II vapor recovery equipment in the Houston-Galveston-Brazoria (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties), and Dallas-Fort Worth (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties). The Beaumont-Port Arthur (Hardin, Jefferson, and Orange Counties), and El Paso county, which is under an ozone nonattainment maintenance plan as part of the 1997 ozone standard are also subject to the Stage I vapor recovery requirements. These rules regulate the filling of gasoline storage tanks at GDFs by tank trucks. To comply with Stage I requirements, a vapor balance system is typically used to capture the vapors from the gasoline storage tanks that would otherwise be displaced to the atmosphere as these tanks are filled with gasoline. The captured vapors are routed to the gasoline tank truck, and the vapors are processed by a vapor control system when the tank truck is subsequently refilled at a gasoline terminal or gasoline bulk plant.

Initially, the 1999 amendments to Chapter 115 extended the existing Chapter 115 Stage I vapor recovery and gasoline tank truck leak testing requirements to 95 counties in the eastern half of Texas. These counties included: Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Augustine, San Jacinto, San Patricio, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood. Ellis, Johnson, Kaufman, Parker, and Rockwall Counties were subsequently designated nonattainment for the 1997 eight-hour ozone standard on June 15, 2004, and the Stage I rules were revised to include these counties under the ozone nonattainment area requirements through rulemaking adopted on April 13, 2005. Wise County in the Dallas-Fort Worth area has been designated as nonattainment for the 2008 eight-hour ozone standard. The executive director has approved a rulemaking project (Rule Project No. 2013-048-115-AI) that will address applicable RACT requirements, including Stage I requirements, for Wise County that are necessary as a result of the designation. These rules will be proposed at a date determined by the rulemaking project schedule.

In 2012, the EPA finalized a rulemaking (published in the May 16, 2012, issue of the *Federal Register* (77 FR 28772)) for 40 Code of Federal Regulations (CFR) Part 51, determining that vehicle on-board refueling vapor recovery (ORVR) technology is in widespread use for the purposes of controlling motor vehicle refueling emissions throughout the motor vehicle fleet. As a result, on October 9, 2013, the commission adopted revisions to the Chapter 115 Stage II rules (Rule Project Number 2013-001-115-AI) and an accompanying SIP revision (Project Number 2013-002-SIP-NR) authorizing the decommissioning of Stage II gasoline vapor recovery systems at GDFs no later than August 31, 2018, in ozone nonattainment areas classified as serious and above. During the development of these two projects, staff identified testing requirements, TXP-101 and TXP-102, in the Stage II rules that are necessary to ensure there are no leaks in the Stage I petroleum storage tanks' (PST) vapor recovery system. With the decommissioning of Stage II vapor recovery controls, the requirement for testing the Stage I system on these PSTs would no longer apply. In order to preserve existing Stage I testing requirements in ozone nonattainment counties from the Stage II rules, the commission is proposing revisions to the Stage I testing requirements.

Research was done on the Stage I testing requirements that facilities in ozone nonattainment areas would have to comply with once Stage II vapor recovery equipment has been decommissioned. The commission determined that additional revisions related to testing requirements were necessary to improve clarity and consistency in compliance and program administration for the affected industry and the agency. The proposed revisions would improve the consistency of required equipment and testing for owners of GDFs in areas that currently have different requirements. These proposed revisions would

eliminate confusion concerning testing requirements within the industry by improving consistency between the state Stage I rules in Chapter 115 and federal National Emission Standards for Hazardous Air Pollutants (NESHAP) Stage I rules. The commission incorporated the NESHAP Stage I rules by reference in 30 TAC §113.1380 on July 26, 2013. The federal Stage I rules require GDFs that have a monthly throughput at or above 100,000 gallons to operate a vapor balance system to capture and return vapors to the tank-truck tank so the vapors can be disposed of properly. GDFs subject to the federal Stage I rule must also meet certain testing and recordkeeping requirements.

The commission also held informal stakeholder meetings on potential revisions to the Stage I testing requirements on April 24, 2013, in Arlington, April 25, 2013, in Longview, April 29, 2013, in Corpus Christi, April 30, 2013, in Houston, May 1, 2013, in Austin, and May 2, 2013, in El Paso. Commenters present agreed that Stage I testing requirements needed to be uniform across the affected East Texas areas in the state and that federally required testing procedures and methods were generally accepted by the industry. Commenters also agreed that testing of Stage I equipment should be performed more frequently than once every three years to better detect potential issues with the system and improve compliance with testing requirements. Counties in West Texas would continue to comply with federal requirements and would not be affected by this rulemaking.

The commission proposes these revisions to Chapter 115 to specify Stage I testing requirements for GDFs located in the 16 counties (Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties) that will be affected by the Stage II decommissioning rule revision, preserve existing Stage I testing requirements in the currently affected 95 counties, and establish testing requirements in Chapter 115 that are more consistent with the federal Stage I rule for all 254 counties.

Compliance with Stage I vapor recovery rules is dependent on the geographical location of the GDF within the state. GDFs within counties located in the eastern part of the state must comply with state requirements found in Chapter 115, Subchapter C, Division 2. The federal Stage I rule in 40 CFR Part 63, Subpart CCCCCC applies to all 254 counties; therefore, GDFs located within any county not covered by the state Stage I requirements are covered under the federal Stage I requirements. The gallons of gasoline dispensed per month and the county where the GDF is located determines if the owner or operator of a GDF is required to install Stage I equipment and subject to either the state or federal Stage I regulations. Owners of GDFs with multiple locations throughout the state with similar monthly gasoline throughput amounts could be subject to different equipment and testing requirements depending on their geographical location.

Additionally, owners or operators of GDFs that have implemented Stage II in the 16 affected counties are required to complete the TXP-101 and the TXP-102 test procedures at the time of installation of Stage II vapor recovery equipment and at least once a year thereafter. This testing requirement will no longer be applicable when Stage II decommissioning occurs at the GDF, which may result in decreased effectiveness of the Stage I equipment installed at these facilities. The owners or operators of GDFs in the remaining 90 counties in the eastern half of Texas and identified under the term covered attainment counties that fall under the state Stage I rule are only required

to inspect for liquid leaks, visible vapors, or significant odors resulting from gasoline transfer from the transport vessel to the PST. All GDFs in the state subject to 40 CFR Part 63, Subpart CCCCCC must comply with the federal Stage I testing requirements and are required to perform the California Air Resource Board (CARB) Vapor Recovery Test Procedures TP-201.3 and TP-201.1E. These CARB testing requirements are similar to the TXP-101 and TXP-102 testing requirements. However, the CARB TP-201.1E test is more stringent than the TXP-102 test because the CARB TP-201.1E test requires testing the pressure and vacuum thresholds of the pressure-vacuum relief valve while the TXP-102 only requires testing the pressure threshold of the pressure-vacuum relief valve.

Additionally, the proposed revisions would reduce the throughput level for exemption from Stage I implementation from 125,000 gallons per month to 100,000 gallons per month for GDFs in the 90 covered attainment counties, except for those covered attainment counties in the Austin/San Antonio area (Bastrop, Bexar, Caldwell, Comal, Guadalupe, Hays, Travis, Williamson, and Wilson) that currently have an applicability threshold of 25,000 gallons per month. This proposed change would establish consistency with the NESHAP requirements and provide owners and operators of GDFs with clarity on compliance with equipment and testing requirements. The lowering of the throughput level is not anticipated to affect owners and operators of GDFs in the covered attainment counties because these facilities have already been subject to NESHAP requirements, which were incorporated by reference by the commission on July 26, 2013, or as is the case for those counties in the Austin/San Antonio area, are already subject to a state-required lower throughput.

Section by Section Discussion

In addition to the proposed revisions regarding testing and other Stage I requirements discussed elsewhere in this preamble, various stylistic, non-substantive changes are included to update the rule language to current Texas Register style and format requirements. Such changes include appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These minor revisions include updating the formatting of geographic area terms used in the rules to be consistent with the formatting of the terms as defined in §115.10 (e.g., Beaumont-Port Arthur in lieu of Beaumont/Port Arthur). These changes are non-substantive and generally are not specifically discussed in this preamble.

Additionally, the commission proposes to replace the term "motor vehicle fuel dispensing facility" in multiple portions of the Stage I rules with a new defined term "gasoline dispensing facility" for clarity and consistency with the terminology found in requirements for the Chapter 115 Stage II rules.

§115.10, Definitions

The commission proposes revisions to §115.10 by adding the definitions for "Dual-point vapor balance system," "Coaxial system," and "Gasoline dispensing facility." The term "Dual-point vapor balance system" would be incorporated from 40 CFR §63.11132 to describe a type of system that should be installed at a facility. A dual-point vapor balance system allows for separate connections for the loading of gasoline and the transfer of gasoline vapors to a tank-truck tank. The term "Coaxial system" would be added to describe a type of vapor control system consisting of a tube within a tube that requires only one tank opening allowing fuel to flow through the inner tube while vapors are displaced through the annular space between the

inner and outer tubes. This type of system is often found at GDFs. The term "Gasoline dispensing facility" would be added to replace the term "Motor vehicle fuel dispensing facility" used in the Stage I rules for consistency with recent revisions to the Chapter 115 Stage II rules and defined for clarification. The definition for "Pressure relief valve" would be updated to also apply to "Pressure-vacuum relief valves" to keep the wording within the rule consistent and with the general use of the term to cover relief valves by the industry. The other definitions in this section would be re-numbered as needed.

§115.221, Emission Specifications

As discussed elsewhere in this Section by Section Discussion, the commission proposes minor revisions to §115.221 to update the formatting of the geographic areas listed and replace the term "motor vehicle fuel dispensing facility" with "gasoline dispensing facility" for consistency with Chapter 115 Stage II rules.

§115.222, Control Requirements

As discussed elsewhere in this Section by Section Discussion, the commission proposes minor revisions to §115.222 to update the formatting of the geographic areas listed and replace the term "motor vehicle fuel dispensing facility" with "gasoline dispensing facility" for consistency with Chapter 115 Stage II rules.

The proposed revisions to §115.222 would also delete the language allowing facilities with a Stage II vapor recovery system to establish a pressure rate at which a pressure-vacuum relief valve is set that meets CARB requirements or has a third-party certification because the Stage II requirements will no longer be required due to the commission's adoption of the decommissioning of Stage II equipment. The proposed language would incorporate the use of "Dual-point vapor balance system" as defined in §115.10 and would remove the language for non-coaxial Stage I connections. Dual-point vapor balance systems are more effective than single-point coaxial systems in controlling vapors during the loading of gasoline because two separate hoses for loading the fuel and recovering fuel vapors are connected to the delivery truck and storage tank which allow less back pressure and higher flow rates. Dual-point vapor balance systems are the only non-coaxial Stage I connection used in Texas and have been required at all applicable facilities since January 10, 2011.

Additionally, the information in paragraph (6) would be incorporated into paragraph (5). After removal of the provision regarding Stage II, the requirements for covered attainment counties in paragraph (6) would be identical to the requirements for ozone nonattainment areas under paragraph (5). Therefore, combining the two paragraphs would eliminate redundant rule language. The other paragraphs in this section would be re-numbered as appropriate.

§115.224, Inspection Requirements

As discussed elsewhere in this Section by Section Discussion, the commission proposes minor revisions to §115.224 to replace the term "motor vehicle fuel dispensing facility" with "gasoline dispensing facility" for consistency with Chapter 115 Stage II rules. In addition, paragraph (1) would be revised to specify that gasoline transfer must be discontinued immediately when any liquid leak, visible vapor, or significant odor is observed to prevent further potential discharges. This proposed revision would provide additional clarity within the rule language by providing more descriptive terms for the types of potential discharges that would result in a discontinuation of the transfer of gasoline.

§115.225, Testing Requirements

The commission proposes to amend §115.225 to remove the current test procedures and require all affected GDFs to comply with the requirements of 40 CFR §63.11120. All affected GDFs will be required to annually comply with the CARB Vapor Recovery Test Procedures, TP-201.1E and TP-201.3, found in 40 CFR §63.11120. Additionally, use of alternative test methods and procedures shall be allowed in accordance with the alternative test method requirements found in 40 CFR §63.7(f). These proposed revisions would make the testing requirements for affected East Texas facilities under Chapter 115 consistent with the federal Stage I rule except for the annual inspection requirement. This revision would minimize confusion within the industry of which test is required in which area in East Texas, the frequency of the tests, and would provide for improved consistency in compliance and enforcement by the commission due to a more defined testing schedule and testing procedures. Owners and operators of GDFs in West Texas would continue to comply with federal requirements and would not be affected by this rulemaking. The CARB Vapor Recovery Test Procedure TP-201.1E would be required for GDFs to demonstrate compliance with the leak rate and cracking pressure requirements for pressure-vacuum vent valves installed on the gasoline tanks at the facility. The CARB Vapor Recovery Test Procedure TP-201.3 would be required to demonstrate compliance with the static pressure performance requirement for a vapor balance system by conducting a static pressure test on the gasoline tanks at the facility. Annual testing of Stage I systems would provide additional benefit to the industry by identifying issues sooner and addressing expensive repair costs experienced by systems that are not tested annually where faulty equipment and parts are allowed to operate for longer periods of time. Affected areas could also benefit by having emissions issues at these facilities addressed earlier resulting in minimal impact to the environment.

§115.226, Recordkeeping Requirements

As discussed elsewhere in this Section by Section Discussion, the commission proposes minor revisions to §115.226 to update the formatting of the geographic areas listed and replace the term "motor vehicle fuel dispensing facility" with "gasoline dispensing facility" for consistency with Chapter 115 Stage II rules. In addition, the proposed revisions would revise the provision in the introduction of §115.226 that all records must be made available upon request to also specify that the records must be made available at the site during inspection. The recordkeeping requirements under paragraphs (1) and (2) include similar language; therefore, this revision does not substantively change the requirements.

The proposed revisions to §115.226(2)(B) would also delete the language requiring facilities with Stage II vapor recovery systems to perform Stage I testing because the requirements would no longer be necessary due to the commission's adoption of the decommissioning of Stage II equipment as previously discussed in this preamble. The commission proposes to combine subparagraphs (B) and (C) to reflect that the recordkeeping requirements would become uniform in the counties listed as the Stage II vapor control requirements are repealed. The requirement to keep the records for gasoline throughput for each calendar month would be updated to clarify that the records shall be kept for the previous 24 months.

§115.227, Exemptions

As discussed elsewhere in this Section by Section Discussion, the commission proposes minor revisions to §115.227 to update the formatting of the geographic areas listed and replace

the term "motor vehicle fuel dispensing facility" with "gasoline dispensing facility" for consistency with Chapter 115 Stage II rules. Additionally, the proposed revisions would reorder provisions that cross-reference to §115.222 to reflect the proper order of the provisions in that section and update the cross-references to reflect changes to §§115.222, 115.224, and 115.226 proposed in this rulemaking.

The proposed revisions to §115.227 would reduce the throughput level for exemption from Stage I vapor control requirements from 125,000 gallons per month to 100,000 gallons per month in paragraph (3) to provide GDF owners and operators with clearer applicability requirements and ensure consistency with throughput limits between the state and the federal Stage I requirements. The lowering of the throughput limit in this proposed rulemaking would provide owners and operators with one standard of throughput for both state and federal Stage I requirements in the majority of the covered attainment counties. The proposed revision would also provide the commission with one throughput standard for assessing applicability and compliance of GDFs in the covered attainment counties that currently have an applicability threshold of 125,000 gallons per month under the Chapter 115 rule. The proposed revisions to §115.227 would also update the date in paragraph (3) to October 2, 2014, to reflect the expected effective date of this rulemaking.

§115.229, Counties and Compliance Schedules

As discussed elsewhere in this Section by Section Discussion, the commission proposes minor revisions to §115.229 to replace the term "motor vehicle fuel dispensing facility" with "gasoline dispensing facility" for consistency with Chapter 115 Stage II rules. In addition, the commission proposes to update the list of ozone nonattainment counties in subsection (a) using the geographic area terms for the Beaumont-Port Arthur, El Paso, and Houston-Galveston-Brazoria areas to be consistent with the other sections of the Stage I rule.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, Texas Commission on Environmental Quality, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government as a result of the administration or enforcement of the proposed rules. The proposed rules relate to the Stage I vapor recovery requirements for GDF owners and operators which is, in part, necessary to fulfill FCAA RACT requirements.

The proposed rules would revise the Chapter 115 Stage I rules to specify Stage I testing requirements for GDF owners and operators and the minimum gasoline throughput level for exemption from Stage I requirements. Stage I vapor recovery is a control strategy to capture gasoline vapors that are released when gasoline is delivered to a storage tank. The proposed rules would preserve existing Stage I testing requirements in the 21 counties (Brazoria, Chambers, Collin, Dallas, Denton, Ellis, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Johnson, Kaufman, Liberty, Montgomery, Orange, Parker, Rockwall, Tarrant, and Waller) that are no longer required by the EPA to have Stage II vapor recovery rules. The proposed rules would also establish testing requirements in Chapter 115 that are more consistent with the federal Stage I testing requirements.

Because the EPA no longer requires Stage II vapor recovery controls, certain testing requirements for Stage I systems on affected facilities will no longer apply. The commission is proposing this

rulemaking in order to preserve existing Stage I testing requirements in ozone nonattainment counties. In addition, the rules are intended to improve the uniformity of testing requirements for GDF equipment in different areas of the state as well as improve the uniformity between the state and federal Stage I rules.

The proposed rules would affect the 90 counties in the eastern half of Texas that fall under the current state Stage I rule. The remaining 143 counties in the western half of Texas are currently subject to the federal Stage I rules, and the proposed rules would not affect facilities in these counties. There is no anticipated impact on the 21 nonattainment counties in the Beaumont-Port Arthur, Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas. These counties currently have annual testing requirements at a comparable cost to the proposed testing requirements.

The proposed rules would require all affected owners and operators of GDFs to comply with the CARB Vapor Recovery Test Procedures TP-201.1E and TP-201.3 found in 40 CFR, with the exception that all tests would be required on an annual basis for the eastern counties. These proposed testing requirements would make the testing requirements uniform across the state for all affected facilities except for the fact that the eastern counties would have to conduct their testing on an annual basis and the western counties would maintain the current testing every three years. The annual testing requirements may result in additional costs for facilities in the 90 eastern covered attainment counties, though additional costs are not anticipated to be significant.

The proposed rules would reduce the throughput level for exemption from the Stage I requirements from 125,000 gallons per month to 100,000 gallons per month in covered attainment counties throughout the state. This proposed change is expected to provide consistency with NESHAP requirements as well as provide owners and operators of GDFs with clarity on compliance with equipment and testing requirements. The lowering of the throughput level is not anticipated to affect owners and operators of GDFs that have already been subject to federal requirements. The 90 covered attainment counties with facilities in East Texas currently are subject to the state Stage I requirements of 125,000 gallons per month. The proposed rules would lower that throughput level to 100,000 gallons per month and could bring additional GDFs under the Chapter 115 Stage I rules. Owner or operators of GDFs that meet the monthly dispensing requirements must install a vapor balance system that captures vapors from PSTs that would otherwise be displaced to the atmosphere when these tanks are filled with gasoline. The captured vapors are routed back to the transport vessel and processed by a vapor control system when the transport vessel is subsequently refilled at a gasoline terminal or gasoline bulk plant. Agency staff does not expect an increase in the number of GDFs subject to Stage I requirements due to the reduced throughput requirements because most GDFs should be complying with the lower throughput limit as required by the NESHAP regulations.

Even though the proposed rules would require annual testing at Stage I facilities currently conducting inspections once every three years, the rules are not anticipated to result in a significant increase in workload for agency inspectors. The additional duties would be included in current inspection activities conducted at GDFs.

As of December 19, 2013, agency staff estimates that there are currently 5,925 facilities that have active underground storage tanks at GDFs in the 90 eastern covered attainment counties. According to the TCEQ's PST Registration information, approx-

imately 1,793 governmental entities own or operate facilities included in this amount and may be affected by the rulemaking. It is not known how many state agencies or units of local government may be affected by the proposed rules, but if there are any that own or operate GDFs that exceed the proposed throughput levels, they may be required to install a vapor-balance system. This equipment may have an average cost of up to \$490 per tank for a total cost of approximately \$980 for a station with an average of two tanks. In general, however, agency staff does not expect an increase in the number of GDFs subject to Stage I requirements, as most GDFs are required to meet the lower throughput limit as required by the NESHAP regulations. State agencies or local governments that currently have Stage I at their GDFs would be affected by the proposed annual testing requirements and would have to perform annual system tests estimated to cost approximately \$250 to \$275 a year.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be the continued protection of public health and safety through control of air pollution with anticipated ozone reductions in much of east and central Texas.

The proposed rules are not expected to have significant fiscal implications for individuals and businesses during the first five years the proposed rules are implemented. According to agency staff, there are currently 5,925 facilities that have active underground storage tanks at GDFs in the 90 eastern covered attainment counties. It is not known how many businesses may be affected by the proposed rules, but if there are any that own or operate GDFs that exceed the proposed throughput levels, they may be required to install a vapor-balance system that captures vapors from PSTs. This equipment may have an average cost of up to \$490 per tank for a total cost of approximately \$980 for a station with an average of two tanks. In general, however, agency staff does not expect an increase in the number of GDFs subject to Stage I requirements due to the reduced throughput limit, as most GDFs are required to meet the lower throughput limit required by the NESHAP regulations. Businesses that currently have Stage I at their GDFs would be affected by the proposed annual testing requirements and would have to perform annual system tests estimated to cost approximately \$250 to \$275 a year.

There is no anticipated fiscal impact on the 21 affected counties in the Beaumont-Port Arthur, Dallas-Fort Worth, El Paso county, and Houston-Galveston-Brazoria areas. These counties currently have annual testing requirements at a comparable cost to the proposed testing requirements. The proposed rules are not expected to impact the counties of Bastrop, Bexar, Caldwell, Comal, Guadalupe, Hays, Travis, Williamson, and Wilson because these counties are already subject to Stage I testing requirements if a GDF's throughput is 25,000 gallons or more per month. This throughput requirement is different than the requirements of other areas in the state and those counties identified as covered attainment counties.

Small Business and Micro-Business Assessment

No significant adverse fiscal implications are anticipated for small or micro-businesses as a result of the administration or enforcement of the proposed rules. The proposed rules would make the testing requirements uniform across the state for all affected GDFs except for the fact that the eastern counties

would have to conduct their testing on an annual basis. The annual testing requirements may result in additional costs for facilities in the 90 eastern covered attainment counties. Small or micro-businesses would have to perform annual system tests estimated to be approximately \$250 to \$275 a year. It is not known how many affected GDFs are small or micro-businesses. Small or micro-businesses that do not have a throughput level of 100,000 gallons per month would not be affected by the proposed rules.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a significant material way for the first five years that the proposed rules are in effect and are necessary for the continued protection of public health and safety through improved control of air pollution in Texas.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rules do not meet the definition of a major environmental rule as defined in the statute. According to Texas Government Code, §2001.0225, a major environmental rule means "a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state." Additionally, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rulemaking would amend §§115.10, 115.221, 115.222, 115.224 - 115.227, and 115.229. The revisions to Chapter 115 would facilitate compliance with agency rules and testing requirements that have changed due to changes to the Stage II vapor recovery program. These changes occurred after the EPA finalized a rulemaking (published in the May 16, 2012, issue of the *Federal Register* (77 FR 28772)) for 40 CFR Part 51, determining that vehicle ORVR technology is in widespread use for the purposes of controlling motor vehicle refueling emissions throughout the motor vehicle fleet. As a result, the commission adopted a rule revision (Rule Project Number 2013-001-115-A1) and an accompanying SIP revision (Project No. 2013-002-SIP-NR) authorizing the decommissioning of

Stage II gasoline vapor recovery systems at GDFs in nonattainment areas classified as serious and above for the ozone NAAQS. During the development of these two projects, staff identified testing requirements, TXP-101 and TXP-102, in the Stage II rules that are necessary to ensure there are no leaks in the vapor recovery Stage I PSTs. With the decommissioning of Stage II vapor recovery controls, the requirement for testing the Stage I system on these PSTs would no longer apply. In order to preserve existing Stage I testing requirements in ozone nonattainment and ozone maintenance counties, the commission is proposing revisions to the Stage I testing requirements. The revisions to Chapter 115 would facilitate compliance with these testing requirements by making the requirements consistent across this sector of the industry. As a result, compliance with the rules would be easier and more consistent. The proposed revisions would improve the consistency of required equipment and testing for owners of GDFs in areas that currently have different requirements. These proposed revisions would also eliminate confusion with testing requirements by members of the industry by improving consistency between the state and federal Stage I rules.

The proposed rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region of the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter (42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule.

The purpose of this rulemaking is to increase protection of the environment and reduce risk to human health; it is not expected that this proposed rulemaking would adversely affect in a material way the economy, a sector of the economy, productivity, jobs, the environment, or the public health and safety of the state or a sector of the state. Therefore, no regulatory impact analysis is required.

This rulemaking would allow the commission to make uniform Stage I testing requirements within the state program areas or between the state and federal program. Currently, owners or operators of GDFs that have implemented Stage II in the 16 participating counties are required to complete the TXP-101 and the TXP-102 test procedures at the time of installation of Stage II vapor recovery equipment and at least once a year thereafter. This testing requirement will no longer be applicable when Stage II decommissioning occurs at GDFs, which may result in decreased effectiveness of the Stage I equipment installed at these

facilities. The owners or operators of GDFs in the 95 counties that do not have Stage II, but fall under the state Stage I rule, are required to inspect for liquid leaks, visible vapors, or significant odors resulting from gasoline transfer from the transport vessel to the PST. The remaining 143 counties must comply with the federal Stage I testing requirements and are required to perform the CARB Vapor Recovery Test Procedures, TP-201.3 and TP-201.1E. These CARB testing requirements are similar to the TXP-101 and TXP-102 testing requirements. However, the CARB TP-201.1E test is more stringent than the TXP-102 test because the CARB TP-201.1E test requires testing the pressure and vacuum thresholds of the pressure-vacuum relief valve while the TXP-102 only requires testing the pressure threshold of the pressure-vacuum relief valve.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These rules are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 concluding that "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP revision would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP revision will have a broad impact, the impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by and do not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed

that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). Cf. *Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The proposed rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this proposed rulemaking. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b) because although the rulemaking meets the definition of a "major environmental rule," it does not meet any of the four applicability criteria for a major environmental rule.

The commission invites public comment on the draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The specific purpose of the proposed rulemaking is to specify Stage I testing requirements for GDFs located in the 16 counties that will be affected by the Stage II rule revision (decommissioning Rule Project Number 2013-001-115-AI), preserve existing Stage I testing requirements in currently affected counties, and establish testing requirements that are uniform throughout the state.

As mentioned previously in the preamble, in 1999 the commission adopted rule revisions to Chapter 115 implementing the Stage I vapor recovery option of the TCAS. The revisions were one element of the new TCAS, which included a variety of options that affected areas could implement to meet the NAAQS for ground level ozone. The purpose of the strategy was to reduce overall background levels of ozone in order to assist in keeping ozone attainment areas and near-nonattainment areas in compliance with the federal ozone standards and to help the ozone nonattainment areas move closer to ultimately reaching attainment with the ozone NAAQS.

On May 16, 2012, the EPA finalized a rulemaking for 40 CFR Part 51, determining that vehicle ORVR technology is in widespread

use for the purposes of controlling motor vehicle refueling emissions throughout the motor vehicle fleet. As a result, the commission adopted a rule revision (Rule Project Number 2013-001-115-AI) and an accompanying SIP revision (Project No. 2013-002-SIP-NR) authorizing the decommissioning of Stage II gasoline vapor recovery systems at GDFs in nonattainment areas classified as serious and above for the ozone NAAQS. During the development of these two projects, staff identified testing requirements, TXP-101 and TXP-102, in the Stage II rules that are necessary to ensure there are no leaks in the Stage I PST vapor recovery. With the decommissioning of Stage II vapor recovery controls, the requirement for testing the Stage I system on these PSTs would no longer apply. In order to preserve existing Stage I testing requirements in ozone nonattainment counties, the commission is proposing revisions to the Stage I testing requirements.

This rulemaking is necessary to ensure that Stage I equipment is functioning properly and to be consistent with the federal rule revision authorizing the decommissioning of Stage II requirements. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to rulemakings that are actions reasonably taken to fulfill an obligation mandated by federal law. Since this rulemaking is such an action, Texas Government Code, Chapter 2007 does not apply.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this action is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). Consequently, the proposed rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this rulemaking.

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. Therefore, Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) (or §505.11(b)(4), whichever is applicable) relating to rules subject to the Coastal Management Program (CMP), and will, therefore, require that goals and policies of the Texas CMP be considered during the rulemaking process. Section 505.11(b)(2) applies only to air pollutant emissions, on-site sewage disposal systems, and underground storage tanks. Section 505.11(b)(4) applies to all other actions.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is administrative and procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 115 contains applicable requirements under 30 TAC Chapter 122, Federal Operating Permits; therefore, owners or operators subject to the Federal Operating Permit Program must, consistent with the revision process in Chapter 122, revise their operating permits to include the revised Chapter 115 requirements for each emission unit at their sites affected by the revisions to Chapter 115.

Announcement of Hearings

The commission will hold public hearings on this proposal in Fort Worth at 2:00 p.m. on April 29, 2014, at the TCEQ Region 4 Office, 2309 Gravel Road; in Austin at 2:00 p.m. on May 1, 2014, at the commission's central office located at 12100 Park 35 Circle, Building E, Room 201S; and in Houston at 2:00 p.m. on May 6, 2014, at the TCEQ Region 12 Office, Conference Room 3C-3F, 5425 Polk Street. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to each hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Mr. Michael Parish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-022-115-AI. The comment period closes May 12, 2014. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Sarah Davis, Air Quality Planning Section, (512) 239-4939.

SUBCHAPTER A. DEFINITIONS

30 TAC §115.10

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard

the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and THSC, §382.208, concerning Attainment Program, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles. The amendment is also proposed under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions. The amendment is also proposed under Federal Clean Air Act, 42 United States Code §§7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements THSC, §382.208, concerning Attainment Program, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

§115.10. Definitions.

Unless specifically defined in Texas Health and Safety Code, Chapter 382, (also known as the Texas Clean Air Act) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the Texas Clean Air Act, the following terms, when used in this chapter (relating to Control of Air Pollution from Volatile Organic Compounds), have the following meanings, unless the context clearly indicates otherwise. Additional definitions for terms used in this chapter are found in §3.2 and §101.1 of this title (relating to Definitions).

(1) Background--The ambient concentration of volatile organic compounds in the air, determined at least one meter upwind of the component to be monitored. Test Method 21 (40 Code of Federal Regulations Part 60, Appendix A) shall be used to determine the background.

(2) Beaumont-Port Arthur [~~Beaumont/Port Arthur~~] area--Hardin, Jefferson, and Orange Counties.

(3) Capture efficiency--The amount of volatile organic compounds (VOC) collected by a capture system that is expressed as a percentage derived from the weight per unit time of VOCs entering a capture system and delivered to a control device divided by the weight per unit time of total VOCs generated by a source of VOCs.

(4) Carbon adsorption system--A carbon adsorber with an inlet and outlet for exhaust gases and a system to regenerate the saturated adsorbent.

(5) Closed-vent system--A system that:

(A) is not open to the atmosphere;

(B) is composed of piping, ductwork, connections, and, if necessary, flow-inducing devices; and

(C) transports gas or vapor from a piece or pieces of equipment directly to a control device.

(6) Coaxial system--A type of system consisting of a tube within a tube that requires only one tank opening. The tank opening allows fuel to flow through the inner tube while vapors are displaced through the annular space between the inner and outer tubes.

(7) [(6)] Component--A piece of equipment, including, but not limited to, pumps, valves, compressors, connectors, and pressure relief valves, which has the potential to leak volatile organic compounds.

(8) [(7)] Connector--A flanged, screwed, or other joined fitting used to connect two pipe lines or a pipe line and a piece of equipment. The term connector does not include joined fittings welded completely around the circumference of the interface. A union connecting two pipes is considered to be one connector.

(9) [(8)] Continuous monitoring--Any monitoring device used to comply with a continuous monitoring requirement of this chapter will be considered continuous if it can be demonstrated that at least 95% of the required data is captured.

(10) [(9)] Covered ozone attainment counties--Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burlison, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Karnes, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Polk, Rains, Red River, Refugio, Robertson, Rusk, Sabine, San Augustine, San Jacinto, San Patricio, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

(11) [(40)] Dallas-Fort Worth [Dallas/Fort Worth] area--For purposes of Subchapter B, Division 5 of this chapter (relating to Municipal Solid Waste Landfills) [of this chapter, General Volatile Organic Compound Sources, Division 5, Municipal Solid Waste Landfills,] Collin, Dallas, Denton, and Tarrant Counties. For all other divisions, Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.

(12) Dual-point vapor balance system--A type of vapor balance system in which the storage tank is equipped with an entry port for a gasoline fill pipe and a separate exit port for vapor connection.

(13) [(41)] El Paso [area]--El Paso County.

(14) [(42)] Emergency flare--A flare that only receives emissions during an upset event.

(15) [(43)] External floating roof--A cover or roof in an open-top tank which rests upon or is floated upon the liquid being contained and is equipped with a single or double seal to close the space between the roof edge and tank shell. A double seal consists of two complete and separate closure seals, one above the other, containing an enclosed space between them. For the purposes of this chapter, an external floating roof storage tank that is equipped with a self-supporting fixed roof (typically a bolted aluminum geodesic dome) shall be considered to be an internal floating roof storage tank.

(16) [(44)] Fugitive emission--Any volatile organic compound entering the atmosphere that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow.

(17) [(45)] Gasoline bulk plant--A gasoline loading and/or unloading facility, excluding marine terminals, having a gasoline throughput less than 20,000 gallons (75,708 liters) per day, averaged

over each consecutive 30-day period. A motor vehicle fuel dispensing facility is not a gasoline bulk plant.

(18) Gasoline dispensing facility--A location that dispenses gasoline to motor vehicles and includes retail, private, and commercial outlets.

(19) [(46)] Gasoline terminal--A gasoline loading and/or unloading facility, excluding marine terminals, having a gasoline throughput equal to or greater than 20,000 gallons (75,708 liters) per day, averaged over each consecutive 30-day period.

(20) [(47)] Heavy liquid--Volatile organic compounds that have a true vapor pressure equal to or less than 0.044 pounds per square inch absolute (0.3 kiloPascal) at 68 degrees Fahrenheit (20 degrees Celsius).

(21) [(48)] Highly-reactive volatile organic compound--As follows.

(A) In Harris County, one or more of the following volatile organic compounds (VOC) [(VOCs)]: 1,3-butadiene; all isomers of butene (e.g., isobutene (2-methylpropene or isobutylene), alpha-butylene (ethylethylene), and beta-butylene (dimethylethylene, including both cis- and trans-isomers)); ethylene; and propylene.

(B) In Brazoria, Chambers, Fort Bend, Galveston, Liberty, Montgomery, and Waller Counties, one or more of the following VOC emissions [VOCs]: ethylene and propylene.

(22) [(49)] Houston-Galveston [Houston/Galveston] or Houston-Galveston-Brazoria [Houston/Galveston/Brazoria] area--Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(23) [(20)] Incinerator--For the purposes of this chapter, an enclosed control device that combusts or oxidizes volatile organic compound gases or vapors.

(24) [(21)] Internal floating cover--A cover or floating roof in a fixed roof tank that rests upon or is floated upon the liquid being contained, and is equipped with a closure seal or seals to close the space between the cover edge and tank shell. For the purposes of this chapter, an external floating roof storage tank that is equipped with a self-supporting fixed roof (typically a bolted aluminum geodesic dome) shall be considered to be an internal floating roof storage tank.

(25) [(22)] Leak-free marine vessel--A marine vessel with cargo tank closures (hatch covers, expansion domes, ullage openings, butterworth covers, and gauging covers) that were inspected prior to cargo transfer operations and all such closures were properly secured such that no leaks of liquid or vapors can be detected by sight, sound, or smell. Cargo tank closures must meet the applicable rules or regulations of the marine vessel's classification society or flag state. Cargo tank pressure/vacuum valves must be operating within the range specified by the marine vessel's classification society or flag state and seated when tank pressure is less than 80% of set point pressure such that no vapor leaks can be detected by sight, sound, or smell. As an alternative, a marine vessel operated at negative pressure is assumed to be leak-free for the purpose of this standard.

(26) [(23)] Light liquid--Volatile organic compounds that have a true vapor pressure greater than 0.044 pounds per square inch absolute (0.3 kiloPascal) at 68 degrees Fahrenheit (20 degrees Celsius), and are a liquid at operating conditions.

(27) [(24)] Liquefied petroleum gas--Any material that is composed predominantly of any of the following hydrocarbons or mixtures of hydrocarbons: propane, propylene, normal butane, isobutane, and butylenes.

(28) [(25)] Low-density polyethylene--A thermoplastic polymer or copolymer comprised of at least 50% ethylene by weight and having a density of 0.940 grams per cubic centimeter or less.

(29) [(26)] Marine loading facility--The loading arm(s), pumps, meters, shutoff valves, relief valves, and other piping and valves that are part of a single system used to fill a marine vessel at a single geographic site. Loading equipment that is physically separate (i.e., does not share common piping, valves, and other loading equipment) is considered to be a separate marine loading facility.

(30) [(27)] Marine loading operation--The transfer of oil, gasoline, or other volatile organic liquids at any affected marine terminal, beginning with the connections made to a marine vessel and ending with the disconnection from the marine vessel.

(31) [(28)] Marine terminal--Any marine facility or structure constructed to transfer oil, gasoline, or other volatile organic liquid bulk cargo to or from a marine vessel. A marine terminal may include one or more marine loading facilities.

(32) [(29)] Metal-to-metal seal--A connection formed by a swage ring that exerts an elastic, radial preload on narrow sealing lands, plastically deforming the pipe being connected, and maintaining sealing pressure indefinitely.

(33) [(30)] Natural gas/gasoline processing--A process that extracts condensate from gases obtained from natural gas production and/or fractionates natural gas liquids into component products, such as ethane, propane, butane, and natural gasoline. The following facilities shall be included in this definition if, and only if, located on the same property as a natural gas/gasoline processing operation previously defined: compressor stations, dehydration units, sweetening units, field treatment, underground storage, liquefied [~~liquified~~] natural gas units, and field gas gathering systems.

(34) [(31)] Petroleum refinery--Any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of crude oil, or through the redistillation, cracking, extraction, reforming, or other processing of unfinished petroleum derivatives.

(35) [(32)] Polymer or resin manufacturing process--A process that produces any of the following polymers or resins: polyethylene, polypropylene, polystyrene, and styrenebutadiene latex.

(36) [(33)] Pressure relief valve or pressure-vacuum relief valve--A safety device used to prevent operating pressures from exceeding the maximum and minimum allowable working pressure of the process equipment. A pressure relief valve or pressure-vacuum relief valve is automatically actuated by the static pressure upstream of the valve[.] but does not include:

(A) a rupture disk; or

(B) a conservation vent or other device on an atmospheric storage tank that is actuated either by a vacuum or a pressure of no more than 2.5 pounds per square inch gauge.

(37) [(34)] Printing line--An operation consisting of a series of one or more printing processes and including associated drying areas.

(38) [(35)] Process drain--Any opening (including a covered or controlled opening) that is installed or used to receive or convey wastewater into the wastewater system.

(39) [(36)] Process unit--The smallest set of process equipment that can operate independently and includes all operations necessary to achieve its process objective.

(40) [(37)] Rupture disk--A diaphragm held between flanges for the purpose of isolating a volatile organic compound from the atmosphere or from a downstream pressure relief valve.

(41) [(38)] Shutdown or turnaround--For the purposes of this chapter, a work practice or operational procedure that stops production from a process unit or part of a unit during which time it is technically feasible to clear process material from a process unit or part of a unit consistent with safety constraints, and repairs can be accomplished.

(A) The term shutdown or turnaround does not include a work practice that would stop production from a process unit or part of a unit:

(i) for less than 24 hours; or

(ii) for a shorter period of time than would be required to clear the process unit or part of the unit and start up the unit.

(B) Operation of a process unit or part of a unit in recycle mode (i.e., process material is circulated, but production does not occur) is not considered shutdown.

(42) [(39)] Startup--For the purposes of this chapter, the setting into operation of a piece of equipment or process unit for the purpose of production or waste management.

(43) [(40)] Strippable volatile organic compound (VOC)--Any VOC in cooling tower heat exchange system water that is emitted to the atmosphere when the water passes through the cooling tower.

(44) [(41)] Synthetic organic chemical manufacturing process--A process that produces, as intermediates or final products, one or more of the chemicals listed in 40 Code of Federal Regulations §60.489 (October 17, 2000).

(45) [(42)] Tank-truck tank--Any storage tank having a capacity greater than 1,000 gallons, mounted on a tank-truck or trailer. Vacuum trucks used exclusively for maintenance and spill response are not considered to be tank-truck tanks.

(46) [(43)] Transport vessel--Any land-based mode of transportation (truck or rail) equipped with a storage tank having a capacity greater than 1,000 gallons that is used to transport oil, gasoline, or other volatile organic liquid bulk cargo. Vacuum trucks used exclusively for maintenance and spill response are not considered to be transport vessels.

(47) [(44)] True partial pressure--The absolute aggregate partial pressure of all volatile organic compounds in a gas stream.

(48) [(45)] Vapor balance system--A system that provides for containment of hydrocarbon vapors by returning displaced vapors from the receiving vessel back to the originating vessel.

(49) [(46)] Vapor control system or vapor recovery system--Any control system that utilizes vapor collection equipment to route volatile organic compounds (VOC) to a control device that reduces VOC emissions.

(50) [(47)] Vapor-tight--Not capable of allowing the passage of gases at the pressures encountered except where other acceptable leak-tight conditions are prescribed in this chapter.

(51) [(48)] Waxy, high pour point crude oil--A crude oil with a pour point of 50 degrees Fahrenheit (10 degrees Celsius) or higher as determined by the American Society for Testing and Materials Standard D97-66, "Test for Pour Point of Petroleum Oils."

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER C. VOLATILE ORGANIC
COMPOUND TRANSFER OPERATIONS
DIVISION 2. FILLING OF GASOLINE
STORAGE VESSELS (STAGE I) FOR MOTOR
VEHICLE FUEL DISPENSING FACILITIES

30 TAC §§115.221, 115.222, 115.224 - 115.227, 115.229

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and THSC, §382.208, concerning Attainment Program, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles. The amendments are also proposed under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions. The amendments are also proposed under Federal Clean Air Act, 42 United States Code §§7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The proposed amendments implement THSC, §382.208, concerning Attainment Program, which authorizes the commission to develop and implement transportation programs and other

measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

§115.221. Emission Specifications.

No person in the Beaumont-Port Arthur [Beaumont/Port Arthur], Dallas-Fort Worth [Dallas/Fort Worth], El Paso, and Houston-Galveston-Brazoria [Houston/Galveston] areas or in the covered attainment counties, as defined in §115.10 of this title (relating to Definitions), shall transfer, or allow the transfer of, gasoline from any tank-truck tank into a stationary storage container which is located at a gasoline [motor vehicle fuel] dispensing facility, unless the displaced vapors from the gasoline storage container are controlled by one of the following:

(1) a vapor control system which reduces the emissions of VOC to the atmosphere to not more than 0.8 pound per 1,000 gallons (93 mg/liter) of gasoline transferred; or

(2) a vapor balance system which is operated and maintained in accordance with the provisions of §115.222 of this title (relating to Control Requirements).

§115.222. Control Requirements.

A vapor balance system will be assumed to comply with the specified emission limitation of §115.221 of this title (relating to Emission Specifications) if the following conditions are met:

(1) the container is equipped with a submerged fill pipe as defined in §101.1 of this title (relating to Definitions). The path through the submerged fill pipe to the bottom of the tank must not be obstructed by a screen, grate, or similar device whose presence would preclude the determination of the submerged fill pipe's proximity to the tank bottom while the submerged fill tube is properly installed;

(2) a vapor-tight return line is connected before gasoline can be transferred into the storage container;

(3) no avoidable gasoline leaks, as detected by sight, sound, or smell, exist anywhere in the liquid transfer or vapor balance systems;

(4) the vapor return line's cross-sectional area is at least one-half of the product drop line's cross-sectional area;

(5) in the Beaumont-Port Arthur [Beaumont/Port Arthur], Dallas-Fort Worth [Dallas/Fort Worth], El Paso, and Houston-Galveston-Brazoria [Houston/Galveston] areas and in the covered attainment counties, as defined in §115.10 of this title (relating to Definitions), the only atmospheric emission during gasoline transfer into the storage container is through a storage container vent line equipped with a pressure-vacuum relief valve set to open at a pressure of no more than eight ounces per square inch (3.4 kilopascals (kPa) [kPa]) [~~or in accordance with the facility's Stage II system as defined in the California Air Resources Board (CARB) Executive Order(s) or third-party certification for the facility~~];

[(6) in the covered attainment counties, as defined in §115.10 of this title (relating to Definitions), the only atmospheric emission during gasoline transfer into the storage container is through a storage container vent line equipped with a pressure-vacuum relief valve set to open at a pressure of no more than eight ounces per square inch (3.4 kPa).]

(6) [(7)] after unloading, the tank-truck tank is kept vapor-tight until the vapors in the tank-truck tank are returned to a loading, cleaning, or degassing operation and discharged in accordance with the control requirements of that operation;

(7) [(8)] the gauge pressure in the tank-truck tank does not exceed 18 inches of water (4.5 kPa) or vacuum exceed six inches of water (1.5 kPa);

(8) [(9)] no leak, as defined in §101.1 of this title, exists from potential leak sources when measured with a hydrocarbon gas analyzer;

(9) [(40)] in the Beaumont-Port Arthur [Beaumont/Port Arthur], Dallas-Fort Worth [Dallas/Fort Worth], El Paso, and Houston-Galveston-Brazoria [Houston/Galveston] areas, any storage tank installed after November 15, 1993, which is required to install Stage I control equipment must be equipped with a dual-point vapor balance system, as defined in §115.10 of this title [non-coaxial Stage I connection]. In addition, any modification to a storage tank existing prior to November 15, 1993, requiring excavation of the top of the storage tank must be equipped with a dual-point vapor balance system [non-coaxial Stage I connection], even if the original installation utilized coaxial Stage I connections[-. At any facility for which a Stage II system was installed prior to November 15, 1993, the Stage I system utilized must be consistent with the relevant requirements of the CARB Executive Order for the Stage II system installed at that facility];

(10) [(44)] in the covered attainment counties, any storage tank installed after December 22, 1998, which is required to install Stage I control equipment must be equipped with a dual-point vapor balance system, as defined in §115.10 of this title [non-coaxial Stage I connection]. In addition, any modification to a storage tank existing prior to December 22, 1998, requiring excavation of the top of the storage tank must be equipped with a dual-point vapor balance system [non-coaxial Stage I connection], even if the original installation utilized coaxial Stage I connections; and

(11) [(42)] any gasoline [motor vehicle fuel] dispensing facility that no longer meets an exemption in §115.227 of this title (relating to Exemptions) because of an increase in throughput shall have 120 days to come into compliance with the provisions of this section [subsection] and will remain subject to the provisions of this section, even if its gasoline throughput later falls below exemption limits. However, if gasoline throughput exceeds the exemption limit due to a natural disaster or emergency condition for a period not to exceed one month, upon written request, the executive director may grant a facility continued exempt status.

§115.224. *Inspection Requirements.*

In the Beaumont-Port Arthur [Beaumont/Port Arthur], Dallas-Fort Worth [Dallas/Fort Worth], El Paso, and Houston-Galveston-Brazoria [Houston/Galveston] areas, and in the covered attainment counties, as defined in §115.10 of this title (relating to Definitions), the following inspection requirements shall apply.

(1) Inspections for liquid leaks, visible vapors, or significant odors resulting from gasoline transfer shall be conducted at gasoline [motor vehicle fuel] dispensing facilities. Gasoline transfer shall be discontinued immediately when any liquid leaks, visible vapors, or significant odors are [a leak is] observed and shall not be resumed until the observed issue [leak] is repaired.

(2) The gasoline tank-truck tank must have been inspected for leaks within one year in accordance with the requirements of §§115.234 - 115.237 of this title (relating to Inspection Requirements; Approved Test Methods; Recordkeeping Requirements; and Exemptions, respectively [Control of Volatile Organic Compound Leaks from Transport Vessels]), as evidenced by a prominently displayed certification affixed near the United States Department of Transportation certification plate.

§115.225. *Testing Requirements.*

Compliance with the emission specification and certain control requirements and inspection requirements of §§115.221, 115.222 and 115.224 of this title (relating to Emission Specifications; Control Requirements; and Inspection Requirements) shall be determined according to the requirements of 40 Code of Federal Regulations (CFR) §63.11120 [by applying one or more of the following test methods, as appropriate]. Additionally, all affected gasoline dispensing facilities are required to annually comply with the following testing requirements found in 40 CFR §63.11120:

(1) California Air Resources Board Vapor Recovery Test Procedure TP 201.1E - Leak Rate and Cracking Pressure of Pressure/Vacuum Vent Valves.

(2) California Air Resources Board Vapor Recovery Test Procedure TP-201.3 - Determination of 2-Inch WC Static Pressure Performance of Vapor Recovery Systems of Dispensing Facilities.

(3) Alternate test methods other than those specified in paragraphs (1) - (2) of this section may be used if validated by 40 CFR §63.7(f).

[(1) Flow rate. Test Methods 1-4 (40 Code of Federal Regulations (CFR) 60, Appendix A) are used for determining flow rate, as necessary.]

[(2) Concentration of volatile organic compounds.]

[(A) Test Method 18 (40 CFR 60, Appendix A) is used for determining gaseous organic compound emissions by gas chromatography.]

[(B) Test Method 25 (40 CFR 60, Appendix A) is used for determining total gaseous nonmethane organic emissions as carbon.]

[(C) Test Method 25A or 25B (40 CFR 60, Appendix A) is used for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis.]

[(3) Leak determination by instrument method. Use Test Method 21 (40 CFR 60, Appendix A) for determining volatile organic compound leaks.]

[(4) Minor modifications. Minor modifications to these test methods may be used, if approved by the executive director.]

§115.226. *Recordkeeping Requirements.*

The owner or operator of each gasoline [motor vehicle fuel] dispensing facility in the Beaumont-Port Arthur [Beaumont/Port Arthur], Dallas-Fort Worth [Dallas/Fort Worth], El Paso, and Houston-Galveston-Brazoria [Houston/Galveston] areas and in the covered attainment counties as defined in §115.10 of this title (relating to Definitions) shall maintain the following records and make them available at the site during inspection upon request to representatives of the executive director, the United States Environmental Protection Agency [EPA], or any local air pollution control program with jurisdiction. The owner or operator shall:

(1) maintain a record at the facility site of the dates on which gasoline was delivered to the dispensing facility and the identification number and date of the last leak testing, required by §115.224(2) of this title (relating to Inspection Requirements), of each tank-truck tank from which gasoline was transferred to the facility. The records shall be kept for a period of two years; and

(2) maintain for a period of two years:

(A) a record of the results of any testing conducted at the gasoline [motor vehicle fuel] dispensing facility in accordance with

the provisions specified in §115.225 of this title (relating to Testing Requirements); and

(B) in the Beaumont-Port Arthur [Beaumont/Port Arthur], Dallas-Fort Worth [Dallas/Fort Worth], El Paso, and Houston-Galveston-Brazoria [Houston/Galveston] areas, a record of the gasoline throughput for each calendar month for the previous 24 months since January 1, 1991 [until such time as the facility installs a Stage II vapor recovery system as required by §§115.241 - 249 of this title (relating to Control of Vehicle Refueling Emissions (Stage II) at Motor Vehicle Fuel Dispensing Facilities)]. In addition, in the covered attainment counties, a record of gasoline throughput for each calendar month for the previous 24 months beginning January 1, 1999 should be maintained at the facility, until the facility is in compliance with §115.221 and §115.222 of this title (relating to Emission Specifications; and Control Requirements). The records must contain the calendar month and year, and the total facility gasoline throughput for each calendar month.]; and

[(C) in the covered attainment counties, a record of gasoline throughput for each calendar month beginning January 1, 1999, until the facility is in compliance with §115.221 and §115.222 of this title (relating to Emission Specifications; and Control Requirements). The records must contain the calendar month and year, and the total facility gasoline throughput for each calendar month. These records must be made available at the site during inspection by representatives of the executive director, EPA, or any local air pollution control program with jurisdiction.]

§115.227. Exemptions.

The following exemptions apply:

(1) In the Beaumont-Port Arthur [Beaumont/Port Arthur], Dallas-Fort Worth [Dallas/Fort Worth], El Paso, and Houston-Galveston-Brazoria [Houston/Galveston] areas, transfers to stationary storage tanks located at a gasoline [motor vehicle fuel] dispensing facility which has dispensed no more than 10,000 gallons of gasoline in any calendar month after January 1, 1991, and for which construction began prior to November 15, 1992, are exempt from the requirements of this division [(relating to Filling of Gasoline Storage Vessels (Stage I) for Motor Vehicle Fuel Dispensing Facilities)], except for:

(A) §115.222(3) [§115.222(7)] of this title (relating to Control Requirements) as it applies to liquid gasoline leaks, visible vapors, or significant odors;

(B) §115.222(6) [§115.222(3)] of this title [as it applies to liquid gasoline leaks];

(C) §115.224(1) of this title (relating to Inspection Requirements) as it applies to liquid gasoline leaks, visible vapors, or significant odors; and

(D) §115.226(2)(B) of this title (relating to Record-keeping Requirements).

(2) In the covered attainment counties, as defined in §115.10 of this title (relating to Definitions), stationary gasoline storage containers with a nominal capacity less than or equal to 1,000 gallons at gasoline [motor vehicle fuel] dispensing facilities are exempt from the requirements of this division, except for:

(A) §115.222(3) [§115.222(7)] of this title as it applies to liquid gasoline leaks, visible vapors, or significant odors;

(B) §115.222(6) [§115.222(3)] of this title [as it applies to liquid gasoline leaks]; and

(C) §115.224(1) of this title as it applies to liquid gasoline leaks, visible vapors, or significant odors.

(3) In the covered attainment counties other than Bexar, Comal, Guadalupe, Wilson, Bastrop, Caldwell, Hays, Travis, and Williamson, transfers to stationary storage tanks located at a gasoline [motor vehicle fuel] dispensing facility which has dispensed less than 100,000 [125,000] gallons of gasoline in any calendar month after October 2, 2014 [January 1, 1999] are exempt from the requirements of this division, except for:

(A) §115.222(3) [§115.222(7)] of this title as it applies to liquid gasoline leaks, visible vapors, or significant odors;

(B) §115.222(6) [§115.222(3)] of this title [as it applies to liquid gasoline leaks];

(C) §115.224(1) of this title as it applies to liquid gasoline leaks, visible vapors, or significant odors; and

(D) §115.226(2)(B) [§115.226(2)(C)] of this title.

(4) In Bexar, Comal, Guadalupe, Wilson, Bastrop, Caldwell, Hays, Travis, and Williamson Counties transfers to stationary storage tanks located at a gasoline [motor vehicle fuel] dispensing facility which has dispensed no more than 25,000 gallons of gasoline in any calendar month after December 31, 2004 are exempt from the requirements of this division [(relating to Filling of Gasoline Storage Vessels (Stage I) for Motor Vehicle Fuel Dispensing Facilities)], except for:

(A) §115.222(3) [§115.222(7)] of this title as it applies to liquid gasoline leaks, visible vapors, or significant odors;

(B) §115.222(6) [§115.222(3)] of this title [as it applies to liquid gasoline leaks];

(C) §115.224(1) of this title as it applies to liquid gasoline leaks, visible vapors, or significant odors; and

(D) §115.226(2)(B) [§115.226(2)(C)] of this title.

(5) Transfers to the following stationary receiving containers are exempt from the requirements of this division:

(A) containers used exclusively for the fueling of implements of agriculture; and

(B) storage tanks equipped with external floating roofs, internal floating roofs, or their equivalent.

§115.229. Counties and Compliance Schedules.

(a) The owner or operator of each gasoline [motor vehicle fuel] dispensing facility in the Beaumont-Port Arthur, El Paso, and Houston-Galveston-Brazoria areas and in Collin, Dallas, Denton, and Tarrant Counties [Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties] shall continue to comply with this division [(relating to Filling of Gasoline Storage Vessels (Stage I) for Motor Vehicle Fuel Dispensing Facilities)] as required by §115.930 of this title (relating to Compliance Dates).

(b) The owner or operator of each gasoline [motor vehicle fuel] dispensing facility in the covered attainment counties, as defined in §115.10 of this title (relating to Definitions), shall continue to comply with this division as required by §115.930 of this title.

(c) The owner or operator of each gasoline [motor vehicle fuel] dispensing facility in Bexar, Comal, Guadalupe, Wilson, Bastrop, Caldwell, Hays, Travis, and Williamson Counties that has dispensed at least 25,000 gallons of gasoline but less than 125,000 gallons of gasoline in any calendar month after December 31, 2004 shall comply with this division as soon as practicable, but no later than December 31, 2005.

(d) The owner or operator of each gasoline [motor vehicle fuel] dispensing facility in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties that has dispensed at least 10,000 gallons of gasoline but less than 125,000 gallons of gasoline in any calendar month after April 30, 2005, shall comply with this division as soon as practicable, but no later than June 15, 2007.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Texas Commission on Environmental Quality

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CHAPTER 312. SLUDGE USE, DISPOSAL, AND TRANSPORTATION

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) is proposing to amend §§312.4, 312.8, 312.10 - 312.13, 312.41, 312.42, 312.44, 312.45, 312.47, 312.50, 312.65, and 312.81 - 312.83.

Background and Summary of the Factual Basis for the Proposed Rules

On May 13, 2013, the TCEQ received a petition from Mr. Cole Turner (petitioner), on behalf of the landowners and citizens of Ellis County (Project Number 2013-033-PET-NR).

The petitioner requested that TCEQ amend Chapter 312 in order to prohibit the land application of sewage sludge in, or within, three miles of a city limit in a county with a population of 140,000 or more that is located adjacent to a county with a population between 2,000,000 and 4,000,000.

On June 18, 2013, the commission instructed the executive director to examine the issues raised in the petition and to initiate a rulemaking proceeding to address nuisance odor issues at bulk sewage sludge land application sites on a statewide basis. As part of this rulemaking proceeding, the commission instructed the executive director to engage stakeholders and to report back to the commission with findings and recommended actions, if any, within five months.

The Water Quality Division and Regional office staff conducted site visits at various wastewater treatment plants (WWTPs), sewage sludge processing facilities and bulk sewage sludge land application sites throughout the state. The objective was to evaluate different types of bulk sewage sludge treatment processes and evaluate odors at several sewage sludge processing and land application sites. Staff concluded that sewage sludge facilities that use more advanced treatment processes such heat drying or composting tend to have more typical odors than those that do not.

The executive director held stakeholder meetings in Parker, Ellis, Waller, and Travis Counties. The comments received at the stakeholder meetings and in writing included support for and against the petition.

At the November 20, 2013, Commissioners Agenda, the executive director recommended initiating a state-wide rulemaking rather than the three-mile prohibition requested in the petition. This recommendation to move forward with the rulemaking process was based upon stakeholder comments requesting relief from odors, vectors, unauthorized discharges from land application sites, tracking of material on roadways and staff observations during site visits. The commissioners instructed the executive director to proceed with releasing draft rule concepts and draft rule language to stakeholders.

The executive director's concept for rulemaking includes separating existing Class A into two categories, Class A and Class AB, and including additional management provisions to address odor. The management provisions for each category become more stringent as the treatment processes used for pathogen reduction used are less advanced. This approach provides additional incentives for permittees to select more advanced pathogen treatment processes which tend to reduce odors (composting, heat drying, pasteurization, and other equivalent processes) and to promote land application through incorporation into the soil, when feasible.

A concern provided during the stakeholder meetings was TCEQ's inability to respond quickly to odor complaints and prevent recurrences. Therefore, in addition to the changes to sludge classification, the rules would clarify the executive director's existing ability to include additional, more stringent requirements to any Class A, AB, or B site such as requiring an Odor Control Plan with measurable goals, as needed. This would allow TCEQ investigators to determine compliance with specific permit conditions designed to address odor and other compliance issues at a specific site and aid in addressing recurrent issues. In addition, staff evaluated existing requirements within Chapter 312 for Class B sites, which could be applied to all sites to address odor.

On January 7, 2014, the Water Quality Division conducted its final stakeholder meeting to present concepts and draft rule language for informal comment.

Section by Section Discussion

The commission is proposing to add new Class AB where appropriate throughout the entire rulemaking. Exceptions to this are in §312.4(a)(1), since Class AB is a new category, and is not currently an existing type of registration and in instances where the Class A and Class AB pathogen requirements are described in §312.82(a), Pathogen Reduction.

Additionally, throughout this rulemaking proposal the commission is proposing to add the word "sewage" before the word "sludge" to be consistent with the definitions since the current rules only state "sludge" after Class A or Class B in certain sections of the rule. Since the definitions of Class A, proposed Class AB and Class B include the word "sewage" before "sludge" it is appropriate to be consistent with each term. Instances where sewage sludge is already mentioned in the same sentence do not include sewage or sludge after the Class A, Class AB or Class B again.

§312.4, Required Authorizations or Notifications

The commission is proposing to amend §312.4(b), (b)(1) and (4) to include "Class AB" due to its applicability to notice and reporting requirements.

The commission is proposing to amend §312.4(b)(2) to replace "Land Application Team" with "Water Quality Division" for

addressing notification forms of Class A or Class AB sewage sludge land application sites.

The commission is proposing to amend §312.4(c)(1) to include "Class AB" due to its applicability to registration requirements.

The commission is proposing to change sewage sludge "composition" to "classification" when requiring notification of Class A or Class AB sewage sludge land application in §312.4(b)(2)(A). Both Class A and new Class AB will now require notification, and it is important to distinguish between the two classes since they have different site management conditions. Also, the commission is adding a requirement to include longitude and latitude coordinates for land application sites, in §312.4(b)(2)(B), when sending notification to the Water Quality Division for Class A or Class AB sewage sludge land application sites. This requirement will aid in determining the location of each land application site.

The commission is proposing to amend §312.4(b)(4) by adding a requirement to require an operator to include an updated list of persons receiving the sewage sludge in each annual Class A or Class AB sewage sludge land application report. Since Class A and Class AB notifications do not expire, it will assist the TCEQ in keeping an up-to-date list of the receivers of sewage sludge for land application.

§312.8, *General Definitions*

The commission is proposing to amend §312.8(17) by providing more clarification to the definition of Class A sewage sludge by adding §312.82(a)(3) when describing it as sewage sludge meeting one of pathogen requirements in §312.82(a)(3). This is to distinguish Class A sewage sludge from the new requirements of Class AB sewage sludge.

The commission is proposing to amend §312.8 by adding a definition for Class AB sewage sludge to distinguish it from the other classifications of sewage sludge that are currently in the rule. The Class AB sewage sludge definition is §312.8(18), and due to this addition, all existing definitions that follow paragraph (18) have been renumbered accordingly.

The commission is proposing to amend §312.8(54) by changing the word "that" to "than" to be grammatically correct for the definition of "Major sole-source impairment zone."

§312.10, *Permit and Registrations Applications Processing*

The commission is proposing to amend §312.10(g) to include the word "sewage" before the word "sludge" to be consistent with the definitions. Since the definitions of Class A, proposed Class AB and Class B include the word "sewage" before "sludge" it is appropriate to be consistent with each term. The commission is also proposing to amend §312.10(g) to include "Class AB" due to its applicability to the application processing procedures and requirements in §§281.18 - 281.20.

§312.11, *Permits*

The commission is proposing to amend §312.11(c)(1)(B)(iii) to include "Class AB sewage sludge beneficial use land application" due to its applicability to application notice requirements.

The commission is proposing to amend §312.11(d)(6) to include the word "sewage" before the word "sludge" to be consistent with the definitions. Since the definitions of Class A, proposed Class AB and Class B include the word "sewage" before "sludge" it is appropriate to be consistent with each term.

The commission is proposing to amend §312.11(g) by updating the Enforcement Division mail code identification number from MC 149 to Mail Code 224 for submittal of noncompliance information to the TCEQ. The Enforcement mail code number has changed since the current Chapter 312 rules were written. Also "MC" has been changed to "Mail Code" since there is no other reference to the MC acronym in prior sections of the rule.

§312.12, *Registrations*

The commission is proposing to amend §312.12(b) and (b)(1)(C)(iv) to include the word "sewage" before the word "sludge" to be consistent with the definitions. Since the definitions of Class A, proposed Class AB and Class B include the word "sewage" before "sludge" it is appropriate to be consistent with each term. The commission is also proposing to amend §312.12(b) and (b)(1)(C)(iv) to include "Class AB" due to its applicability to registrations.

§312.13, *Actions and Notice*

The commission is proposing to amend §312.13(c)(1) to include "Class AB" due to its applicability to notice requirements for registrations.

§312.41, *Applicability*

The commission is proposing to amend §312.41(b) by changing the applicability section since all classes of bulk sewage sludge will now be subject to new core requirements under §312.44(a), (b), (h)(3), (j) and (m).

The commission is proposing to amend §312.41(b)(1)(A) by adding applicability for the proposed Class AB sewage sludge requirements under §312.44(a), (b), (c)(2), (2)(D) and (E), (d), (h)(1), (3), (5), and (6), (j), (l) and (m).

The commission is proposing to amend §312.41(b)(1)(B) to identify an exemption to the requirements under proposed §312.41(b)(1)(A) for Class AB sewage sludge when the sludge is injected or incorporated into the soil at the land application site.

The commission is adding the requirements pertaining to applicability for bulk sewage sludge in §312.41(b) to the applicability for General Requirements for Bulk Derived Materials in §312.41(c). Bulk derived materials are products that are added to bulk sewage sludge (i.e., compost, soils, dirt) and must follow the same requirements as bulk sewage sludge.

The commission is proposing to amend §312.41(d) to include "Class AB" due to its applicability to special requirements for certain bulk derived materials.

The commission is proposing to amend §312.41(e) to include "Class AB" due to its applicability to special requirements for bagged sludge.

The commission is proposing to amend §312.41(f) to include "Class AB" due to its applicability to bagged derived materials.

The commission is proposing to amend §312.41(g) to include "Class AB" due to its applicability to bagged materials.

§312.42, *General Requirements*

The commission is proposing to amend §312.42(i) to provide when the applicant is to determine to concentration of regulated metals. The current rule refers to §312.12(a)(1)(E). The new reference to rule will be correctly listed as §312.43.

§312.44, *Management Practices*

The commission is proposing to amend §312.44(h)(3) to provide more clarity pertaining to prohibiting land application during certain surface conditions. Along with the current prohibitions associated with rainstorms or during periods in which surface soils are water-saturated, the rule will also include a new prohibition, "when pooling of water is evident on the land application site". This provision will be applicable to Class A, Class AB and Class B bulk sewage sludge land application sites.

The commission is proposing to amend §312.44(h)(3) by adding a requirement that will require the submittal of an Adverse Weather and Alternative Plan that addresses actions to be taken when sewage sludge cannot be land applied due to adverse weather. This proposed subsection of the rule will be applicable to Class A, Class AB and Class B sewage sludge land application sites and is intended to address odor conditions due to weather.

The commission is proposing to amend §312.44(j)(3) to change the wording that currently states: "If necessary or when significant nuisance conditions occur" to "To prevent nuisance conditions from occurring". This change in wording is clearer as to the intent of the requirement. Within the same subsection, the commission is removing the word "objectionable" in §312.44(j)(3)(B) when requiring to minimize odors at a land application site. All odors, and not just objectionable odors, should be minimized. Within the same subsection, the commission is adding a requirement that the operator shall design and utilize appropriate controls to prevent off-site tracking during the transport of sewage sludge material to and from a land application site or storage area. Proposed §312.44(j)(3)(C) will help enforce against instances when sewage sludge debris has been tracked off-site and on to roadways. This provision will be applicable to Class A, Class AB, and Class B bulk sewage sludge.

The commission is proposing to amend §312.44(j)(4) to clarify the executive director's ability, on a case-by-case basis, to require an Odor Control Plan. A typical Odor Control Plan may include the following elements: 1) identification of odor sources; 2) evaluation of the processing of the sludge source; 3) implementation of corrective action measures; 4) implementation of Best Management Practices (BMPs); 5) identification of milestones and deadlines of submittals; 6) professional engineer certification; and 7) submission of progress reports and a final report. The executive director would require operators to prepare and implement an Odor Control Plan in cases where odor nuisance from the processing, transport, storage, or land application of sewage sludge have been substantiated by TCEQ staff. This subsection also clarifies that the commission or executive director has the authority to require such a plan (as stated in §312.6). This provision will be applicable to Class A, Class AB and Class B bulk sewage sludge.

The commission is proposing to amend §312.44(l) by changing the term: "permit holder" to "operator" and is adding Class AB sewage sludge. This is an existing requirement for Class B sewage sludge sites which will now also be applicable to Class AB sewage sludge sites. It will require the operator to post a sign that is visible from a publically accessible road or sidewalk that is adjacent to the premises on which the land application unit is located stating that a sewage sludge beneficial land application site is located on the premises. The commission is also proposing timing requirements to the rule that would require the sign be posted three days prior to and 14 days after the commencement of land application of sewage sludge and to include the opera-

tor name, telephone number, the classification of sewage sludge and the TCEQ authorization number.

The commission is proposing to amend §312.44(m) to change the term: "permit holder" to "operator" and is adding Class A and Class AB sewage sludge. This is an existing requirement for Class B which will now be applicable to all classes of sewage sludge. It will require that trucks transporting sewage sludge are appropriately covered to prevent spillage of material during transport.

§312.45, Operational Standards--Pathogens and Vector Attraction

The commission is proposing to amend §312.45(a)(1) - (3), to include "Class AB" due to its applicability to pathogen reduction requirements.

§312.47, Record Keeping

The commission is proposing to amend §312.47(a)(1)(B) and (C), (2)(B) and (C), and (3) to include "Class AB" due to its applicability to record keeping requirements. The commission is also proposing to amend §312.47(a)(1)(B) and (C), (2)(B) and (C), (3), (4)(A)(ii) and (iii), (6)(C) and (D) to include the word "sewage" before the word "sludge" to be consistent with the definitions. Since the definitions of Class A, proposed Class AB and Class B include the word "sewage" before "sludge" it is appropriate to be consistent with each term.

The commission is changing units from "hectares" to "acres" in §312.47(a)(5)(B)(ii), since all sewage sludge land application sites are currently measured and reported in acres.

§312.50, Storage and Staging of Sludge at Beneficial Use Sites

The commission added in §312.50(a)(10), that an operator that prepares or land applies sewage sludge must comply with an Odor Control Plan if required under proposed §312.44(j)(4).

The Odor Control Plan would include the following elements for the sewage sludge storage area at a land application site: 1) identification of odor sources; 2) evaluation of the processing of the sludge source; 3) implementation of corrective action measures; 4) implementation of BMPs; 5) identification of milestones and deadlines of submittals; 6) professional engineer certification; and 7) submission of progress reports and a final report. Since this rule references §312.44(j)(4), the commission or executive director has the authority to require such a plan (as stated in §312.6). Since Class A and Class AB sewage also apply to the conditions of §312.50, this provision will be applicable to Class A, Class AB and Class B bulk sewage sludge storage areas.

The commission is proposing to revise the staging requirements in §312.50(c) to allow, with prior approval from the TCEQ regional office, up to an additional 14 days for staging of sewage sludge. This allowance is intended to cover situations when more time would be needed due to weather conditions that would cause flooding, saturated soils or frozen soils. Additional language to this subsection also includes requirements for the operator to stage the sewage sludge away from odor receptors in order to minimize off-site dust migration and nuisance odors.

§312.65, Operational Standards-Pathogen and Vector Attraction

The commission is proposing to amend §312.65(a) to include "Class AB" due to its applicability to pathogen and vector attraction reduction requirements. The commission is also proposing to amend section §312.65(a) to include the word "sewage" before the word "sludge" to be consistent with the definitions. Since

the definitions of Class A, proposed Class AB and Class B include the word "sewage" before "sludge" it is appropriate to be consistent with each term.

§312.81, *Scope*

The commission is proposing to amend §312.81(a) to include "Class AB" due to its applicability to pathogen and vector attraction reduction requirements.

§312.82, *Pathogen Reduction*

Given the separation of the current Class A pathogen requirements into two classes: Class A and Class AB, the commission is proposing to amend §312.82(a)(1)(A) to distinguish the pathogen requirements from Class A and Class AB. This separation of the two classes also required §312.82(a)(2) to be changed from Class A to Class AB and the addition of a proposed §312.82(a)(1)(B) to specifically define the pathogen requirements of Class A. For sludge to be categorized as Class AB, the density of fecal coliform in the sewage sludge must be less than 1,000 Most Probable Number (MPN) per gram of solids or the density of Salmonella in the sewage sludge must be less than three MPN per four grams of total solids and it must meet one of the pathogen alternatives listed under Alternatives 2, 3 and 4, which are listed in §312.82(a)(2). These alternatives include: Alternative 2 - high pH; Alternative 3 - temperature and time; and Alternative 4 - concentrations of enteric viruses and helminth ova (known and unknown processes). For sludge to be categorized as Class A, the density of fecal coliform in the sewage sludge must be less than 1,000 MPN per gram of solids or the density of Salmonella in the sewage sludge must be less than three MPN per four grams of total solids and it must meet one of the pathogen alternatives listed under Alternatives 1, 5, and 6, which are listed in proposed §312.82(a)(3). Alternative 1 includes time and temperature. Alternative 5 includes Processes to Further Reduce Pathogens (PFRP). Examples of PFRP are composting, heat drying, heat treatment, thermophilic aerobic digestion or pasteurization. Alternative 6 is a process that is equivalent to a PFRP and requires EPA approval.

§312.83, *Vector Attraction Reduction*

The commission is proposing to amend §312.83(b)(2) and (3) to change the word: "can not" to "cannot" to be grammatically correct.

The commission is proposing to amend §312.83(b)(9) to include "Class AB" due to its applicability to vector attraction reduction via injection of sewage sludge below the surface of the land.

The commission is proposing to amend §312.83(b)(10) to include "Class AB" due to its applicability to its applicability to vector attraction reduction via incorporation of sewage sludge into the soil.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency and no fiscal implications are anticipated for other units of state or local government as a result of administration or enforcement of the proposed rules. However, the proposed rules are anticipated to result in costs, which may be significant, for those sewage sludge sites owned or operated by local governments if they are determined by the executive director to require an Odor Control Plan to address odor complaints

from the processing, transport, storage, or land application of sewage sludge.

The proposed rules relate to the processing, storage, transport, or land application of sewage sludge and are based upon executive director recommendations and stakeholder comments requesting relief from odors, vectors, unauthorized discharges from land application sites, tracking of material on roadways and staff observations during site visits. The proposed rules are not anticipated to result in significant fiscal or workload changes for the agency.

The proposed rules would add a new sludge classification of Class AB. The current Class A and the new Class AB will share most of the same requirements. Due to the separation of the current Class A pathogen requirements to Class A and Class AB, the proposed rules will make conforming changes to current rules so that the pathogen requirements are distinguished.

The proposed rules add a requirement to include longitude and latitude when sending notification to the Water Quality Division for Class A or Class AB sewage sludge land application. Using longitude and latitude coordinates will add more clarity to the exact location of each land application site.

The proposed rules would add core land application requirements to Class A and AB sewage sludge land application. Class B application sites are already subject to these requirements. The proposed rules would add an exemption to the items required for Class AB sewage sludge if it meets one of the current vector attraction reduction requirements. This exemption from certain site management practices would be permissible when the Class AB sewage sludge is either injected or incorporated into the soil at the land application site to prevent odor conditions from occurring.

The proposed rules would clarify conditions prohibiting land application during certain surface conditions. Along with rainstorms or during periods in which surface soils are water-saturated, "when pooling of water is evident on the land application site" will be included. This will assist in enforcing land application sites that are not properly following site management conditions. This provision will be applicable to Class A, Class AB and Class B bulk sewage sludge land application sites.

The proposed rules would require an operator of a sewage sludge site to submit an Adverse Weather and Alternative Plan that details procedures to address when sewage sludge cannot be land applied due to adverse weather or other conditions. The proposed subsection to the rule will be applicable to Class A, Class AB, and Class B sewage sludge land application sites and is intended to address odor conditions due to weather.

The proposed rules would change the wording of §312.44(j)(3) that currently states, "If necessary or when significant nuisance conditions occur" to "To prevent nuisance conditions from occurring". This change in wording is more direct regarding the action the operator must take and is easier to enforce. The proposed rulemaking would remove the word "objectionable" when requiring odors to be minimized at a land application site. All odors would be minimized leaving no ambiguity over whether the odor is objectionable. Additionally, the commission is adding a requirement that an operator shall design and utilize appropriate controls to prevent off-site tracking during the transport of sewage sludge material to and from a land application site or storage area. This provision will help enforce instances when sewage sludge debris has been discharged off-site on to roadways, water of the state, adjacent properties, etc., and will be

applicable to Class A, Class AB and Class B bulk sewage sludge land application sites.

The proposed rules would provide new requirements, on a case-by-case basis, for an operator that prepares or land applies sewage sludge to submit an Odor Control Plan. The Odor Control Plan would include investigating odor sources, evaluating the processing of the sludge source, implementation of corrective action measures, implementation of BMP, deadlines of submittal, professional engineer certification, submission of progress reports and final report. The executive director would require this plan for operators that have odor complaints from the processing, transport, storage, or land application of sewage sludge and will help to reduce or eliminate odor conditions. This rulemaking also states that the commission or executive director has the authority to require such a plan. This provision will be applicable to Class A, Class AB and Class B bulk sewage sludge land application sites.

The proposed rules would also add language to current staging requirements that would include up to an additional 14 days of staging sewage sludge with prior approval from the TCEQ regional office. This change would allow additional time to stage sewage sludge at a land application site when there are adverse weather conditions. Additional language to this subsection also includes requirements for the operator to stage the sewage sludge away from odor receptors in order to prevent off-site dust migration and to prevent nuisance odors. This provision will assist in preventing any possible sewage sludge odors from affecting landowners or those that use public right-of-ways within the vicinity of the land application site.

The proposed rules will affect those cities, municipalities, and other local governments that produce Class A sewage sludge and use a pathogen reduction process that falls under the proposed AB classification. The new classification would incorporate some of the current land management requirements for Class B sewage sludge beneficial land use sites. In general, the proposed rules are not anticipated to result in any additional costs for local governments that produce Class A sewage sludge. However, the proposed rules are anticipated to result in costs for those sites owned or operated by local governments that require an Odor Control Plan to address odor complaints from the processing, transport, storage, or land application of sewage sludge, as determined by the executive director. At this time, agency staff estimates that the proposed rules could affect approximately six cities and one river authority. Agency staff also estimates that engineering costs for the development and design of the sewage sludge Odor Control Plan for the largest systems would be approximately \$500,000 for the first year. Costs for the design and development of the plan for the average system are estimated to be approximately \$50,000 for the first year. These estimated costs would involve engineering contracts to meet the new requirements related to the development and design of the Odor Control Plan. The anticipated cost for the implementation of the plan would be approximately \$100,000 each year for the largest systems and \$1,000 each year for the average systems.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be enhanced protection of the public health and safety through the reduction of odor nuisance problems associated with the management and land application of sewage sludge.

The proposed rules are not anticipated to result in fiscal implications for businesses or individuals. Agency staff estimates that there are approximately nine companies (three large businesses and six smaller companies) who treat and prepare sewage sludge or land apply sewage sludge and will be subject to the new proposed core requirements. However, at this time staff is not aware of any company who will fall under the proposed new classification standard, or any company that will need to develop a new management or Odor Control Plan. This fiscal note assumes that these businesses will be in compliance with the proposed rules and will not be required to prepare an Odor Control Plan, and therefore, no fiscal implications are anticipated for these businesses. If the businesses do become subject to the direction of the executive director to develop an Odor Control Plan, plan development and design costs are estimated to be \$50,000 in the first year and approximately \$1,000 each year thereafter to implement the plan.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect for those small or micro-businesses that treat and prepare sewage sludge for land application or land apply sewage sludge. There are an estimated three to six small businesses that may be affected by the proposed rules. At this time, agency staff is not aware of any company who will fall under the proposed new classification standard, or any company that will need to develop a new management or Odor Control Plan. This fiscal note assumes that these businesses will be in compliance with the proposed rules and will not be required to prepare an Odor Control Plan, and therefore, no fiscal implications are anticipated for these businesses.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way and are necessary to protect the public health, safety, environmental and economic welfare of the state.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Texas Government Code, §2001.0225 applies to "major environmental rules" the result of which are to exceed standards set by federal law, express requirements of state law, requirements of a delegation agreements between state and the federal governments to implement a state and federal program, or rules adopted solely under the general powers of the agency instead of under a specific state law.

A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human

health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rulemaking does not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed rulemaking is to ensure regulatory consistency by expanding existing "core requirements" to all classifications of sewage sludge, establish a more comprehensive regulatory classification for sewage sludge and clarify the executive director's authority to include additional requirements in his regulation of land application of sewage sludge. The proposed rulemaking affects the same class of regulated entities, except that the entities may be subject to more or less stringent requirements depending on the processes employed by those entities.

The proposed rulemaking modifies the state rules related to land application of sewage sludge. This will have an impact on the environment, human health, or public health and safety; however, the proposed rulemaking will not adversely affect the economy, a sector of the economy, productivity, competition, or jobs within the state or a sector of the state. Therefore, the commission concludes that the proposed rulemaking does not meet the definition of a "major environmental rule."

Furthermore, even if the proposed rulemaking did meet the definition of a "major environmental rule," it is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicable requirements specified in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) applies only to a state agency's adoption of a major environmental rule that: 1) exceeds a standard set by federal law, unless state law specifically requires the rule; 2) exceeds an express requirement of state law, unless federal law specifically requires the rule; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) is adopted solely under the general powers of the agency instead of under a specific state law.

In this case, the proposed rulemaking does not meet any of the four requirements in Texas Government Code, §2001.0225(a). First, this rulemaking does not exceed standards set by federal law. Second, the proposed rulemaking does not exceed an express requirement of state law, but rather changes the requirements under state law to ensure regulatory consistency, regulate more comprehensively the land application of sewage sludge, and clarify the executive director's authority related to regulating land application of sewage sludge. Third, the proposed rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Finally, the commission adopts the proposed rulemaking under Texas Water Code, §§5.013, 5.102, 5.103, 5.120, 26.011, 26.027, and 26.041. Therefore, the commission does not adopt the rule solely under the commission's general powers. The commission invites public comment on the draft regulatory impact analysis determination.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, §2007.043. The following is a summary of that analysis. The specific purpose of the proposed rulemaking is to modify the Texas Administrative Code to ensure regulatory consistency by expanding existing "core requirements" to all classifications of sewage sludge, establish a more comprehensive regulatory classification for sewage sludge and clarify the executive director's authority to include additional requirements in his regulation of land application of sewage sludge. The proposed rulemaking will substantially advance this stated purpose by adopting language intended to regulate more comprehensively the land application of sewage sludge.

Promulgation and enforcement of the proposed rules will not be a statutory or constitutional taking of private real property. Specifically, the proposed rulemaking does not apply to or affect any landowner's rights in private real property because it does not burden (constitutionally), restrict, or limit any landowner's right to real property and reduce any property's value by 25% or more beyond that which would otherwise exist in the absence of the regulations. These actions will not affect private real property.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking and found that the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, which therefore, requires that the goals and policies of the CMP be considered during the rulemaking process.

CMP goals applicable to the adopted rules include protection, preservation, restoration, and enhancement of the diversity, quality, quantity, functions, and values of coastal natural resource areas. Ensuring sound management of all coastal resources that balances the benefits of economic development with multiple human uses of the coastal zone, while enhancing planned public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone.

CMP policies applicable to the adopted rules include 31 TAC §501.13(a)(1) and (2) that mandate commission rules, require applicants to provide necessary information so that the commission makes an informed decision on a proposed action listed in 30 TAC §505.11 (relating to Actions and Rules Subject to the CMP), and identify the monitoring needed to ensure that activities authorized by actions listed 30 TAC §505.11 comply with all applicable requirements.

The proposed rulemaking ensures regulatory consistency by expanding existing "core requirements" to all classifications of sewage sludge, establishes a more comprehensive regulatory classification for sewage sludge, and clarifies the executive director's authority to include additional requirements in his regulation of land application of sewage sludge. By adopting these rules, there will be greater protection in the areas of concern to the CMP.

The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the rulemaking is consistent with the applicable CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules are consistent with those CMP goals and policies and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on May 6, 2014, at 2:00 p.m. in Building E, Room E201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Derek Baxter, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2014-010-312-OW. The comment period closes May 12, 2014. Copies of the proposed rule-making can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adapt.html. For further information, please contact Brian Sierant, Wastewater Permitting Section, (512) 239-1375.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§312.4, 312.8, 312.10 - 312.13

Statutory Authority

These amendments are proposed under the Texas Water Code (TWC). Specifically, TWC, §5.013, which establishes the general jurisdiction of the commission while TWC, §5.102, provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the code and other laws of the state; TWC, §5.105, which authorizes the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; TWC, §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state; TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state; and TWC, §26.034, which gives the commission the authority to set standards to prevent the discharge of waste that is injurious to the public health.

These amendments are also proposed under TWC, §26.027, which authorizes the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state and Texas Health and Safety Code, §361.121, which gives the

commission the authority to require a permit before a responsible person may apply Class B sludge on a land application unit.

The proposed amendments implement TWC, §§5.013, 5.102, 5.103, 5.105, 5.120, 26.011, 26.027, and Texas Health and Safety Code, §361.121.

§312.4. Required Authorizations or Notifications.

(a) Permits. Except where in conflict with other chapters in this title, a permit shall be required before any storage, processing, incineration, or disposal of sewage sludge, except for storage allowed under this section, §312.50 of this title (relating to the Storage and Staging of Sludge at Beneficial Use Sites), §312.61(c) of this title (relating to Applicability), §312.147 of this title (relating to Temporary Storage), and §312.148 of this title (relating to Secondary Transportation of Waste). Any permit authorizing disposal of sewage sludge shall be in accordance with any applicable standards of Subchapter C of this chapter (relating to Surface Disposal) or §312.101 of this title (relating to Incineration). No permit will be required under this chapter if issued in accordance with other requirements of the commission, as specified in §312.5 of this title (relating to Relationship to Other Requirements).

(1) Effective September 1, 2003, a permit is required for the beneficial land application of Class B sewage sludge. All registrations for the land application of Class B sewage sludge will expire on or before August 31, 2003. A person holding a registration to land apply sewage sludge who submitted an administratively complete permit application on or before September 1, 2002, may continue operations under the existing registration until final commission action on the permit application. For registrations that also authorize the use of Class A, sewage sludge, domestic septage, or water treatment plant sludge, only the provisions for the use of Class B sewage sludge will expire on August 31, 2003; the other provisions will expire on the expiration date of the registration or when a permit authorizing the use of Class A sewage sludge, domestic septage, or water treatment plant sludge is issued for the site.

(2) The effective date of a permit is the date that the executive director signs the permit.

(3) Site permit information on file with the commission must be confirmed or updated, in writing, whenever the mailing address and/or telephone number of the owner or operator is changed, or whenever requested by the commission.

(4) If a permit is required under this chapter, all activities at the site under this chapter, except transportation, shall be incorporated in the permit.

(5) The commission may not issue a Class B sewage sludge permit for a land application unit that is located both in a county that borders the Gulf of Mexico and within 500 feet of any water well or surface water.

(b) Notification of certain Class A or Class AB sewage sludge land application activities.

(1) If sewage sludge meets the metal concentration limits in §312.43(b)(3) of this title (relating to Metal Limits), the Class A or Class AB pathogen reduction requirements in §312.82(a) of this title (relating to Pathogen Reduction), and one of the requirements in §312.83(b)(1) - (8) of this title (relating to Vector Attraction Reduction), it will not be subject to the requirements of §312.10 of this title (relating to Permit and Registration Applications Processing), §312.11 of this title (relating to Permits), §312.12 of this title (relating to Registration of Land Application Activities), and §312.13 of this title (relating to Actions and Notices), except as provided in this subsection.

(2) Any generator in Texas or any person who first conveys sewage sludge from out of state into the State of Texas and who proposes to store, land apply, or market and distribute sewage sludge meeting the standards of this subsection shall submit notification to the executive director, at least 30 days prior to engaging in such activities for the first time on a form approved by the executive director. A completed notification form shall be submitted to the ~~Land Application Team of the~~ Water Quality Division by certified mail, return receipt requested. The notification must contain information detailing:

(A) sewage sludge classification ~~[composition]~~, all points of generation, and wastewater treatment facility identification;

(B) name, address, ~~[and]~~ telephone number, and the longitude and latitude of the site for ~~[of]~~ all persons who are being proposed to receive the sewage sludge directly from the generator;

(C) a description in a marketing and distribution plan that describes any of the following activities:

(i) to sell or give away sewage sludge directly to the public, including a general description of the types of end uses proposed by persons who will be receiving the sewage sludge;

(ii) methods of distribution, marketing, handling, and transportation of the sewage sludge;

(iii) a reasonable estimate of the expected quantity of sewage sludge to be generated or handled by the person making the notification; and

(iv) a description of any proposed storage and the methods that will be employed to prevent surface water runoff of the sewage sludge or contamination of groundwater.

(3) Thirty days after the notification has occurred, the activities regulated by this subsection may commence unless the executive director determines that the activities do not meet the requirements of this subsection or an applicant's permit. After receiving a notification, the executive director may review a generator's activities or the activities of the person conveying the sewage sludge into Texas to determine whether any or all of the requirements of this chapter are necessary. In making this determination, the executive director will consider specific circumstances related to handling procedures, site conditions, or the application rate of the sewage sludge. The executive director may review a proposal for storage of sewage sludge, considering the amount of time and the amount of material described on the notification. Also, in accordance with §312.41 of this title (relating to Applicability), any reasonably anticipated adverse effect that may occur due to a metal pollutant in the sewage sludge may also be considered.

(4) Annually, on September 1, each person subject to notification of certain Class A and Class AB sewage sludge activities required by this subsection shall provide a report to the commission, which shows in detail all activities described in paragraph (2) of this subsection that occurred in the reporting period. The report must include an update of new information since the prior report or notification was submitted and all newly proposed activities. The report must also include a description of the annual amounts of sewage sludge provided to each initial receiver from the in-state generator and for persons who convey out-of-state sewage sludge into Texas, the amounts provided from this person directly to any initial receivers and an updated list of persons receiving the sewage sludge. This report can be combined with the annual report(s) required under §312.48 of this title (relating to Reporting), §312.68 of this title (relating to Reporting), or §312.123 of this title (relating to Annual Report).

(c) Registration of land application sites.

(1) Effective September 1, 2003, registrations may only be obtained for the land application of Class A or Class AB sewage sludge that does not meet the requirements of subsection (b) of this section, water treatment plant sludge, and domestic septage.

(2) The effective date of the registration is the date that the executive director signs the registration in accordance with §312.12(d) of this title. Site registration information on file with the commission must be confirmed or updated, in writing, whenever the mailing address and/or telephone number of the owner or operator is changed, or requested by the executive director.

(d) Authorization. No person may cause, suffer, allow, or permit any activity of land application for beneficial use of sewage sludge unless such activity has received the prior written authorization of the commission.

§312.8. General Definitions.

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

(1) 25-year, 24-hour rainfall event--The maximum rainfall event with a probable recurrence interval of once in 25 years, with a duration of 24 hours as defined by the National Weather Service in Technical Paper Number 40, Rainfall Frequency Atlas of the United States, May 1961, and subsequent amendments, or equivalent regional or state rainfall information developed from it.

(2) Active sludge unit--A sludge unit that has not closed and/or is still receiving sewage sludge.

(3) Aerobic digestion--The biochemical decomposition of organic matter in sewage sludge into carbon dioxide, water, and other by-products by microorganisms in the presence of free oxygen.

(4) Agricultural land--Land on which a food crop, a feed crop, or a fiber crop is grown. This includes range land and land used as pasture.

(5) Agricultural management unit--A portion of a land application area contained within an identifiable boundary, such as a river, fence, or road, where the area has a known crop or land use history.

(6) Agronomic rate--The whole sludge application rate (dry weight basis) designed:

(A) to provide the amount of nitrogen needed by the crop or vegetation grown on the land; and

(B) to minimize the amount of nitrogen in the sewage sludge that passes below the root zone of the crop or vegetation grown on the land to the groundwater.

(7) Anaerobic digestion--The biochemical decomposition of organic matter in sewage sludge into methane gas, carbon dioxide, and other by-products by microorganisms in the absence of free oxygen.

(8) Annual metal loading rate--The maximum amount of a pollutant (dry weight basis) that can be applied to a unit area of land during a 365-day period.

(9) Annual whole sludge application rate--The maximum amount of sewage sludge that can be applied to a unit area of land during a 365-day period.

(10) Applied uniformly--Sewage sludge placed on the land for beneficial use such that the agronomic rate is not exceeded anywhere in the application area.

(11) Apply sewage sludge or sewage sludge applied to the land--Land application or the spraying/spreading of sewage sludge

onto the land surface; the injection of sewage sludge below the land surface; or the incorporation of sewage sludge into the soil.

(12) Aquifer--A geologic formation, group of geologic formations, or a portion of a geologic formation capable of yielding groundwater to wells or springs.

(13) Base flood--A flood that has a 1% chance of occurring in any given year.

(14) Beneficial use--Placement of sewage sludge onto land in a manner that complies with the requirements of Subchapter B of this chapter (relating to Land Application for Beneficial Use and Storage at Beneficial Use Sites), and does not exceed the agronomic need or rate for a cover crop, or any metal or toxic constituent limitations that the cover crop may have. Placement of sewage sludge on the land at a rate below the optimal agronomic rate will be considered a beneficial use.

(15) Bulk sewage sludge--Sewage sludge that is not sold or given away in a bag or other container for application to the land.

(16) Certified nutrient management specialist--An organization in Texas or an individual who is currently certified as a nutrient management specialist through a United States Department of Agriculture-Natural Resources Conservation Service recognized certification program.

(17) Class A sewage sludge--Sewage sludge meeting one of the pathogen reduction requirements in §312.82(a)(3) [§312.82(a)] of this title (relating to Pathogen Reduction).

(18) Class AB sewage sludge--Sewage sludge meeting one of the pathogen reduction requirements in §312.82(a)(2) of this title (relating to Pathogen Reduction).

(19) [(18)] Class B sewage sludge--Sewage sludge meeting one of the pathogen reduction requirements in §312.82(b) of this title.

(20) [(19)] Contaminate an aquifer--To introduce a substance that causes the maximum contaminant level for nitrate in 40 Code of Federal Regulations (CFR) §141.11, as amended, to be exceeded in groundwater or that causes the existing concentration of nitrate in groundwater to increase when the existing concentration of nitrate in the groundwater already exceeds the maximum contaminant level for nitrate in 40 CFR §141.11, as amended.

(21) [(20)] Cover--Soil or other material used to cover sewage sludge placed on an active sludge unit.

(22) [(21)] Cover crop--Grasses or small grain crop, such as oats, wheat, or barley, not grown for harvest.

(23) [(22)] Cumulative metal loading rate--The maximum amount of an inorganic pollutant (dry weight basis) that may be applied to a unit area of land.

(24) [(23)] Density of microorganisms--The number of microorganisms per unit mass of total solids (dry weight basis) in the sewage sludge.

(25) [(24)] Displacement--The relative movement of any two sides of a fault measured in any direction.

(26) [(25)] Disposal--The placement of sewage sludge on the land for any purpose other than beneficial use. Disposal does not include placement onto the land where the activity has been approved by the executive director or commission as storage or temporary storage and it occurs only for the period of time expressly approved.

(27) [(26)] Domestic septage--Either liquid or solid material removed from a septic tank, cesspool, portable toilet, Type III marine sanitation device, or similar treatment works that receives only

domestic sewage. Domestic septage does not include liquid or solid material removed from a septic tank, cesspool, or similar treatment works that receives either commercial wastewater or industrial wastewater and does not include grease removed from a grease trap.

(28) [(27)] Domestic sewage--Waste and wastewater from humans or household operations that is discharged to a wastewater collection system or otherwise enters a treatment works.

(29) [(28)] Dry weight basis--Calculated on the basis of having been dried at 105 degrees Celsius until reaching a constant mass (i.e., essentially 100% solids content).

(30) [(29)] Experimental use--Non-routine beneficial use land application or reclamation projects where sewage sludge is added to the soil for research purposes, in pilot projects, feasibility studies, or similar projects.

(31) [(30)] Facility--Includes all contiguous land, structures, other appurtenances, and improvements on the land used for the surface disposal, land application for beneficial use, or incineration of sewage sludge.

(32) [(31)] Fault--A fracture or zone of fractures in any materials along which strata, rocks, or soils on one side are displaced with respect to strata, rocks, or soil on the other side.

(33) [(32)] Feed crops--Crops produced primarily for consumption by domestic livestock, such as swine, goats, cattle, or poultry.

(34) [(33)] Fiber crops--Crops such as flax and cotton.

(35) [(34)] Final cover--The last layer of soil or other material placed on a sludge unit at closure.

(36) [(35)] Floodway--A channel of a river or watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the surface elevation more than one foot.

(37) [(36)] Food crops--Crops consumed by humans. These include, but are not limited to, fruits, vegetables, and tobacco.

(38) [(37)] Forest--Land densely vegetated with trees and/or underbrush.

(39) [(38)] Grit trap--A unit/chamber that allows for the sedimentation of solids from an influent liquid stream by reducing the flow velocity of the influent liquid stream. In a grit trap, the inlet and the outlet are both located at the same vertical level, at, or very near, the top of the unit/chamber; the outlet of the grit trap is connected to a sanitary sewer system. A grit trap is not designed to separate oil and water.

(40) [(39)] Grit trap waste--Waste collected in a grit trap. Grit trap waste includes waste from grit traps placed in the drains prior to entering the sewer system at maintenance and repair shops, automobile service stations, car washes, laundries, and other similar establishments. The term does not include material collected in an oil/water separator or in any other similar waste management unit designed to collect oil.

(41) [(40)] Groundwater--Water below the land surface in the saturated zone.

(42) [(41)] Harvesting--Any act of cutting, picking, drying, baling, gathering, and/or removing vegetation from a field, or storing.

(43) [(42)] Holocene time--The most recent epoch of the Quaternary period, extending from the end of the Pleistocene Epoch to the present. Holocene time began approximately 10,000 years ago.

(44) [(43)] Incorporation--Mixing the applied material evenly through the top three inches of soil.

(45) [(44)] Industrial wastewater--Wastewater generated in a commercial or industrial process.

(46) [(45)] Institution--An established organization or corporation, especially of a public nature or where the public has access, such as child care facilities, public buildings, or health care facilities.

(47) [(46)] Land application--The spraying or spreading of sewage sludge onto the land surface; the injection of sewage sludge below the land surface; or the incorporation of sewage sludge into the soil so that the sewage sludge can either condition the soil or fertilize crops or vegetation grown in the soil.

(48) [(47)] Land with a high potential for public exposure--Land that the public uses frequently and/or is not provided with a means of restricting public access.

(49) [(48)] Land with a low potential for public exposure--Land that the public uses infrequently and/or is provided with a means of restricting public access.

(50) [(49)] Leachate collection system--A system or device installed immediately above a liner that is designed, constructed, maintained, and operated to collect and remove leachate from a sludge unit.

(51) [(50)] Licensed professional geoscientist--A geoscientist who maintains a current license through the Texas Board of Professional Geoscientists in accordance with its requirements for professional practice.

(52) [(51)] Liner--Soil or synthetic material that has a hydraulic conductivity of 1 x 10⁻⁷ centimeters per second or less. Soil liners must be of suitable material with more than 30% passing a number 200 sieve, have a liquid limit greater than 30%, a plasticity index greater than 15, compaction of greater than 95% Standard Proctor at optimum moisture content, and will be at least two feet thick placed in six-inch lifts. Synthetic liners must be a membrane with a minimum thickness of 20 mils and include an underdrain leak detection system.

(53) [(52)] Lower explosive limit for methane gas--The lowest percentage of methane in air, by volume, that propagates a flame at 25 degrees Celsius and atmospheric pressure.

(54) [(53)] Major sole-source impairment zone--A watershed that contains a reservoir that is used by a municipality as a sole source of drinking water supply for a population of more than [that] 140,000, inside and outside of its municipal boundaries; and into which at least half of the water flowing is from a source that, on September 1, 2001, is on the list of impaired state waters adopted by the commission as required by 33 United States Code, §1313(d), as amended, at least in part because of concerns regarding pathogens and phosphorus, and for which the commission at some time prepared and submitted a total maximum daily load standard.

(55) [(54)] Metal limit--A numerical value that describes the amount of a metal allowed per unit amount of sewage sludge (e.g., milligrams per kilogram of total solids); the amount of a pollutant that can be applied to a unit area of land (e.g., kilograms per hectare); or the volume of a material that can be applied to a unit area of land (e.g., gallons per acre).

(56) [(55)] Monofill--A landfill or landfill trench in which sewage sludge is the only type of solid waste placed.

(57) [(56)] Municipality--A city, town, county, district, association, or other public body (including an intermunicipal agency of two or more of the foregoing entities) created by or under state law; an Indian tribe or an authorized Indian tribal organization having ju-

isdiction over sewage sludge management; or a designated and approved management agency under Clean Water Act, §208, as amended. The definition includes a special district created under state law, such as a water district, sewer district, sanitary district, or an integrated waste management facility as defined in Clean Water Act, §201(e), as amended, that has as one of its principal responsibilities the treatment, transport, use, or disposal of sewage sludge.

(58) [(57)] Off-site--Property that cannot be characterized as "on-site."

(59) [(58)] On-site--The same or contiguous property owned, controlled, or supervised by the same person. If the property is divided by public or private right-of-way, the access must be by crossing the right-of-way or the right-of-way must be under the control of the person.

(60) [(59)] Operator--The person responsible for the overall operation of a facility or beneficial use site.

(61) [(60)] Other container--Either an open or closed receptacle, including, but not limited to, a bucket, box, or a vehicle or trailer with a load capacity of one metric ton (2,200 pounds) or less.

(62) [(61)] Owner--The person who owns a facility or part of a facility.

(63) [(62)] Pasture--Land that animals feed directly on for feed crops such as legumes, grasses, grain stubble, forbs, or stover.

(64) [(63)] Pathogenic organisms--Disease-causing organisms including, but not limited to, certain bacteria, protozoa, viruses, and viable helminth ova.

(65) [(64)] Person who prepares sewage sludge--Either the person who generates sewage sludge during the treatment of domestic sewage in a treatment works or the person who derives a material from sewage sludge.

(66) [(65)] Place sewage sludge or sewage sludge placed--Disposal of sewage sludge on a surface disposal site.

(67) [(66)] Pollutant--An organic or inorganic substance, or a pathogenic organism that, after discharge and upon exposure, ingestion, inhalation, or assimilation into an organism either directly from the environment or indirectly by ingestion through the food chain, could, on the basis of information available to the executive director, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunction in reproduction), or physical deformations in either organisms or offspring of the organisms.

(68) [(67)] Process or processing--For the purposes of this chapter, these terms shall have the same meaning as "treat" or "treatment."

(69) [(68)] Public contact site--Land with a high potential for contact by the public. This includes, but is not limited to, public parks, ball fields, cemeteries, plant nurseries, turf farms, and/or golf courses.

(70) [(69)] Range land--Open land with indigenous vegetation.

(71) [(70)] Reclamation site--Drastically disturbed land that is reclaimed using sewage sludge. This includes, but is not limited to, strip mines and/or construction sites.

(72) [(71)] Runoff--Rainwater, leachate, or other liquid that drains overland on any part of a land surface and runs off of the land surface.

(73) [(72)] Seismic impact zone--An area that has a 10% or greater probability that the horizontal ground level acceleration of the rock in the area exceeds 0.10 gravity once in 250 years.

(74) [(73)] Sewage sludge--Solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in treatment works. Sewage sludge includes, but is not limited to, domestic septage, scum, or solids removed in primary, secondary, or advanced wastewater treatment processes; and material derived from sewage sludge. Sewage sludge does not include ash generated during preliminary treatment of domestic sewage in a treatment works.

(75) [(74)] Sewage sludge debris--Solid material such as rubber, plastic, glass, or other trash that may pass through a wastewater treatment process or sludge process or may be collected with septage. This solid material is visibly distinguishable from sewage sludge. This material does not include grit or screenings removed during the preliminary treatment of domestic sewage at a treatment works, nor does it include grit trap waste.

(76) [(75)] Sludge lagoon--An existing surface impoundment located on site at a wastewater treatment plant for the storage of sewage sludge. Any other type impoundment must be considered an active sludge unit, as defined in this section.

(77) [(76)] Sludge unit--Land that only sewage sludge is placed for disposal. A sludge unit must be used for sewage sludge. This does not include land that sewage sludge is either stored or treated.

(78) [(77)] Sludge unit boundary--The outermost perimeter of a surface disposal site.

(79) [(78)] Sole-source surface drinking water supply--A body of surface water that is identified as a public water supply in §307.10 of this title (relating to Appendices A - E) and is the sole source of supply of a public water supply system, exclusive of emergency water connections.

(80) [(79)] Source-separated organic material--As defined in §332.2 of this title (relating to Definitions).

(81) [(80)] Specific oxygen uptake rate--The mass of oxygen consumed per unit time per unit mass of total solids (dry weight basis) in the sewage sludge.

(82) [(81)] Staging--Temporary holding of sewage sludge at a beneficial use site, for up to a maximum of seven calendar days, prior to the land application of the sewage sludge.

(83) [(82)] Store or storage--The placement of sewage sludge on land for longer than seven days.

(84) [(83)] Temporary storage--Storage of waste regulated under this chapter by a transporter, which has been approved in writing by the executive director, in accordance with §312.147 of this title (relating to Temporary Storage).

(85) [(84)] Three hundred-sixty-five day period--A running total that covers the period between sludge application to a site and the nutrient uptake of the cover crop.

(86) [(85)] Total solids--The materials in sewage sludge that remain as residue if the sewage sludge is dried at 103 degrees Celsius to 105 degrees Celsius.

(87) [(86)] Transporter--Any person who collects, conveys, or transports sewage sludge, water treatment plant sludges, grit trap waste, grease trap waste, chemical toilet waste, and/or septage by roadway, ship, rail, or other means.

(88) [(87)] Treat or treatment of sewage sludge--The preparation of sewage sludge for final use or disposal. This includes, but

is not limited to, thickening, stabilization, and dewatering of sewage sludge. This does not include storage of sewage sludge.

(89) [(88)] Treatment works--Either a federally owned, publicly owned, or privately owned device or system used to treat (including recycle and reclaim) either domestic sewage or a combination of domestic sewage and industrial waste of a liquid nature.

(90) [(89)] Unstabilized solids--Organic materials in sewage sludge that have not been treated in either an aerobic or anaerobic treatment process.

(91) [(90)] Unstable area--Land subject to natural or human induced forces that may damage the structural components of an active sewage sludge unit. This includes, but is not limited to, land that the soils are subject to mass movement.

(92) [(91)] Vector attraction--The characteristic of sewage sludge that attracts rodents, flies, mosquitoes, or other organisms capable of transporting infectious agents.

(93) [(92)] Volatile solids--The amount of the total solids in sewage sludge lost when the sewage sludge is combusted at 550 degrees Celsius in the presence of excess oxygen.

(94) [(93)] Water treatment sludge--Sludge generated during the treatment of either surface water or groundwater for potable use, which is not an industrial solid waste as defined in §335.1 of this title (relating to Definitions).

(95) [(94)] Wetlands--Those areas that are inundated or saturated by surface water or groundwater at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

§312.10. Permit and Registration Applications Processing.

(a) Applications for permits, registrations, or other types of approvals required by this subchapter shall be reviewed by staff for administrative completeness within 14 calendar days of receipt of the application by the executive director.

(b) Permit and registration applications must include all information required by §312.11 of this title (relating to Permits), §312.12 of this title (relating to Registration of Land Application Activities), or §312.142 of this title (relating to Transporter Registration).

(c) Upon receipt of an application for a permit or registration, excluding transportation registrations, the executive director shall assign the application a number for identification purposes, and prepare a Notice of Receipt of Application and Declaration of Administrative Completeness for domestic septage registrations or Notice of Receipt of Application and Intent to Obtain Permit for permits where applicable, which is suitable for publishing or mailing, and forward that notice to the Office of the Chief Clerk. The Office of the Chief Clerk shall notify every person entitled to notification of a particular application as described in §312.13 of this title (relating to Actions and Notice).

(d) The Notice of Receipt of Application and Declaration of Administrative Completeness for domestic septage registrations or Notice of Receipt of Application and Intent to Obtain Permit for permit where applicable, must contain the information required by Chapter 39 of this title (relating to Public Notice), Texas Water Code, §5.552(c), and the approximate anticipated date of the first land application of sludge to the proposed land application unit.

(e) Nothing in this section shall be construed so as to waive the notice and processing requirements concerning the application and the draft permit in accordance with Chapter 39, Subchapters H and J

of this title (relating to Applicability and General Provisions and Public Notice of Water Quality Applications and Water Quality Management Plans), Chapter 50, Subchapters E - G of this title (relating to Purpose, Applicability, and Definitions; Action by the Commission; and Action by the Executive Director), Chapter 55, Subchapters D - F of this title (relating to Applicability and Definitions; Public Comment and Public Meetings; and Requests for Reconsideration or Contested Case Hearing), or Chapter 305, Subchapters C, D, and F of this title (relating to Application for Permit or Post-Closure; Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits; and Permit Characteristics and Conditions) for applications for sewage sludge land application, processing, disposal, storage, or incineration permits.

(f) All permit applications for sewage sludge land application, processing, disposal, storage, or incineration are subject to the application processing procedures and requirements in §§281.18 - 281.24 of this title (relating to Applications Returned; Technical Review; Extension; Draft Permit, Technical Summary, Fact Sheet, and Compliance History; Referral to Commission; Application Amendment; and Effect of Rules).

(g) All registration applications for Class A or sewage sludge, Class AB sewage sludge, water treatment plant sludge, and domestic septage are subject to the application processing procedures and requirements in §§281.18 - 281.20 of this title.

(h) A registration or permit will be cancelled upon receipt of a written request for cancellation from either the site operator or landowner. The executive director will provide notice to the other party that cancellation has been requested and that cancellation will occur ten days from the issuance of notice. This notice is provided merely as a courtesy by the commission and is not mandatory for cancellation.

(i) To transfer a registration or permit, both the site operator and the landowner must sign the transfer application. An application for transfer that is not signed by both the site operator and the landowner will be considered a request for cancellation.

(j) If a registration or permit for a site is cancelled, a complete application for registration or permit must be submitted in order to reauthorize the site. If the application is approved, the site will be authorized under the same site registration or permit number.

(k) For permits, a major amendment is defined in Chapter 305, Subchapter D of this title. For purposes of this chapter concerning registrations and except as provided in subsection (l) of this section, a major amendment for a registration is an amendment that changes a substantive term, provision, requirement, or a limiting parameter of a registration or a substantive change in the information provided in an application for registration. Changes to registrations that are not considered major include, but are not limited to, typographical errors, changes that result in more stringent monitoring requirements, changes in site ownership, changes in site operator, or similar administrative information.

(l) Upon the effective date of this chapter, the executive director will process as a minor amendment a request by an existing permittee or registrant to change any substantive term, provision, requirement, or a limiting parameter in a permit or registration that implemented prior regulations of the commission, when it is no longer a requirement of this chapter. Notice requirements of §312.13 of this title are not applicable to a minor amendment for a registration.

(m) Term limits for registrations or permits may not exceed five years.

§312.11. Permits.

(a) The provisions of this section set the standards and requirements for permit applications to land apply, process, store, dispose of, or incinerate sewage sludge. Any information provided under this subsection must be submitted in quadruplicate form.

(b) Any person who is required to obtain or who requests a new permit or an amendment, modification, or renewal of a permit under this section is subject to the permit application procedures of §1.5(d) of this title (relating to Records of the Agency), §305.42(a) of this title (relating to Application Required), §305.43 of this title (relating to Who Applies), §305.44 of this title (relating to Signatories to Applications), §305.45 of this title (relating to Contents of Application for Permit), and §305.47 of this title (relating to Retention of Application Data). For a land application permit, the applicant must be:

(1) the owner of the application site, if the sewage sludge was generated outside this state; or

(2) the site operator, if the sewage sludge was generated in this state.

(c) A permit application must include all information in accordance with Chapter 281, Subchapter A of this title (relating to Applications Processing) and Chapter 305, Subchapter C of this title (relating to Application for Permit or Post-Closure Order), and must also include the following:

(1) the map required by §305.45(a)(6) of this title that provides the following information:

(A) the approximate boundaries of the site to be permitted, which must include all contiguous properties owned by or under the control of the applicant;

(B) the name and mailing address of the owner of each tract of land located:

(i) within 1/4 mile of the site to be permitted, as such information can be determined from the current county tax rolls at the time the application is filed, or other reliable sources, for Class B sewage sludge beneficial land use permit applications submitted on or after September 1, 2003, or applications submitted before September 1, 2003, but not administratively complete by the commission by that date;

(ii) within 1/2 mile of the site to be permitted, as such information can be determined from the current county tax rolls or other reliable sources, for a sewage sludge incineration or disposal permit application; and

(iii) adjacent to the site to be permitted, as such information can be determined from the current county tax rolls or other reliable sources, at the time the application is filed for a domestic septage [or] Class A or sewage sludge beneficial use land application, Class AB sewage sludge beneficial use land application, or sewage sludge processing or storage facility;

(C) the source(s) of the information for the surrounding property owners; and

(D) the list of property owners. The list must be provided both as a hard copy, either on the map or as an attached list, and in electronic format or on four sets of self-adhesive mailing labels; and

(2) a notarized affidavit from the applicant(s) verifying land ownership of the permitted site or landowner agreement to the proposed activity.

(d) A permit application for land application of Class B sewage sludge must also include the following information:

(1) the information listed in §312.12(b)(1)(A) - (C) of this title (relating to Registration);

(2) analytical results establishing the background soil concentration of metals regulated by this chapter in the application area(s), based on the following:

(A) samples taken from the zero to six-inch zone of soil to be affected by the addition of sewage sludge (including domestic septage);

(B) soil samples that accurately show soil conditions in the application area(s) and that are taken at a spatial distribution of at least one composite sample per every 80 acres or less of soil type or area being sampled;

(C) composite samples comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;

(D) a separate composite sample taken from each United States Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) soil type (soils with the same characterization or texture), unless an alternate method is used; and

(E) when using an alternate method for defining areas to be sampled such as sampling by agricultural management units or other defined areas, a sampling plan included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA NRCS soil type in each area sampled;

(3) analytical results establishing the background soil concentration of nutrients, salinity, and pH in the application area(s), based on the following:

(A) separate samples taken from the zero to six-inch and from the six to 24-inch zones of soil to be affected by the addition of sewage sludge (including domestic septage);

(B) soil samples that accurately show soil conditions in the application area(s) and that are taken at a spatial distribution of at least one composite sample per every 80 acres or less of soil type or area being sampled;

(C) composite samples comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;

(D) a separate composite sample taken from each USDA NRCS soil type (soils with the same characterization or texture), unless an alternate method is used;

(E) when using an alternate method for defining areas to be sampled such as sampling by agricultural management units or other defined areas, a sampling plan also included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA NRCS soil type in each area sampled;

(4) information necessary to identify the hydrological characteristics of the surface water and groundwater within 1/4 mile of the site to be permitted;

(5) except for applications by political subdivisions, proof of a commercial liability insurance policy and an environmental impairment policy or a similar policy in accordance with Chapter 37, Subchapter V of this title (relating to Financial Assurance for Class B Sewage Sludge for Land Application Units); and

(6) proof that the applicant has minimized the risk of water quality impairment caused by nitrogen applied to the land application unit through the application of Class B sewage sludge by having had a

nutrient management plan prepared by a certified nutrient management specialist in accordance with the NRCS Practice Standard Code 590.

(e) A permittee of a Class B sewage sludge land application site shall comply with the requirements of Chapter 37, Subchapter V of this title.

(f) Any person who is issued a permit to land apply, process, store, dispose of, or incinerate sewage sludge is subject to the permit characteristics and standards set forth in §305.122 of this title (relating to Characteristics of Permits), §305.123 of this title (relating to Reservation in Granting Permit), §305.124 of this title (relating to Acceptance of Permit, Effect), §305.125 of this title (relating to Standard Permit Conditions), §305.126(d) of this title (relating to Additional Standard Permit Conditions for Waste Discharge Permits), §305.127 of this title (relating to Conditions to be Determined for Individual Permits), §305.128 of this title (relating to Signatories to Reports), and §305.129 of this title (relating to Variance Procedures).

(g) If any provision of a permit is violated during its term, the permit holder is required to report to the executive director the noncompliance in accordance with Texas Health and Safety Code, §361.121(d)(5) and §305.125(9) of this title. Each permit for the land application of sewage sludge must contain a provision requiring such reporting. Report of such information must be provided orally or by facsimile transmission (fax) to the appropriate regional office within 24 hours of the permit holder becoming aware of the noncompliance. A written submission of such information must also be provided by the permit holder to the regional office and to the Enforcement Division at the commission's Central Office (Mail Code 224) [(MC 149)] within five working days of becoming aware of the noncompliance. The written submission must contain the following information:

- (1) a description of the noncompliance and its cause;
- (2) the potential danger to human health, safety, or the environment;
- (3) the period of noncompliance, including exact dates and times;
- (4) if the noncompliance has not been corrected, the anticipated time it is expected to continue; and
- (5) steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance, and to mitigate its adverse effects.

(h) Each sewage sludge land application permit must include a reference to the maximum quantity of sewage sludge that may be land applied under the permit.

(i) Any permittee who requests a new permit or an amendment, modification, or renewal of a permit to land apply, process, store, dispose of, or incinerate sewage sludge is subject to the standards and requirements for applications and actions concerning amendments, modifications, renewals, transfers, corrections, revocations, denials, and suspensions of permits, as set forth in §305.62 of this title (relating to Amendment), §305.63 of this title (relating to Renewal), §305.64 of this title (relating to Transfer of Permits), §305.65 of this title (relating to Renewal), §305.66 of this title (relating to Permit Denial, Suspension, and Revocation), §305.67 of this title (relating to Revocation and Suspension upon Request or Consent), and §305.68 of this title (relating to Action and Notice on Petition for Revocation or Suspension).

(j) The permittee shall immediately provide written notice to the executive director of any changes to a permit or to information on soil or subsurface conditions at the site, and provide any additional information concerning changes in land ownership, site control, operator, waste composition, source of sewage sludge, or waste management methods.

(k) For land application sites located in a major sole-source impairment zone, the permittee is subject to the following provisions.

(1) The operator shall have a nutrient management plan (nitrogen and phosphorus) prepared by a certified nutrient management specialist in accordance with the USDA NRCS Practice Standard Code 590;

(2) When results of the annual soil analysis for extractable phosphorus indicate a level greater than 200 parts per million of extractable phosphorus (reported as P) in the zero to six-inch sample for a particular land application field or if ordered by the commission in order to protect the quality of water in the state, then the operator may not apply any sewage sludge to the affected area unless the land application is implemented in accordance with a detailed nutrient utilization plan (NUP) that has been approved by the commission.

(3) A NUP is equivalent to the NRCS Nutrient Management Plan Practice Standard Code 590. The nutrient management plan, based on crop removal, must be developed and certified by one of the following individuals or entities:

- (A) an employee of the NRCS;
- (B) a nutrient management specialist certified by the NRCS;
- (C) the Texas State Soil and Water Conservation Board;
- (D) Texas Cooperative Extension;
- (E) an agronomist or soil scientist on full-time staff at an accredited university located in the State of Texas;
- (F) a professional agronomist certified by the American Society of Agronomy;
- (G) a certified professional soil scientist certified by the Soil Science Society of America; or
- (H) a licensed Texas geoscientist-soil scientist, after approval by the executive director based on a determination by the executive director that another person or entity identified in this paragraph cannot develop the plan in a timely manner.

(4) After a NUP is implemented, the operator shall land apply in accordance with the NUP until soil phosphorus is reduced below 200 parts per million in the zero to six-inch sample. Thereafter, the operator shall implement the requirements of the nutrient management plan.

(5) The buffer zones must be maintained according to the applicable requirements specified in §312.44(c) of this title (relating to Management Practices).

§312.12. Registrations.

(a) After August 31, 2003, all registrations for the beneficial use of Class B sewage sludge will be void. Registrations for the beneficial use of Class A sewage sludge, water treatment plant sludge, and/or domestic septage will remain valid until they expire, are renewed, are cancelled, or are revoked.

(b) Except as provided in §312.4(b) of this title (relating to Required Authorizations or Notifications), an applicant for a registration to land apply Class A sewage sludge, Class AB sewage sludge, water treatment sludge, and/or domestic septage shall:

(1) submit to the executive director an original, completed application form approved by the executive director, along with the appropriate number of copies of the registration application. Each applicant shall submit to the executive director such information as may

reasonably be required to enable the executive director to determine whether such land application for beneficial use activities are compliant with the terms of this chapter. Such information may include, but is not limited to, the following:

(A) a description and composition of the material to be land applied;

(B) a description of all processes generating the material to be land applied at the site;

(C) information about the site and the planned management of the material to be land applied, including the name, address, and telephone number of any landowner or operator at the site and the following information:

(i) whether such material is managed on site and/or off site from its point of generation;

(ii) a description of each on-site land application beneficial use unit or tract, including the name, address, and telephone number of all landowners, or the same information from a landowner acting as a spokesperson(s) for all the landowners, so long as the spokesperson submits to the executive director a sworn statement allowing the spokesperson to act for other persons;

(iii) a listing of the types of material to be land applied managed in each unit or tract;

(iv) a detailed description of the beneficial use occurring at each unit or tract of land where application of Class A or Class AB sewage sludge, water treatment sludge, and/or domestic septage is proposed, including proposed waste management and crop production methods; and

(v) information regarding soil characteristics and subsurface conditions where the land application site will be located;

(D) the verified legal status of the applicant(s), as applicable;

(E) the notarized signature of each applicant, in accordance with §305.44 of this title (relating to Signatories to Applications);

(F) a notarized affidavit from the applicant(s) verifying land ownership or landowner agreement to the proposed activity;

(G) technical reports and supporting data required by the application;

(H) for applications for major amendments or new registrations, information concerning surrounding landowners, including the following, as applicable:

(i) a map depicting the approximate boundaries of the tract of land owned or under the control of the applicant and each residential or business address and owner of all the tracts of land bordering the perimeter of any portion of the site;

(ii) a list on or attached to the map of the names and addresses of the owners of such tracts of land as can be determined from the current county tax rolls at the time the application is filed, and other reliable sources. The list of property owners must be provided in both hard copy and either in electronic format or on four sets of self-adhesive mailing labels; and

(iii) the source of the information;

(I) analytical results establishing the background soil concentration of metals regulated by this chapter in the application area(s), as applicable, based on the following:

(i) samples taken from the zero to six-inch zone of soil to be affected by the addition of sewage sludge (including domestic septage);

(ii) soil samples that accurately show soil conditions in the application area(s) and that are taken at a spatial distribution of at least one composite sample per every 80 acres or less of soil type or area being sampled;

(iii) composite samples comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;

(iv) a separate composite sample taken from each United States Department of Agriculture (USDA) Natural Resource Conservation Service (NRCS) soil type (soils with the same characterization or texture), unless an alternate method is used;

(v) when using an alternate method for defining areas to be sampled such as sampling by agricultural management units or other defined areas, a sampling plan also included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA NRCS soil type in each area sampled;

(J) analytical results establishing the background soil concentration of nutrients, salinity, and pH in the application area(s), as applicable, based on the following:

(i) separate samples taken from the zero to six-inch and from the six to 24-inch zones of soil to be affected by the addition of sewage sludge (including domestic septage);

(ii) soil samples that accurately show soil conditions in the application area(s) and that are taken at a spatial distribution of at least one composite sample per every 80 acres or less of soil type or area being sampled;

(iii) composite samples comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;

(iv) a separate composite sample taken from each USDA NRCS soil type (soils with the same characterization or texture), unless an alternate method is used;

(v) when using an alternate method for defining areas to be sampled such as sampling by agricultural management units or other defined areas, a sampling plan also included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA NRCS soil type in each area sampled;

(K) any information provided under this paragraph submitted to the executive director in quadruplicate form;

(2) immediately provide written notice to the executive director of any changes, requests for an amendment, modification, or renewal of a registration, or any additional information concerning changes in land ownership, changes in site control, or operator, changes in waste composition, changes in the source of sewage sludge, or waste management methods, and information regarding soils and subsurface conditions where the operation is to be located. Any information provided under this paragraph must be submitted to the executive director in duplicate form.

(c) The executive director shall determine, after review of any application, whether to approve or deny an application in whole or in part, deny with prejudice, suspend the authority to conduct an activity for a specified period of time, or amend or modify the proposed activity

requested by the applicant. The determination of the executive director shall include review and action on any new applications or changes, renewals, and requests for major amendment of any existing application. In consideration of such an application, the executive director shall consider all relevant requirements of this chapter and consider all information pertaining to those requirements received by the executive director regarding the application. The written determination on any application, including any authorization granted, shall be mailed to the applicant upon the decision of the executive director.

(d) At the same time that the executive director's decision is mailed to the applicant, notice of this decision must also be mailed to all parties who submitted written information on the application, as described in §312.13(c)(2) and (3) of this title (relating to Actions and Notice).

(e) For registered land application sites located in a major sole-source impairment zone, the registrant must comply with the provisions listed in §312.11(k) of this title (relating to Permits).

§312.13. *Actions and Notice.*

(a) *Applicability.* This section sets forth the manner in which action will be taken on applications filed with the executive director for either a permit or a registration to land apply, store, process, dispose of, or incinerate sewage sludge.

(b) *Permit actions.*

(1) All permit applications are subject to the standards and requirements as set forth in Chapter 39, Subchapters H - J of this title (relating to Applicability and General Provisions; Public Notice of Solid Waste Applications; and Public Notice of Water Quality Applications and Water Quality Management Plans), Chapter 50, Subchapters E - G of this title (relating to Purpose, Applicability, and Definitions; Action by the Commission; and Action by the Executive Director), and Chapter 55, Subchapters D - F of this title (relating to Applicability and Definitions; Public Comment and Public Meetings; and Requests for Reconsideration or Contested Case Hearing).

(2) For disposal and incineration permit applications, notice must be provided to all owners of properties within 1/2 mile of the border of any portion of the tract of land where the permitted activities would occur. For beneficial use (excluding Class B sewage sludge), processing, and storage permit applications, notice must be provided to all owners of properties adjacent to any portion of the tract of land where the permitted activities will occur. The tract of land includes all contiguous properties under the ownership or control of the applicant.

(3) For Class B sewage sludge beneficial land use permit applications:

(A) notice must be provided under Chapter 39 of this title (relating to Public Notice) and under Texas Water Code, §5.552. The notice must also contain the anticipated date of the first land application of sludge to the proposed land application unit. An applicant for a new permit, permit amendment, or permit renewal under Texas Health and Safety Code, §361.121(c), shall notify by registered or certified mail each owner of land located within 1/4 mile of the proposed land application unit who lives on that land; and

(B) an owner of the land located within 1/4 mile of the proposed land application unit who lives on the land is considered an "affected person" for purposes of Texas Water Code, §5.115, and Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment). Individuals who do not own land within 1/4 mile of the proposed land application site are not excluded from being considered "affected persons" under §55.203 of this title (relating to Determination of Affected Person).

(c) Registration actions.

(1) The public notice requirements of this subsection apply to new applications for a registration, and to applications for major amendment of a registration. The requirements of this subsection do not apply to sites where only Class A or Class AB sewage sludge that has been authorized for marketing and distribution is to be land applied for beneficial use or registrations for water treatment sludge.

(2) The Office of the Chief Clerk shall mail the Notice of Receipt of Application and Declaration of Administrative Completeness along with a copy of the registration application to the county judge in the county where the proposed site is to be located.

(3) The Office of the Chief Clerk shall mail the Notice of Receipt of Application and Declaration of Administrative Completeness to the landowners named on the application map or supplemental map, or the sheet attached to the application map or supplemental map.

(4) Each notice must specify both the name, affiliation, address, and telephone number of the applicant and of the commission employee who may be reached to obtain more information about the application to register the site. The notice must specify that the registration application has been provided to the county judge and that it is available for review by interested parties.

(5) Any application for a registration is subject to the standards and requirements for actions concerning amendments, modifications, transfers, and renewals of registrations, as set forth in Chapter 50, Subchapter G of this title.

(d) Public comment on registrations. A person may provide the commission with written comments on any new or major amendment applications to register a site, where applicable. The executive director shall review any written comments when they are received within 30 days of mailing the notice. The written information received will be utilized by the executive director in determining what action to take on the application for registration in accordance with §312.12(c) of this title (relating to Registrations).

(e) Motion to overturn. The applicant, public interest counsel, or other person may file with the chief clerk a motion to overturn under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) to overturn the executive director's final approval or denial of an application.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Texas Commission on Environmental Quality

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For further information, please call: (512) 239-2613



SUBCHAPTER B. LAND APPLICATION FOR BENEFICIAL USE AND STORAGE AT BENEFICIAL USE SITES

30 TAC §§312.41, 312.42, 312.44, 312.45, 312.47, 312.50

Statutory Authority

These amendments are proposed under the Texas Water Code (TWC). Specifically, TWC, §5.013, establishes the general jurisdiction of the commission, while TWC, §5.102, provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the code and other laws of the state; TWC, §5.105, which authorizes the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; TWC, §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state; TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state; and TWC, §26.034, which gives the commission the authority to set standards to prevent the discharge of waste that is injurious to the public health.

These amendments are also proposed under TWC, §26.027, which authorizes the TCEQ to issue permits for the discharge of waste or pollutants into or adjacent to water in the state and Texas Health and Safety Code, §361.121, which gives the TCEQ the authority to require a permit before a responsible person may apply Class B sludge on a land application unit.

The proposed amendments implement TWC, §§5.013, 5.102, 5.103, 5.105, 5.120, 26.011, 26.027, and Texas Health and Safety Code, §361.121.

§312.41. *Applicability.*

(a) Application to land. This subchapter applies to any person who prepares sewage sludge that is applied to the land, to any person who applies sewage sludge to the land, to sewage sludge applied to the land, and to the land on which sewage sludge is applied.

(b) Bulk sewage sludge.

(1) When bulk sewage sludge is applied to the land and meets the metal concentrations in §312.43(b)(3) of this title (relating to Metal Limits), the Class A sewage sludge pathogen requirements in §312.82(a)(3) of this title (relating to Pathogen Reduction), and one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title (relating to Vector Attraction Reduction), then all of the provisions of §312.42 of this title (relating to General Requirements) and §312.44 of this title (relating to Management Practices) do not apply with the exception of §312.44(a), (b), (h)(3), (j) and (m) of this title. [Section 312.42 of this title (relating to General Requirements) and §312.44 of this title (relating to Management Practices) do not apply when bulk sewage sludge is applied to the land if the bulk sewage sludge meets the metal concentrations in §312.43(b)(3) of this title (relating to Metal Limits), the Class A pathogen requirements in §312.82(a) of this title (relating to Pathogen Reduction), and one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title (relating to Vector Attraction Reduction).]

(A) When bulk sewage sludge that meets the metal concentrations in §312.43(b)(3) of this title, the Class AB pathogen requirements in §312.82(a)(2) of this title, and one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title, is applied to the land, then §312.44(a), (b), (c)(2)(D) and (E), (d), (h)(1), (3), (5) and (6), (j), (l), and (m) of this title will apply to the land application of sewage sludge.

(B) When bulk sewage sludge that meets the metal concentrations in §312.43(b)(3) of this title, the Class AB pathogen requirements in §312.82(a)(2) of this title, and one of the vector attraction reduction requirements in §312.83(b)(1) - (8) in addition to (9)

or (10) of this title, then the requirements in subparagraph (A) of this paragraph do not apply with the exception of §312.44(a), (b), (h)(3), (j), and (m) of this title.

(2) The executive director may apply any or all of §312.42 and §312.44 of this title to the bulk sewage sludge described in this subsection on a case-by-case basis after determining that the general requirements or management practices are needed to protect public health and the environment from any reasonably anticipated adverse effect that may occur from any metal in the bulk sewage sludge.

(c) General Requirements for Bulk Derived Materials.

(1) When bulk derived sewage sludge is applied to the land and meets the metal concentrations in §312.43(b)(3) of this title, the Class A pathogen requirements in §312.82(a)(3) of this title, and one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title, then all of the provisions of §312.42 and §312.44 of this title do not apply with the exception of §312.44(a), (b), (h)(3), (j), and (m) of this title.

(A) When bulk sewage sludge that meets the metal concentrations in §312.43(b)(3) of this title, the Class AB pathogen requirements in §312.82(a)(2) of this title, and one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title is applied to the land, then §312.44(a), (b), (c)(2)(D) and (E), (d), (h)(1), (3), (5), and (6), (j), (l), and (m) of this title will apply to the land application of sewage sludge.

(B) When bulk sewage sludge that meets the metal concentrations in §312.43(b)(3) of this title, the Class AB pathogen requirements in §312.82(a)(2) of this title, and one of the vector attraction reduction requirements in §312.83(b)(1) - (8) in addition to (9) or (10) of this title, is applied to the land, then the requirements in subsection (b)(1)(A) of this section do not apply with the exception of §312.44(a), (b), (h)(3), (j), and (m) of this title.

~~{(1) Section 312.42 of this title (relating to General Requirements) and the management practices in §312.44 of this title (relating to Management Practices) do not apply when a bulk material derived from sewage sludge is applied to the land if the derived bulk material meets the metal concentrations in §312.43(b)(3) of this title (relating to Metal Limits); the Class A pathogen requirements in §312.82(a) of this title (relating to Pathogen Reduction); and one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title (relating to Vector Attraction Reduction).}~~

(2) The executive director may apply any or all of §312.42 and §312.44 of this title to the bulk material described in this subsection on a case-by-case basis after determining that the general requirements or management practices are needed to protect public health and the environment from any reasonably anticipated adverse effect that may occur from any metal in the bulk sewage sludge.

(d) Special Requirements for Certain Bulk Derived Materials. The requirements in this subchapter may not apply when a bulk material derived from sewage sludge is applied to the land; if the sewage sludge from which the bulk material is derived meets the metal concentrations in §312.43(b)(3) of this title the Class A or Class AB pathogen requirements in §312.82(a) of this title, and one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title. The executive director may apply any or all of §312.42 and §312.44 of this title to the bulk derived material on a case-by-case basis after determining that the general requirements or management practices are needed to protect public health and the environment from any reasonably anticipated adverse effect that may occur from any metal in the sewage sludge.

(e) Bagged sludge. Sewage sludge sold or given away in a bag or other container for application to the land. Section 312.42 and

§312.44 of this title may not apply when sewage sludge is sold or given away in a bag or other container for application to the land if the sewage sludge sold or given away in a bag or other container for application to the land meets the metal concentrations in §312.43(b)(3) of this title, the Class A or Class AB pathogen requirements in §312.82(a) of this title, and one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title.

(f) Bagged derived materials. Section 312.42 and §312.44 of this title may not apply when a material derived from sewage sludge is sold or given away in a bag or other container for application to the land if the derived material meets the metal concentrations in §312.43(b) of this title, the Class A or Class AB pathogen requirements in §312.82(a) of this title, and one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title.

(g) Bagged materials. The requirements in this subchapter may not apply when a material derived from sewage sludge is sold or given away in a bag or other container for application to the land if the sewage sludge from which the material is derived meets the metal concentrations in §312.43(b)(3) of this title [~~(relating to Metal Limits)~~], the Class A or Class AB pathogen requirements in §312.82(a) of this title [~~(relating to Pathogen Reduction)~~], and one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title.

§312.42. General Requirements.

(a) No person shall apply sewage sludge, including domestic septage, to the land except in accordance with the requirements in this subchapter.

(b) No person shall apply sewage sludge that does not meet the metal concentrations in §312.43(b)(3) of this title (~~relating to Metal Limits~~) to land where any of the cumulative metal loading rates in §312.43(b)(2) of this title [~~(relating to Metal Limits)~~] have been reached.

(c) No person shall apply domestic septage to agricultural land, forest, or a reclamation site during a 365-day period where the annual application rate in §312.43(c) of this title has been reached.

(d) The person who applies sewage sludge, including domestic septage, to the land shall obtain information needed to comply with the requirements in this subchapter.

(e) If a treatment works provides bulk sewage sludge to a person who applies the bulk sewage sludge to the land, the treatment works shall provide the person who applies the bulk sewage sludge to the land notice and necessary information to comply with the requirements in this subchapter.

(f) If a treatment works provides bulk sewage sludge to a person who prepares the bulk sewage sludge for application to the land, the treatment works shall provide the person who prepares the bulk sewage sludge for application to the land notice and necessary information to comply with the requirements in this subchapter.

(g) The person who applies bulk sewage sludge to the land shall provide the owner or lease-holder of the land on which the bulk sewage sludge is applied notice and necessary information to comply with the requirements in this subchapter.

(h) If a treatment works provides sewage sludge to a person who prepares the sewage sludge for sale or give away in a bag or other container for application to the land, the treatment works shall provide the person who prepares the sewage sludge for sale or give away in a bag or other container for application to the land notice and information to comply with the requirements in this subchapter.

(i) The applicant shall determine the concentration of regulated metals in accordance with §312.43 of this title [~~§312.42(a)(1)(E)~~]

of this title (relating to Registration of Land Application Activities)] and demonstrate to the satisfaction of the commission that the proposed cumulative metal loading will result in a non-toxic condition or reduce the toxicity of the existing soil.

§312.44. *Management Practices.*

(a) Land application of bulk sewage sludge must not cause or contribute to the harm of a threatened or endangered species of plant, fish, or wildlife or result in the destruction or adverse modification of the critical habitat of a threatened or endangered species.

(b) Bulk sewage sludge must not be applied to agricultural land, forest, a public contact site, or a reclamation site that is flooded, frozen, or snow-covered so that the bulk sewage sludge enters a wetland or other water in the state, except as provided in a permit issued under Chapter 305 of this title (relating to Consolidated Permits) or Clean Water Act, §404.

(c) When bulk sewage sludge that does not meet Class A pathogen requirements or domestic septage is applied to agricultural land, forest, or a reclamation site, buffer zones must be established for each application area as noted in this section unless otherwise specified by the commission.

(1) Surface water:

(A) 200-foot buffer zone, if the sludge is not incorporated; for land application sites located in a major sole-source impairment zone this buffer zone must maintain a vegetative cover; or

(B) 33-foot vegetative buffer zone, if the sludge is incorporated.

(2) Other buffer zones:

(A) 150 feet, private water supply well;

(B) 500 feet, public water supply well, intake, spring or similar source, public water supply treatment plant, or public water supply elevated or ground storage tank;

(C) 200 feet, solution channel, sinkhole, or other conduit to groundwater;

(D) 750 feet, established school, institution, business, or occupied residential structure;

(E) 50 feet, public right-of-way and property boundaries; and

(F) 10 feet, irrigation conveyance canal.

(d) Any of the buffers established in subsection (c)(2)(D) and (E) of this section may be reduced or eliminated if an agreement to that effect is signed by the owners of the established school, institution, business, occupied residential structure, or adjacent property and this documentation is provided to the executive director prior to issuance of a permit or registration. Reductions or elimination of buffer zones in an existing permit or registration by agreement of the affected landowner will be considered a minor amendment of the permit or registration.

(e) Bulk sewage sludge must be applied to agricultural land, forest, or a public contact site at a whole sludge application rate that is equal to or less than the agronomic rate for the agricultural land, forest, or public contact site on which the bulk sewage sludge is applied.

(f) Bulk sewage sludge must be applied to a reclamation site at a whole application rate that is equal to or less than the agronomic rate for the reclamation site on which the bulk sewage sludge is applied, unless otherwise specified by the commission. On a case-by-case basis, a whole sludge application rate may exceed the agronomic rate for a specific time period.

(g) Groundwater protection measures.

(1) A seasonal high groundwater table must be not less than three feet below the treatment zone for soils with moderate or slower permeability (less than two inches per hour).

(2) A seasonal high groundwater table must be not less than four feet below the treatment zone for soils with moderately rapid or rapid permeability (greater than two inches per hour and less than 20 inches per hour).

(3) Seasonal generally refers to a groundwater table that may be perched on a less permeable soil or geologic unit and fluctuates with seasonal climatic variation or that occurs in a soil or geologic unit as a variation in saturation due to seasonal climatic conditions and is identified as such in a published soil survey report or similar document.

(4) Application of sludge to land having soils with greater permeability and with higher groundwater tables will be considered on a case-by-case basis, after consideration of soil pH, metal loadings onto the soil, soil buffering capacity, or other protective measures to prevent groundwater contamination.

(h) Sludge must be applied by a method and under conditions that prevent runoff of sewage sludge beyond the active application area and protect the quality of the surface water and the soils in the unsaturated zone.

(1) Sludge must be applied uniformly over the surface of the land.

(2) Sludge may not be applied to areas where permeable surface soils are less than two feet thick. The executive director will consider sites with thinner permeable surface soils, on a case-by-case basis.

(3) Sewage sludge may not be applied during rainstorms or during periods in which surface soils are water-saturated, and when pooling of water is evident on the land application site. The operator of a sewage sludge site shall submit an Adverse Weather and Alternative Plan that details procedures to address times when the sewage sludge cannot be applied to the land application site due to adverse weather or other conditions such as wind, precipitation, field preparation delays, and access road limitations.

(4) Sludge may not be applied to areas having topographical slopes in excess of 8.0%. On a case-by-case basis, the executive director will consider sites with steeper slopes when runoff controls are proposed and utilized, incorporation of sewage sludge into the soil occurs, or for certain reclamation projects.

(5) Where runoff of sludge from the active application area is evident, the operator shall cease further sludge application until the condition is corrected.

(6) Sewage sludge may not be applied under provisions of this section on land within a designated floodway.

(i) Either a label must be affixed to the bag or other container in which sewage sludge is sold or given away for application to the land or an information sheet must be provided to the person who receives sewage sludge sold or given away in another container for application to the land. The label or information sheet must contain the following information:

(1) the name and address of the person who prepared the sewage sludge for sale or given away in a bag or other container for application to the land;

(2) a statement that prohibits the application of the sewage sludge to the land except in accordance with the instructions on the label or information sheet; and

(3) the annual whole sludge application rate for the sewage sludge that does not cause the annual metal loading rates in §312.43(b)(4) of this title (relating to Metal Limits) to be exceeded.

(j) Nuisance controls.

(1) A land application site location must be selected and the site operated in a manner to prevent public health nuisances.

(2) Sewage sludge debris must be prevented from blowing or running off site boundaries or into surface waters.

(3) To prevent nuisance conditions from occurring, the operator shall: [If necessary or when significant nuisance conditions occur, the operator shall:]

(A) minimize dust migration from the site and access roadways; and

(B) minimize [objectionable] odors through incorporation of sewage sludge into the soil or by taking some other type of corrective action; and [-]

(C) design and utilize appropriate controls to prevent off-site tracking during the transport of sewage sludge material to and from the land application site or storage area.

(4) Odor Prevention. Pursuant to the authority vested in the commission or executive director in §312.6 of this title (relating to Additional or More Stringent Requirements), a person who prepares or land applies sewage sludge may be subject to an Odor Control Plan on a case-by-case basis.

(k) A permit or registration must specify the soil testing requirements for each application area.

(1) The testing frequency must take into account common agricultural methods of determining cover crop nutrient needs, soil pH, phytotoxicity, and concentrations of metals regulated by this chapter.

(2) No authorization may require soil testing of metals regulated by this chapter, at a frequency greater than once per five years or prior to submittal of a renewal application for a beneficial use site. Soil testing for metals regulated by this chapter may not be required for portions of the authorized site where sewage sludge has not been applied since the last soil metals testing was performed.

(3) Paragraph (2) of this subsection does not apply if the executive director becomes aware of circumstances warranting increased monitoring of metals regulated by this chapter, in order to address sites where metal loading into the soil is a threat to human health or environmental quality.

(l) An operator [A permit holder] of a Class AB or Class B sewage sludge site shall post a sign that is visible from a publically accessible road or sidewalk that is adjacent to the premises on which the land application unit is located stating that a sewage sludge beneficial land application site is located on the premises. The sign shall be posted three days prior to and 14 days after the commencement of land application of sewage sludge and shall include the operator name, telephone number, the classification of sewage sludge and the TCEQ authorization number.

(m) An operator [A permit holder] of a Class A, Class AB or Class B sewage sludge site may not accept sewage sludge, unless the sludge is transported to the land application unit in a covered container with the covering firmly secured at the front and back.

§312.45. *Operational Standards--Pathogens and Vector Attraction.*

(a) Pathogens.

(1) The Class A or Class AB sewage sludge pathogen requirements in §312.82(a) of this title (relating to Pathogen Reduction) or Class B sewage sludge pathogen requirements in §312.82(b) of this title shall be met if bulk sewage sludge is applied to agricultural land, forest, a public contact site, or a reclamation site.

(2) The Class A or Class AB sewage sludge pathogen requirements in §312.82(a) of this title shall be met if bulk sewage sludge is applied to a lawn or a home garden.

(3) The Class A or Class AB sewage sludge pathogen requirements in §312.82(a) of this title shall be met if sewage sludge is sold or given away in a bag or other container for application to the land.

(4) The requirements in §312.82(c) of this title shall be met if domestic septage is applied to agricultural land, forest, or a reclamation site.

(b) Vector attraction reduction.

(1) One of the vector attraction reduction requirements in §312.83(b)(1) - (10) of this title (relating to Vector Attraction Reduction) shall be met if bulk sewage sludge is applied to agricultural land, forest, a public contact site, or a reclamation site.

(2) One of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title shall be met if bulk sewage sludge is applied to a lawn or a home garden.

(3) One of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title shall be met if sewage sludge is sold or given away in a bag or other container for application to the land.

(4) The vector attraction reduction requirements in §312.83(b)(12) of this title shall be met if domestic septage is applied to agricultural land, forest, or a public contact site.

§312.47. *Record Keeping.*

(a) Sewage sludge.

(1) The person who prepares the sewage sludge in §312.41(b)(1) or in §312.41(e) of this title (relating to Applicability) shall develop the following information and shall retain the information for five years:

(A) the concentration of each metal listed in §312.43(3) of this title (relating to Metal Limits) in the sewage sludge;

(B) the following certification statement: "I certify, under penalty of law, that the Class A (or insert Class AB) sewage sludge pathogen requirements in 30 TAC §312.82(a) and the vector attraction reduction requirement in (insert one of the vector attraction reduction requirements in §312.83(b)(1) - (8)) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the pathogen requirements and vector attraction reduction requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment."

(C) a description of how the Class A or Class AB sewage sludge pathogen requirements in §312.82(a) of this title (relating to Pathogen Reduction) are met; and

(D) a description of how one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title (relating to Vector Attraction Reduction) is met.

(2) The person who derives the material in §312.41(c)(1) or in §312.41(f) of this title [~~relating to Applicability~~] shall develop the following information and shall retain the information for five years:

(A) the concentration of each metal listed in Table 3 of §312.43(b)(3) of this title [~~relating to Metal Limits~~] in the material;

(B) the following certification statement: "I certify, under penalty of law, that the Class A (or insert Class AB) sewage sludge pathogen requirements in 30 TAC §312.82(a) and the vector attraction reduction requirement in (insert one of the vector attraction reduction requirements in 30 TAC §312.83(b)(1) - (8)) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the pathogen requirements and the vector attraction reduction requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment";

(C) a description of how the Class A or Class AB sewage sludge pathogen requirements in §312.82(a) of this title are met; and

(D) a description of how one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title is met.

(3) If the metal concentrations in §312.43(b)(3) of this title, the Class A or Class AB sewage sludge pathogen requirements in §312.82(a) of this title, and the vector attraction reduction requirements in either §312.83(b)(9) or (10) of this title are met when bulk sewage sludge is applied to agricultural land, forest, a public contact site, or a reclamation site:

(A) The person who prepares the bulk sewage sludge shall develop the following information and shall retain the information for five years:

(i) the concentration of each metal listed in Table 3 of §312.43(b)(3) of this title in the bulk sewage sludge;

(ii) the following certification statement: "I certify, under penalty of law, that the pathogen requirements in 30 TAC §312.82(a) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the pathogen requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment." and

(iii) a description of how the pathogen requirements in §312.82(a) of this title are met.

(B) The person who applies the bulk sewage sludge shall develop the following information and shall retain the information for five years.

(i) the following certification statement: "I certify, under penalty of law, that the management practices in 30 TAC §312.44 and the vector attraction reduction requirement in (insert either §312.83(b)(9) or (10)) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the management practices and vector attraction reduction requirements have been met. I am aware that there are significant penalties for false certification including fine and imprisonment";

(ii) a description of how §312.44 of this title (relating to Management Practices) are met for each site on which bulk sewage sludge is applied; and

(iii) a description of how the vector attraction reduction requirements in either §312.83(b)(9) or (10) of this title are met for each site on which bulk sewage sludge is applied.

(4) If the metal concentrations in §312.43(b)(3) of this title and the Class B pathogen requirements in §312.82(b) of this title are met when bulk sewage sludge is applied to agricultural land, forest, a public contact site, or a reclamation site:

(A) The person who prepares the bulk sewage sludge shall develop the following information and shall retain the information for five years:

(i) the concentration of each metal listed in §312.43(b)(3) (Table 3) of this title in the bulk sewage sludge;

(ii) the following certification statement: "I certify under, penalty of law, that the Class B sewage sludge pathogen requirements in 30 TAC §312.82(b) and the vector attraction reduction requirement in (insert one of the vector attraction reduction requirements in §312.83(b)(1) - (8) if one of those requirements is met) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the pathogen requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment";

(iii) a description of how the Class B sewage sludge pathogen requirements in §312.82(b) of this title are met; and

(iv) when one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title is met, a description of how the vector attraction reduction requirement is met.

(B) The person who applies the bulk sewage sludge shall develop the following information and shall retain the information for five years:

(i) the following certification statement: "I certify, under penalty of law, that the management practices in 30 TAC §312.44, the site restrictions in §312.82(b)(3), and the vector attraction reduction requirements in (insert either §312.83(b)(9) or (10), if one of those requirements is met) have been met for each site on which bulk sewage sludge is applied. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the management practices and site restrictions (and the vector attraction reduction requirements if applicable) have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment";

(ii) a description of how §312.44 of this title are met for each site on which bulk sewage sludge is applied;

(iii) a description of how the site restrictions in §312.82(b)(3) of this title are met for each site on which bulk sewage sludge is applied; and

(iv) when the vector attraction reduction requirement in either §312.83(b)(9) or (10) of this title is met, a description of how the vector attraction reduction requirement is met.

(5) If the requirements in §312.43(a)(2)(A) of this title are met when bulk sewage sludge is applied to agricultural land, forest, a public contact site, or a reclamation site:

(A) The person who prepares the bulk sewage sludge shall develop the following information and shall retain the information for five years:

(i) the concentration of each metal listed in §312.43(b)(1) (Table 1) of this title in the bulk sewage sludge;

(ii) the following certification statement: "I certify, under penalty of law, that the pathogen requirements in (insert either 30 TAC §312.82(a) or (b)) and the vector attraction reduction requirement in (insert one of the vector attraction reduction requirements in §312.83(b)(1) - (8) if one of those requirements is met) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the pathogen requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment";

(iii) a description of how the pathogen requirements in either §312.82(a) or (b) of this title [~~(relating to Pathogen Reduction)~~] are met;

(iv) when one of the vector attraction requirements in §312.83(b)(1) - (8) of this title is met, a description of how the vector attraction requirement is met.

(B) The person who applies the bulk sewage sludge shall develop the following information, retain the information in §312.47(a)(5)(B)(i) - (vii) of this title (relating to Record Keeping) indefinitely, and retain the information in §312.47(a)(5)(B)(viii) - (xiii) of this title, for five years:

(i) the location, by either street address or latitude and longitude, of each site on which bulk sewage sludge is applied;

(ii) the number of acres [~~hectares~~] in each site on which bulk sewage sludge is applied;

(iii) the date and time bulk sewage sludge is applied to each site;

(iv) the cumulative amount of each metal (i.e., kilograms) listed in §312.43(b)(2) (Table 2) of this title in the bulk sewage sludge applied to each site, including the amount in §312.42(e) of this title;

(v) the amount of sewage sludge (i.e., metric tons) applied to each site;

(vi) the following certification statement: "I certify, under penalty of law, that the requirements to obtain information in 30 TAC §312.42(e) have been met for each site on which bulk sewage sludge is applied. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the requirements to obtain information have been met. I am aware that there are significant penalties for false certification including fine and imprisonment";

(vii) a description of how the requirements to obtain information in §312.42(e) of this title (relating to General Requirements) are met;

(viii) the following certification statement: "I certify, under penalty of law, that the management practices in 30 TAC §312.44 have been met for each site on which bulk sewage sludge is applied. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the management practices have been met. I am aware that there are significant penalties for false certification including fine and imprisonment";

(ix) a description of how §312.44 of this title are met for each site on which bulk sewage sludge is applied;

(x) the following certification statement when the bulk sewage sludge meets the Class B pathogen requirements in §312.82(b) of this title: "I certify, under penalty of law, that the site restrictions in §312.82(b)(3) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the site restrictions have been met. I am aware that there are significant penalties for false certification including fine and imprisonment";

(xi) a description of how the site restrictions in §312.82(b)(3) of this title are met for each site on which Class B bulk sewage sludge is applied;

(xii) the following certification statement when the vector attraction reduction requirement in either §312.83(b)(9) or (10) of this title is met: "I certify, under penalty of law, that the vector attraction reduction requirement in (insert either §312.83(b)(9) or (10)) has been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the vector attraction reduction requirement has been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment"; and

(xiii) if the vector attraction reduction requirements in either §312.83(b)(9) or (10) of this title are met, a description of how the requirements are met.

(6) If the requirements in §312.43(a)(4)(B) of this title are met when sewage sludge is sold or given away in a bag or other container for application to the land, the person who prepares the sewage sludge that is sold or given away in a bag or other container shall develop the following information and shall retain the information for five years:

(A) the annual whole sludge application rate for the sewage sludge that does not cause the annual metal loading rates in §312.43(b)(4) (Table 4) of this title to be exceeded;

(B) the concentration of each metal listed in §312.43(b)(4) (Table 4) of this title in the sewage sludge;

(C) the following certification statement: "I certify, under penalty of law, that the management practice in 30 TAC §312.44(e), the Class A (or insert Class AB) sewage sludge pathogen requirement in 30 TAC §312.82(a), and the vector attraction reduction requirement in (insert one of the vector attraction reduction requirements in §312.83(b)(1) - (8)) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the management practice, pathogen requirements, and vector attraction reduction requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment";

(D) a description of how the Class A or Class AB sewage sludge pathogen requirements in §312.82(a) of this title are met;

(E) a description of how one of the vector attraction requirements in §312.83(b)(1) - (8) of this title is met;

(b) Domestic septage. When domestic septage is applied to agricultural land, forest, or a reclamation site, the person who applies

the domestic septage shall develop the following information and shall retain the information for five years:

- (1) the location, by either street address or latitude and longitude, of each site on which domestic septage is applied;
- (2) the number of acres in each site on which domestic septage is applied;
- (3) the date and time domestic septage is applied to each site;
- (4) the nitrogen requirement for the crop or vegetation grown on each site during a 365-day period;
- (5) the rate, in gallons per acre per 365-day period, at which domestic septage is applied to each site;

(6) The following certification statement: "I certify, under penalty of law, that the pathogen requirements in (insert either §312.82(c)(1) or §312.82(c)(2)) and the vector attraction reduction requirements in (insert §312.83(b)(9), (10), or (12)) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the pathogen requirements and vector attraction reduction requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment";

(7) a description of how the pathogen requirements in either §312.82(c)(1) or (2) of this title are met;

(8) a description of how the vector attraction reduction requirements in §312.83(b)(9), (10), or (12) of this title are met.

§312.50. Storage and Staging of Sludge at Beneficial Use Sites.

(a) Except as provided in subsection (b) of this section, storage of sludge at a beneficial land application site must not exceed 90 days. Storage is allowed only when the following requirements are carried out.

(1) Written authorization must be obtained from the executive director prior to construction of the storage area.

(2) The storage area must be operated and maintained to prevent surface water runoff and to prevent a release to groundwater. Discharge of storm water or wastewater which has come into contact with sewage sludge is prohibited. The storage area shall be designed to collect such runoff. Any runoff collected during the storage of sewage sludge shall be disposed in a manner to prevent a release to groundwater.

(3) The storage area shall be designed, constructed, and operated in a manner which protects public health and the environment.

(4) The storage area must be lined to prevent a release to groundwater. Natural or artificial liners are required for leachate control. A natural liner or equivalent barrier of one foot of compacted clay with a permeability coefficient of 1×10^{-7} cm/sec or less must be provided. Various flexible synthetic membrane lining materials may be used in lieu of soil liners if prior written approval has been obtained from the executive director. The registrant shall furnish certification by a licensed professional engineer or licensed professional geoscientist that the completed storage area lining meets the appropriate criteria described in this section prior to using the facilities. The certification shall be signed, sealed, and dated by a licensed professional engineer or licensed professional geoscientist.

(5) The application shall outline measures to be taken to minimize vectors and to avoid public health nuisances such as odors.

(6) The storage area shall be fenced or other methods shall be used, if necessary to control access by humans or domestic animals.

(7) Berms or dikes shall be constructed to contain the waste without leakage.

(8) Liquid sludge must be stored in an enclosed vessel.

(9) Processing of sludge is prohibited unless a permit is obtained from the commission.

(10) In the event a person who prepares sewage sludge that is applied to the land or who applies sewage sludge to the land, is subject to an Odor Control Plan as described in §312.44(j)(4) of this title (relating to Management Practices), that person must comply with the terms of the applicable Odor Control Plan in order to store sewage sludge at a beneficial use site.

(b) Up to an additional 90 days of storage will be allowed with the prior approval of the appropriate Texas Commission on Environmental Quality regional office, for reasons associated with application area flooding, saturated soils, or frozen soils.

(c) Staging of sewage sludge on-site, prior to land application, is allowable without executive director approval. Staging of sewage sludge may only occur for a maximum of seven calendar days. Up to an additional 14 days of staging sewage sludge will be allowed with the prior approval of the appropriate Texas Commission on Environmental Quality regional office, for reasons associated with application area flooding, saturated soils, or frozen soils. The operator shall stage the sewage sludge away from odor receptors in order to:

(1) prevent off-site dust migration from the staging area;
and

(2) prevent nuisance odors.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER C. SURFACE DISPOSAL

30 TAC §312.65

Statutory Authority

The amendment is proposed under the Texas Water Code (TWC). Specifically, TWC, §5.013, which establishes the general jurisdiction of the commission, while TWC, §5.102, provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the code and other laws of the state; TWC, §5.105, which authorizes the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; TWC, §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state; TWC,

§26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state; and TWC, §26.034, which gives the commission the authority to set standards to prevent the discharge of waste that is injurious to the public health.

The amendment is also proposed under TWC, §26.027, which authorizes the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state and Texas Health and Safety Code, §361.121, which gives the commission the authority to require a permit before a responsible person may apply Class B sludge on a land application unit.

The proposed amendment implements TWC, §§5.013, 5.102, 5.103, 5.105, 5.120, 26.011, 26.027, and Texas Health and Safety Code, §361.121.

§312.65. Operational Standards--Pathogen and Vector Attraction.

(a) Pathogen reduction. Sewage sludge (other than domestic septage). The Class A and Class AB sewage sludge pathogen reduction requirements in §312.82(a) of this title (relating to Pathogen Reduction) or the Class B sewage sludge pathogen reduction requirements in §312.82(b)(1)(A) and ~~(2) [(b)(2)]~~ of this title shall be met when sewage sludge is placed on an active sludge unit, unless the vector attraction reduction requirements in §312.83(b)(11) of this title (relating to Vector Attraction Reduction) is met.

(b) Pathogen reduction. Domestic septage. The pathogen reduction requirement in §312.82(c)(2) of this title shall be met when domestic septage is placed on an active sludge unit.

(c) Vector attraction reduction. Sewage sludge (other than domestic septage). One of the alternatives for vector attraction reduction in §312.83(b)(1) - (11) of this title shall be met when sewage sludge is placed on an active sludge unit.

(d) Vector attraction reduction. Domestic septage. The vector attraction reduction requirement in §312.83(b)(12) of this title shall be met when domestic septage is placed on an active sludge unit.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER D. PATHOGEN AND VECTOR ATTRACTION REDUCTION

30 TAC §§312.81 - 312.83

Statutory Authority

These amendments are proposed under the Texas Water Code (TWC). Specifically, TWC, §5.013, which establishes the general jurisdiction of the commission, while TWC, §5.102, provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the

code and other laws of the state; TWC, §5.105, which authorizes the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; TWC, §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state; TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state; and TWC, §26.034, which gives the commission the authority to set standards to prevent the discharge of waste that is injurious to the public health.

These amendments are also proposed under TWC, §26.027, which authorizes the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state and Texas Health and Safety Code, §361.121, which gives the commission the authority to require a permit before a responsible person may apply Class B sludge on a land application unit.

The proposed amendments implement TWC, §§5.013, 5.102, 5.103, 5.105, 5.120, 26.011, 26.027, and Texas Health and Safety Code, §361.121.

§312.81. Scope.

(a) This subchapter contains the requirements that must be met for a sewage sludge to be classified either Class A, Class AB or Class B with respect to pathogen reduction.

(b) This subchapter contains the site restrictions for the land on which a sewage sludge that is Class B with respect to pathogens is either land applied for beneficial use or placed on an active sludge unit.

(c) This subchapter contains the pathogen reduction requirements for domestic septage applied to agricultural land, forest, or a reclamation site for beneficial use and the pathogen reduction requirements for domestic septage placed on an active sludge unit.

(d) This subchapter contains the site restrictions for the land on which domestic septage is applied for beneficial use or placed on an active sludge unit.

(e) This subchapter contains the vector attraction reduction requirements for sewage sludge and domestic septage land applied for beneficial use or placed on an active sludge unit.

§312.82. Pathogen Reduction.

(a) Sewage sludge--Class A and Class AB.

(1) Compliance requirements--Class A and Class AB.

(A) For a sewage sludge to be classified as Class AB [A] with respect to pathogens, the requirements in subparagraphs (C) and (D) [(B) and (C)] of this paragraph and the requirements of one of the alternatives listed in paragraph (2) of this subsection must be met.

(B) For a sewage sludge to be classified as Class A or with respect to pathogens, the requirements in subparagraphs (C) and (D) of this paragraph and the requirements of one of the alternatives listed in paragraph (3) of this subsection must be met.

(C) ~~[(B)]~~ The requirements of the chosen alternative for pathogen reduction from paragraphs (2) and (3) [~~paragraph (2)]~~ of this subsection must be met prior to or at the same time as the vector attraction reduction requirements, except the requirements in §312.83(b)(6) - (8) of this title (relating to Vector Attraction Reduction).

(D) ~~[(C)]~~ Either the density of fecal coliform in the sewage sludge must be less than 1,000 Most Probable Number per gram of total solids (dry weight basis) or the density of Salmonella (sp. bacteria) in the sewage sludge must be less than three Most Probable

Number per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed of, at the time the sewage sludge is prepared for sale or given away in a bag or other container for application to the land, or at the time the sewage sludge or material derived from sewage sludge is prepared to meet the requirements in §312.41(b), (c), (e), or (f) of this title (relating to Applicability).

(2) Compliance alternatives--Class AB [A].

~~[(A) Alternative 1. The temperature of the sewage sludge that is used or disposed of must be maintained at a specified value for a period of time.]~~

~~[(i) When the percent solids of the sewage sludge is 7.0% or higher, the temperature of the sewage sludge must be 50 degrees Celsius or higher; the time period must be 20 minutes or longer; and the temperature and time period must be determined using the equation in this clause, except when small particles of sewage sludge are heated by either warmed gases or an immiscible liquid.]~~
~~[Figure: 30 TAC §312.82(a)(2)(A)(i)]~~

~~[(ii) When the percent solids of the sewage sludge is 7.0% or higher and small particles of sewage sludge are heated by either warmed gases or an immiscible liquid, the temperature of the sewage sludge must be 50 degrees Celsius or higher; the time period must be 15 seconds or longer; and the temperature and time period must be determined using the equation in clause (i) of this subparagraph.]~~

~~[(iii) When the percent solids of the sewage sludge is less than 7.0% and the time period is at least 15 seconds, but less than 30 minutes, the temperature and time period must be determined using the equation in clause (i) of this subparagraph.]~~

~~[(iv) When the percent solids of the sewage sludge is less than 7.0%; the temperature of the sewage sludge is 50 degrees Celsius or higher; and the time period is 30 minutes or longer, the temperature and time period must be determined using the equation in this clause.]~~
~~[Figure: 30 TAC §312.82(a)(2)(A)(iv)]~~

~~(A) [(B)] Alternative 2. The temperature and pH of the sewage sludge that is used or disposed of must be maintained at specific values for periods of time.~~

~~(i) The pH of the sewage sludge must be raised to above 12 and must remain above 12 for 72 hours.~~

~~(ii) The temperature of the sewage sludge must be above 52 degrees Celsius for 12 hours or longer during the period that the pH of the sewage sludge is above 12.~~

~~(iii) At the end of the 72-hour period during which the pH of the sewage sludge is above 12, the sewage sludge must be air dried to achieve a percent solids in the sewage sludge greater than 50%.~~

~~(B) [(C)] Alternative 3. The sewage sludge that is used or disposed of must be analyzed prior to pathogen treatment to determine whether the sewage sludge contains enteric viruses and viable helminth ova.~~

~~(i) When the density of enteric viruses in the sewage sludge prior to pathogen treatment is less than one Plaque-forming Unit per four grams of total solids (dry weight basis), the sewage sludge is Class A with respect to enteric viruses until the next monitoring episode for the sewage sludge.~~

~~(ii) When the density of enteric viruses in the sewage sludge prior to pathogen treatment is equal to or greater than one Plaque-forming Unit per four grams of total solids (dry weight basis), the sewage sludge is Class A with respect to enteric viruses~~

when the density of enteric viruses in the sewage sludge after pathogen treatment is less than one Plaque-forming Unit per four grams of total solids (dry weight basis) and when the values or ranges of values for the operating parameters for the pathogen treatment process that produces the sewage sludge that meets the enteric virus density requirement are documented.

~~(iii) After the enteric virus reduction in clause (i) of this subparagraph is demonstrated for the pathogen treatment process, the sewage sludge continues to be Class A with respect to enteric viruses when the values for the pathogen treatment process operating parameters are consistent with the values or ranges of values documented in clause (i) of this subparagraph.~~

~~(iv) When the density of viable helminth ova in the sewage sludge prior to pathogen treatment is less than one per four grams of total solids (dry weight basis), the sewage sludge is Class A with respect to viable helminth ova until the next monitoring episode for the sewage sludge.~~

~~(v) When the density of viable helminth ova in the sewage sludge prior to pathogen treatment is equal to or greater than one per four grams of total solids (dry weight basis), the sewage sludge is Class A with respect to viable helminth ova when the density of viable helminth ova in the sewage sludge after pathogen treatment is less than one per four grams of total solids (dry weight basis) and when the values or ranges of values for the operating parameters for the pathogen treatment process that produces the sewage sludge that meets the viable helminth ova density requirement are documented.~~

~~(vi) After the viable helminth ova reduction in clause (v) of this subparagraph is demonstrated for the pathogen treatment process, the sewage sludge continues to be Class A with respect to viable helminth ova when the values for the pathogen treatment process operating parameters are consistent with the values or ranges of values documented in clause (v) of this subparagraph.~~

~~(C) [(D)] Alternative 4. The sewage sludge that is used or disposed of must be analyzed prior to pathogen treatment to determine whether the sewage sludge contains enteric viruses and viable helminth ova.~~

~~(i) The density of enteric viruses in the sewage sludge must be less than one Plaque-forming Unit per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed of, at the time the sewage sludge is prepared for sale or given away in a bag or other container for application to the land, or at the time the sewage sludge or material derived from sewage sludge is prepared to meet the requirements in §312.41(b), (c), (e), or (f) of this title.~~

~~(ii) The density of viable helminth ova in the sewage sludge must be less than one per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed of, at the time the sewage sludge is prepared for sale or given away in a bag or other container for application to the land, or at the time the sewage sludge or material derived from sewage sludge is prepared to meet the requirements in §312.41(b), (c), (e), or (f) of this title.~~

(3) Compliance alternatives--Class A.

(A) Alternative 1. The temperature of the sewage sludge that is used or disposed of must be maintained at a specified value for a period of time.

(i) When the percent solids of the sewage sludge is 7.0% or higher, the temperature of the sewage sludge must be 50 degrees Celsius or higher; the time period must be 20 minutes or longer; and the temperature and time period must be determined using the

equation in this clause, except when small particles of sewage sludge are heated by either warmed gases or an immiscible liquid.

Figure: 30 TAC §312.82(a)(3)(A)(i)

(ii) When the percent solids of the sewage sludge is 7.0% or higher and small particles of sewage sludge are heated by either warmed gases or an immiscible liquid, the temperature of the sewage sludge must be 50 degrees Celsius or higher, the time period must be 15 seconds or longer, and the temperature and time period must be determined using the equation in clause (i) of this subparagraph.

(iii) When the percent solids of the sewage sludge is less than 7.0% and the time period is at least 15 seconds, but less than 30 minutes, the temperature and time period must be determined using the equation in clause (i) of this subparagraph.

(iv) When the percent solids of the sewage sludge is less than 7.0%; the temperature of the sewage sludge is 50 degrees Celsius or higher; and the time period is 30 minutes or longer, the temperature and time period must be determined using the equation in this clause.

Figure: 30 TAC §312.82(a)(3)(A)(iv)

~~(B)~~ ~~[(E)]~~ Alternative 5 (Processes to Further Reduce Pathogens (PFRP)). Sewage sludge that is used or disposed of must be treated in one of the PFRP described in 40 Code of Federal Regulations (CFR) Part 503, Appendix B.

~~(C)~~ ~~[(F)]~~ Alternative 6 (PFRP Equivalent). Sewage sludge that is used or disposed of must be treated in a process that has been approved by the United States Environmental Protection Agency (EPA) as being equivalent to those in subparagraph ~~(B)~~ ~~[(E)]~~ of this paragraph.

(b) Sewage sludge--Class B.

(1) Compliance requirements--Class B.

(A) For a sewage sludge to be classified as Class B with respect to pathogens, the requirements in subparagraphs (B) and (C) of this paragraph must be met. As an alternative for a sewage sludge to be classified as Class B, the requirements of subparagraph (B) of this paragraph and paragraph (2) of this subsection must be met.

(B) The site restrictions in paragraph (3) of this subsection must be met when sewage sludge that is classified as Class B with respect to pathogens is applied to the land for beneficial use.

(C) A minimum of seven representative samples of the sewage sludge must be collected within 48 hours of the time that the sewage sludge is used or disposed of during each monitoring episode for the sewage sludge. The geometric mean of the density of fecal coliform for the samples collected must be less than either 2,000,000 Most Probable Number per gram of total solids (dry weight basis) or 2,000,000 Colony-forming Units per gram of total solids (dry weight basis).

(2) Processes to Significantly Reduce Pathogens (PSRP) compliance alternatives--Class B. Sewage sludge that is used or disposed of must be treated in one of the PSRP described in 40 CFR Part 503, Appendix B, or must be treated by an equivalent process approved by the EPA, so long as all of the following requirements are met by the generator of the sewage sludge.

(A) Prior to use or disposal, all the sewage sludge must have been generated from a single location, except as provided in subparagraph (F) of this paragraph.

(B) An independent Texas registered professional engineer must make a certification to the generator of a sewage sludge that

the wastewater treatment facility generating the sewage sludge is designed to achieve one of the PSRP at the permitted design loading of the facility. The certification need only be repeated if the design loading of the facility is increased. The certification must include a statement indicating that the design meets all the applicable standards specified in 40 CFR Part 503, Appendix B.

(C) Prior to any off-site transportation or on-site use or disposal of any sewage sludge generated at a wastewater treatment facility, the chief certified operator of the wastewater treatment facility or other responsible official who manages the PSRP at the wastewater treatment facility for the permittee, shall certify that the sewage sludge underwent at least the minimum operational requirements necessary in order to meet one of the PSRP. The acceptable processes and the minimum operational and recordkeeping requirements must be in accordance with established EPA final guidance.

(D) All certification records and operational records describing how the requirements of this paragraph were met must be kept by the generator for a minimum of three years and be available for inspection by commission staff for review.

(E) In lieu of a generator obtaining a certification as specified in subparagraph (B) of this paragraph, the executive director will accept from the EPA a finding of equivalency to the defined PSRP.

(F) If the sewage sludge is generated from a mixture of sources, resulting from a person who prepares sewage sludge from more than one wastewater treatment facility, the resulting derived product must meet one of the PSRP, and meet the certification, operation, and recordkeeping requirements of this paragraph.

(3) Site restrictions.

(A) Food crops with harvested parts totally above the land surface that touch the sewage sludge/soil mixture must not be harvested from the land for at least 14 months after the application of sewage sludge.

(B) Food crops with harvested parts below the surface of the land must not be harvested for at least 20 months after application of sewage sludge when the sewage sludge remains on the land surface for four months or longer prior to incorporation into the soil.

(C) Food crops with harvested parts below the surface of the land must not be harvested for at least 38 months after application of sewage sludge when the sewage sludge remains on the land surface for less than four months prior to the incorporation into the soil.

(D) Food crops, feed crops, and fiber crops must not be harvested for at least 30 days after application of sewage sludge.

(E) Animals must not be allowed to graze on the land for at least 30 days after application of sewage sludge.

(F) Turf grown on land where sewage sludge is applied may not be harvested for at least one year after application of sewage sludge when the harvested turf is placed on either land with a high potential for public exposure or a lawn.

(G) Public access to land with a high potential for public exposure must be restricted for at least one year after application of sewage sludge.

(H) Public access to land with a low potential for public exposure must be restricted for at least 30 days after application of the sewage sludge.

(c) Domestic septage.

(1) The site restrictions in subsection (b)(3) of this section must be met if domestic septage is applied to agricultural land, forest, or a reclamation site.

(2) The pH of domestic septage applied to agricultural land, forest, or a reclamation site must be raised to 12 or higher by alkali addition and, without the addition of more alkali, must remain at 12 or higher for a period of 30 minutes.

§312.83. *Vector Attraction Reduction.*

(a) Compliance requirements.

(1) One of the vector attraction reduction requirements in subsection (b)(1) - (10) of this section shall be met when bulk sewage sludge is applied to agricultural land, forest, a public contact site, or a reclamation site.

(2) One of the vector attraction reduction requirements in subsection (b)(1) - (8) [paragraphs (1) - (8)] of this section shall be met when bulk sewage sludge is applied to a lawn, home garden, or is sold or given away in a bag or other container.

(3) One of the vector attraction reduction requirements in subsection (b)(1) - (11) of this section shall be met when sewage sludge (other than domestic septage) is placed on an active sewage sludge unit.

(4) One of the vector attraction reduction requirements in subsection (b)(9), (10), or (12) of this section shall be met when domestic septage is applied to agricultural land, forest, or a reclamation site.

(5) One of the vector attraction reduction requirements in subsection (b)(9) - (12) of this section shall be met when domestic septage is placed on an active sewage sludge unit.

(b) Compliance alternatives.

(1) The mass of volatile solids in the sewage sludge shall be reduced by a minimum of 38%.

(2) If an anaerobically digested sewage sludge ~~cannot~~ [cannot] meet the 38% volatile solids reduction requirement in paragraph (1) of this subsection, vector attraction reduction can be demonstrated by digesting a portion of the previously digested sewage sludge anaerobically in a laboratory in a bench-scale unit for 40 additional days at a temperature between 30 and 37 degrees Celsius. If at the end of the 40 days, the volatile solids in the sewage sludge at the beginning of that period is reduced by less than 17%, vector attraction reduction is achieved.

(3) If an aerobically digested sewage sludge ~~cannot~~ [cannot] meet the 38% volatile solids reduction requirement in paragraph (1) of this subsection, vector attraction reduction can be demonstrated by digesting a portion of the previously digested sewage sludge that has a percent solids of 2.0% or less aerobically in a laboratory in a bench-scale unit for 30 additional days at 20 degrees Celsius. If at the end of the 30 days, the volatile solids in the sewage sludge at the beginning of that period is reduced by less than 15%, vector attraction reduction is achieved.

(4) The specific oxygen uptake rate (SOUR) for sewage sludge treated in an aerobic process shall be equal to or less than 1.5 milligrams of oxygen per hour per gram of total solids (dry weight basis) at a temperature of 20 degrees Celsius.

(5) Sewage sludge shall be treated in an aerobic process for 14 days or longer. During that time, the temperature of the sewage sludge shall be higher than 40 degrees Celsius and the average temperature of sewage sludge shall be higher than 45 degrees Celsius.

(6) The pH of sewage sludge shall be raised to 12 or higher by alkali addition and, without the addition of more alkali, shall remain at 12 or higher for two hours and then remain at a pH of 11.5 or higher for an additional 22 hours.

(7) The percent solids of sewage sludge that does not contain unstabilized solids generated in a primary wastewater treatment process shall be equal to or greater than 75% based on the moisture content and total solids prior to mixing with other materials.

(8) The percent solids of sewage sludge that contains unstabilized solids generated in a primary wastewater treatment process shall be equal to or greater than 90% based on the moisture content and total solids prior to mixing with other materials.

(9) Sewage sludge shall be injected below the surface of the land. No significant amount of the sewage sludge shall be present on the land surface within one hour after the sewage sludge is injected. If the sewage sludge that is injected below the surface of the land is Class A or Class AB with respect to pathogens, as described in §312.82 of this title (relating to Pathogen Reduction), the sewage sludge shall be injected below the land surface within eight hours after the sewage sludge is discharged from the pathogen treatment process.

(10) Sewage sludge applied to the land surface or placed on a surface disposal site shall be incorporated into the soil within six hours after application or placement on the land. If the sewage sludge that is incorporated into the soil is Class A or Class AB with respect to pathogens, as described in §312.82 of this title [relating to Pathogen Reduction], the sewage sludge shall be applied to or placed on the land within eight hours after the sewage sludge is discharged from the pathogen treatment process.

(11) Sewage sludge placed on an active sewage sludge unit shall be covered with soil or other material at the end of each operating day.

(12) The pH of domestic septage shall be raised to 12 or higher by alkali addition and, without the addition of more alkali, shall remain at 12 or higher for 30 minutes.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-2613



TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING

SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §§15.2, 15.3, 15.10 - 15.13

The General Land Office (GLO) proposes amendments to §§15.2, 15.3, and 15.10 - 15.13, relating to Management of the Beach/Dune System. The GLO proposes amendments to §15.2 (relating to Definitions) to add definitions for "all-terrain vehicle," "recreational vehicle," and "recreational off-highway vehicle," in conformance with amendments to §63.002 of the Texas Natural Resources Code under House Bill (HB) 2741 which relates to requirements for all-terrain vehicles; and "meteorological event," in conformance with House Bill 3459 which relates to the suspension of a line of vegetation determination following the obliteration of the natural line of vegetation by a meteorological event. The GLO proposes amendments to §15.3 (relating to Administration) to modify language to conform with amendments to §§61.001, 61.011, 61.016, 61.017, and 61.0185 of the Texas Natural Resources Code under HB 3459 and delete references to the Attorney General to conform to amendments in HB 1457 which modified implementation and enforcement authority under the Open Beaches Act. The GLO proposes amendments to §15.10 (relating to General Provisions) to modify language to conform to HB 3459 and delete references to the Attorney General. The GLO proposes amendments to §15.11 (relating to Repairs to Certain Houses Located Seaward of the Boundary of the Public Beach) to modify language to conform to HB 3459 and to match the language in §15.12. The GLO proposes amendments to §15.12 (relating to Temporary Order Issued by the Land Commissioner) to modify language to conform to HB 3459. The GLO proposes amendments to §15.13 (relating to Disaster Recovery Orders) to modify language to conform to HB 3459, clarify language, and to conform the language to match changes in other sections.

BACKGROUND AND SECTION BY SECTION ANALYSIS OF THE PROPOSED AMENDMENTS

The 83rd Legislature enacted HB 1044 (Acts 2013, 83rd Leg., ch. 895, eff. September 1, 2013) and HB 3459 (Acts 2013, 83rd Leg., ch. 1086, eff. September 1, 2013). The proposed amendments to §§15.2, 15.3, and 15.10 - 15.13 conform 31 TAC Chapter 15 to the requirements of those statutory amendments and provide some clarification of requirements applicable to post-storm activities on the Texas coast.

§15.2. Definitions

The 83rd Legislature enacted HB 1044 (Acts 2013, 83rd Leg., ch. 895, eff. September 1, 2013) which amended Texas Natural Resources Code (TNRC) §63.002. The amendments proposed will add definitions for the terms "all-terrain vehicle," "recreational vehicle," and "recreational off-highway vehicle" to reflect the additions and changes to TNRC §63.002.

The 83rd Legislature enacted HB 3459 (Acts 2013, 83rd Leg., ch. 1086, eff. September 1, 2013) which amended §§61.001, 61.011, 61.016, 61.017, and 61.0185 of the Open Beaches Act (TNRC §§61.001 - 61.026) and added §61.0171 to provide the commissioner with authority to suspend action on conducting of a line of vegetation (LOV) determination for up to three years if the commissioner determines that a meteorological event has obliterated the LOV. The amendments proposed will add the definition for "meteorological event" found in the new §61.001(7-a).

§15.3. Administration

The proposed amendments modify §15.3(b)(4) to delete language that is redundant to new §15.3(b)(5), add language to §15.3(b)(5) which specifies that if the LOV has been delineated in an order under §15.12 and §15.13, the local government will not make an initial determination under §15.3(b)(4), renumber

the remaining paragraphs as §15.3(b)(6) and (7), and modify §15.3(b)(7) to insert reference to TNRC §61.0171. The proposed changes also modify §15.3(c), (m), and (s)(5) to delete reference to the Attorney General to conform to changes in HB 1457 (Acts 2003, 78th Leg., ch. 245, eff. immediately).

§15.10. General Provisions

The proposed changes also modify §15.10 to delete reference to the Attorney General and insert reference to new TNRC §61.0171 and an order issued under the amended 31 TAC §15.12(e) which provides for the suspension of line of vegetation determination where the natural line of vegetation has been obliterated as a result of a meteorological event under TNRC §61.0171.

§15.11. Repairs to Certain Houses Located Seaward of the Boundary of the Public Beach

The proposed changes modify the definition of the boundary of the public beach in §15.11(b)(2) to reference an order issued under new TNRC §61.0171 and new 31 TAC §15.12(e). The proposed changes delete the term "natural" in §15.11(b) and (c) to be consistent with new TNRC §61.0171 and 31 TAC §15.12 and §15.13, wherein the LOV may be delineated without reference to the natural state of the LOV.

§15.12. Temporary Orders Issued by the Land Commissioner

The proposed changes modify the title to reflect the plural of "Order". The proposed changes modify §15.12 to divide the section into two parts which establish the requirements for orders suspending enforcement of the prohibition against encroachments on and interferences with the public beach easement and orders suspending line of vegetation determinations where the natural line of vegetation has been obliterated as a result of a meteorological event. The proposed changes modify §15.12(a) to reference an order suspending line of vegetation determinations where the natural line of vegetation has been obliterated as a result of a meteorological event under TNRC §61.0171. The proposed changes add the definition of the boundary of the public beach to §15.12(b), which includes reference to a boundary as described in §15.3(b) or an order issued under §15.12 or §15.13, and renumber the remaining definitions. The proposed changes modify §15.12(c) to delete reference to suspension of the submission of a request that the Attorney General file suit for enforcement under §61.018 of the Code and modify the section to provide for the requirement of any order issued under §15.12.

The proposed changes modify §15.12(d) to add a title, "Orders suspending enforcement of the prohibition against encroachments on and interferences with the public beach easement" and renumber the subsection. References to "natural line of vegetation" are deleted and replaced with "boundary of the public beach" to be consistent with the new TNRC §61.0171 and 31 TAC §15.12 and §15.13, wherein the LOV may be delineated without reference to the natural state of the LOV.

The proposed change adds §15.12(e), titled "Orders suspending line of vegetation determinations where the line of vegetation has been obliterated as a result of a meteorological event." New §15.12(e)(1) provides that the commissioner may suspend conducting a line of vegetation determination for a period of up to three years. New §15.12(e)(2) establishes that for the duration of the Order, the public beach shall not extend inland further than 200 feet from the seaward line of mean low tide as established by a licensed state land surveyor and new §15.12(e)(3) provides that, while an order issued under §15.12 is in effect, a

local government may issue a certificate or permit based upon the boundary of the public beach, as delineated by the commissioner under §15.13 (relating to Disaster Recovery Orders). New §15.12(e)(4) describes how the commissioner will make a line of vegetation determination following the expiration of an order.

§15.13. Disaster Recovery Orders

The proposed change modifies language in §15.13(c) to clarify that disaster recovery orders provide the minimum measures needed to mitigate for adverse effect to "the public beach" and "public access points" and to make grammatical improvements to the subsection and delete redundant language. The proposed change modifies language in §15.13(e)(2) to delete substantive requirements from the definition of "boundary of the public beach" which are already described in §15.13(c). The proposed changes delete language from §15.13(e)(11), which are not a necessary part of the definition. The proposed changes to §15.13(e)(14) delete the language "no more than 30 feet seaward of the post-storm landward boundary of the public beach," and replace it with "to the line of vegetation as delineated by the commissioner in an order under this subsection or an order issued under §15.12(e) of this title (relating to Temporary Orders Issued by the Land Commissioner)," to be consistent with amended 31 TAC §15.12 and §15.13.

The proposed change adds language in §15.13(f) to include "the initiation of an enforcement action by the commissioner" as a disqualifying factor in determining whether a structure can be repaired under §15.13. The proposed change modifies §15.13(j)(1) to reorganize the section into two subparagraphs (A) and (B) and add language to §15.13(j)(4) to require notice to the commissioner in writing for the temporary closure of any access points. The proposed change deletes the phrase "recovery repair" in §15.13(p), as it is repeated language within the sentence, and the term "natural" in §15.13(p)(5)(D), to make it consistent with changes to TNRC §61.0171 and §15.12 and §15.13.

FISCAL AND EMPLOYMENT IMPACTS

Mrs. Helen Young, Deputy Commissioner for the GLO's Coastal Resources Division, has determined that for each year of the first five years the amended sections as proposed are in effect, there will be fiscal implications for the state government as a result of enforcing or administering the amended sections. The GLO, however, cannot estimate the costs given the uncertainty of storms, the locations of their landfall, their impacts to the Texas coast, and time necessary for the line of vegetation to recover. At this time, any costs necessary to implement HB 3459, HB 2741, HB 1457, and these rules can be managed within the existing budget.

Mrs. Young has determined that there will be no fiscal impact on the local government as a result of enforcing or administering the amended sections that are independent of the costs associated with recovery from any meteorological event. Mrs. Young has determined that there will be no additional costs of compliance, independent of the costs associated with recovery from any meteorological event, for large and small businesses resulting from implementation of the amendments. Mrs. Young has also determined that for each year of the first five years the amended sections, as proposed, are in effect, there will be no impacts to the local economy that are independent of the costs associated with recovery from any meteorological event.

PUBLIC BENEFIT

Mrs. Young has determined that for the first five years the public will benefit from the proposed amendments because they provide an objective means of delineating and preserving the public beach following the obliteration of the line of vegetation by a meteorological event. The proposed amendments implement HB 3459, which seeks to balance the preservation of the public beach and the property rights of littoral landowners. Under the proposed rules, the commissioner can suspend a line of vegetation determination, which establishes the boundary of the public beach, following a meteorological event that has obliterated the line of vegetation. The boundary of the public beach will be extended up to 200 feet from the seaward line of mean low tide as established by a licensed state land surveyor, which will allow littoral owners to repair their structures following an event. The proposed amendments provide up to three years within which the line of vegetation can recover from an event, thereby preserving as much of the public beach easement as is possible following the storm, and define how the commissioner will reestablish the line of vegetation after the suspension has expired.

Mrs. Young has determined that there are no probable economic costs to persons required to comply with these amendments independent of the costs associated with recovery from any meteorological event.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments are adopted under the specific authority of §61.011 and do not exceed the expressed requirements of federal or state law. The proposed amendments implement legislative amendments to TNRC §§61.001, 61.011, 61.016, 61.017, and 61.0185 and are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the proposed rulemaking in accordance with Texas Government Code §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines to determine whether a detailed takings impact assessment is required. The GLO has determined that the proposed amendments do not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, §17 and §19 of the Texas Constitution. GLO has determined that the proposed amendments conforming with HB 2741 and HB 1457 would not affect any private real property in a manner that restricts or limits any owner's right to property.

The GLO has determined that the proposed amendments, which conform the administrative code with HB 3459, would not affect any private real property in a manner that restricts or limits any owner's right to property that would not otherwise exist in

the absence of the rule amendment. Under TNRC §61.0171(d), Chapter 2007 of the Government Code does not apply to an order issued under §61.0171. Under the Open Beaches Act the public has a right to access and use public beaches to which it has acquired the right of use or easement to or over the area by prescription, dedication, presumption or has retained a right by virtue of continuous right in the public since time immemorial. TNRC §61.011. The Open Beaches Act does not create public beach access and use rights, but rather provides a system of administration and enforcement for the rights that exist under state common law. State courts have recognized public beach easements for unrestricted travel and recreation uses along various parts of the Texas Gulf shore.

Under the Open Beaches Act, in an area where the public has acquired or retained an easement, the landward boundary of the public beach easement is the line of vegetation, until a court adjudication establishes the line in another location. TNRC §61.011. In the dynamic environment of the coast, the respective rights of beachfront property owners and the public change with the ebb and flow of the tides as the shoreline gradually erodes and accretes and, over time, the rights of use change accordingly. With the advent of a meteorological event that obliterates the line of vegetation, however, the rights of beachfront property owners and the public's right to access the public beach becomes uncertain and difficult to ascertain.

These amendments implement HB 3459 and provide a system of preserving, administering, and enforcing the respective rights of beachfront property owners and the public in the absence of a natural line of vegetation. The proposed amendments substantially advance the purpose of balancing the public's right to access and use the public beach with the property rights of beachfront property owners by establishing a method to determine an interim boundary for the public beach. The interim boundary allows landowners to make repairs to their homes and continue to use their properties, preserves a portion of the beach for public use and access, and reduces the need to rely upon court adjudication to delineate the rights of the parties following a meteorological event. Once the line of vegetation has had an opportunity to reestablish itself, the amendments describe how the commissioner would establish a line of vegetation in accordance with TNRC §61.016 and §61.017. The proposed amendments impose no burdens on private real property that would not otherwise exist in the absence of the proposed amendments.

An alternative to the implementation of HB 3459 and these proposed amendments would require the commissioner to immediately engage in line of vegetation determinations on a case-by-case basis following a meteorological event. The immediate initiation of line of vegetations determinations would also create haphazard and inconsistent boundary determinations thereby creating an erratic and skewed boundary for coastal developments and delineation of the public beach, which may be difficult for property owners and the public to ascertain. Another alternative to implementing HB 3459 and the proposed amendments is to rely upon individual property owners to use litigation to resolve issues related to the respective rights of each individual beachfront property owner and the public's right to access and use the beach. These alternatives would not constitute a taking.

CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM

The proposed rulemaking is subject to the Coastal Management Program as provided for in the Texas Natural Resource Code §33.2053, and 31 TAC §505.11(a)(1)(J) and §505.11(c), relating to the Actions and Rules Subject to the CMP. GLO has reviewed

this proposed action for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations and has determined that the proposed action is consistent with the applicable CMP goals and policies. The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals) and §501.26 (relating to Policies for Construction in the Beach/Dune System).

The proposed rulemaking implements HB 3459, which provides a system of preserving, administering, and enforcing the rights of beachfront property owners and the public in the absence of a line of vegetation. The proposed amendments are consistent with the CMP goals outlined in 31 TAC §501.12(2), and §501.12(4). These goals seek to allow for the compatible economic development and multiple uses of the coastal zone and ensure and enhance planned public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone. The proposed amendments are consistent with 31 TAC §501.12(2) as they provide for the protection of the CNRA by establishing a means for the line of vegetation to recover following obliteration of the line of vegetation by a meteorological event. The proposed amendments are consistent with 31 TAC §501.12(4) as they ensure public access and use of the coastal zone following a meteorological event that obliterates the line of vegetation in a way that is compatible with private property rights of beachfront property owners until a new line of vegetation can be established. The proposed rules are also consistent with CMP policies in §501.26(a)(4) (relating to Policies for Construction in the Beach/Dune System) by ensuring the ability of the public, individually and collectively, to exercise its right of use and access to and from the public beach following the obliteration of the line of vegetation by a meteorological event.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking or its consistency with the CMP goals and policies, please send a written comment to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 475-1859 or email to walter.talley@glo.texas.gov. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The amendments are proposed under Texas Natural Resources Code §61.011, relating to commissioner's authority to adopt rules for the temporary suspension of the determination of the line of vegetation and local government prohibition of vehicular traffic on public beaches and §63.121, relating to the commissioner's authority to promulgate rules for the protection of critical dune areas.

Texas Natural Resources Code §§61.011 - 61.026 and §§63.001 - 63.1814 are affected by the proposed amendments.

§15.2. Definitions.

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

(1) (No change.)

(2) All-terrain vehicle--Has the meaning assigned by §502.001, Transportation Code.

(3) [~~2~~] Amenities--Any nonhabitable major structure including swimming pools, bathhouses, detached garages, cabanas,

pipelines, piers, canals, lakes, ditches, artificial runoff channels and other water retention structures, roads, streets, highways, parking areas and other paved areas (exceeding 144 square feet in area), underground storage tanks, and similar structures.

(4) [(3)] Applicant--Any person applying to a local government for a permit and/or certificate for any construction or development plan.

(5) [(4)] Backdunes--The dunes located landward of the foredune ridge which are usually well vegetated but may also be unvegetated and migratory. These dunes supply sediment to the beach after the foredunes and the foredune ridge have been destroyed by natural or human activities.

(6) [(5)] Beach access--The right to use and enjoy the public beach, including the right of free and unrestricted ingress and egress to and from the public beach.

(7) [(6)] Beach/Dune Rules--31 TAC §§15.1 - 15.12.

(8) [(7)] Beach/dune system--The land from the line of mean low tide of the Gulf of Mexico to the landward limit of dune formation.

(9) [(8)] Beachfront construction certificate or certificate--The document issued by a local government that certifies that the proposed construction either is consistent with the local government's dune protection and beach access plan or is inconsistent with the local government's dune protection and beach access plan. In the latter case, the local government must specify how the construction is inconsistent with the plan, as required by the Open Beaches Act, §61.015.

(10) [(9)] Beach maintenance--The cleaning or removal of debris from the beach by handpicking, raking, or mechanical means.

(11) [(10)] Beach profile--The shape and elevation of the beach as determined by surveying a cross section of the beach.

(12) [(11)] Beach-related services--Reasonable and necessary services and facilities directly related to the public beach which are provided to the public to ensure safe use of and access to and from the public beach, such as vehicular controls, management, and parking (including acquisition and maintenance of off-beach parking and access ways); sanitation and litter control; lifeguarding and lifesaving; beach maintenance; law enforcement; beach nourishment projects; beach/dune system education; beach/dune protection and restoration projects; providing public facilities such as restrooms, showers, lockers, equipment rentals, and picnic areas; recreational and refreshment facilities; liability insurance; and staff and personnel necessary to provide beach-related services. Beach-related services and facilities shall serve only those areas on or immediately adjacent to the public beach.

(13) [(12)] Beach user fee--A fee collected by a local government in order to establish and maintain beach-related services and facilities for the preservation and enhancement of access to and from and safe and healthy use of public beaches by the public.

(14) [(13)] Blowout--A breach in the dunes caused by wind erosion.

(15) [(14)] Breach--A break or gap in the continuity of a dune caused by wind or water.

(16) [(15)] Bulkhead--A structure or partition built to retain or prevent the sliding of land. A secondary purpose is to protect the upland against damage from wave action.

(17) [(16)] Coastal and shore protection project--A project designed to slow shoreline erosion or enhance shoreline stabilization, including, but not limited to, erosion response structures, beach nourishment, sediment bypassing, construction of man-made vegetated mounds, and dune revegetation.

ishment, sediment bypassing, construction of man-made vegetated mounds, and dune revegetation.

(18) [(17)] Commercial facility--Any structure used for providing, distributing, and selling goods or services in commerce including, but not limited to, hotels, restaurants, bars, rental operations, and rental properties.

(19) [(18)] Construction--Causing or carrying out any building, bulkheading, filling, clearing, excavation, or substantial improvement to land or the size of any structure. "Building" includes, but is not limited to, all related site work and placement of construction materials on the site. "Filling" includes, but is not limited to, disposal of dredged materials. "Excavation" includes, but is not limited to, removal or alteration of dunes and dune vegetation and scraping, grading, or dredging a site. "Substantial improvements to land or the size of any structure" include, but are not limited to, creation of vehicular or pedestrian trails, landscape work (that adversely affects dunes or dune vegetation), and increasing the size of any structure.

(20) [(19)] Coppice mounds--The initial stages of dune growth formed as sand accumulates on the downwind side of plants and other obstructions on or immediately adjacent to the beach seaward of the foredunes. Coppice mounds may be unvegetated.

(21) [(20)] Critical dune areas--Those portions of the beach/dune system as designated by the General Land Office that are located within 1,000 feet of mean high tide of the Gulf of Mexico that contain dunes and dune complexes that are essential to the protection of public beaches, submerged land, and state-owned land, such as public roads and coastal public lands, from nuisance, erosion, storm surge, and high wind and waves. Critical dune areas include, but are not limited to, the dunes that store sand in the beach/dune system to replenish eroding public beaches.

(22) [(21)] Cumulative impact--The effect on beach use and access, on a critical dune area, or an area seaward of the dune protection line which results from the incremental effect of an action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.

(23) [(22)] Dedication--Includes, but is not limited to, a restrictive covenant, permanent easement, and fee simple donation.

(24) [(23)] Dune--An emergent mound, hill, or ridge of sand, either bare or vegetated, located on land bordering the waters of the Gulf of Mexico. Dunes are naturally formed by the windward transport of sediment, but can also be created via man-made vegetated mounds. Natural dunes are usually found adjacent to the uppermost limit of wave action and are usually marked by an abrupt change in slope landward of the dry beach. The term includes coppice mounds, foredunes, dunes comprising the foredune ridge, backdunes, and man-made vegetated mounds.

(25) [(24)] Dune complex or dune area--Any emergent area adjacent to the waters of the Gulf of Mexico in which several types of dunes are found or in which dunes have been established by proper management of the area. In some portions of the Texas coast, dune complexes contain depressions known as swales.

(26) [(25)] Dune Protection Act--Texas Natural Resources Code, §§63.001, et seq.

(27) [(26)] Dune protection and beach access plan or plan--A local government's legally enforceable program, policies, and procedures for protecting dunes and dune vegetation and for preserv-

ing and enhancing use of and access to and from public beaches, as required by the Dune Protection Act and the Open Beaches Act.

(28) [(27)] Dune protection line--A line established by a county commissioners court or the governing body of a municipality for the purpose of preserving, at a minimum, all critical dune areas identified by the General Land Office pursuant to the Dune Protection Act, §63.011, and §15.3(f) of this title (relating to Administration). A municipality is not authorized to establish a dune protection line unless the authority to do so has been delegated to the municipality by the county in which the municipality is located. Such lines will be located no farther than 1,000 feet landward of the mean high tide of the Gulf of Mexico.

(29) [(28)] Dune protection permit or permit--The document issued by a local government to authorize construction or other regulated activities in a specified location seaward of a dune protection line or within a critical dune area, as provided in the Texas Natural Resources Code, §63.051.

(30) [(29)] Dune vegetation--Flora indigenous to natural dune complexes, and growing on naturally-formed dunes or man-made vegetated mounds on the Texas coast and can include coastal grasses and herbaceous and woody plants.

(31) [(30)] Effect or effects--"Effects" include: direct effects--those impacts on public beach use and access, on critical dune areas, or on dunes and dune vegetation seaward of a dune protection line which are caused by an action and occur at the same time and place; and indirect effects--those impacts on beach use and access, on critical dune areas, or on dunes and dune vegetation seaward of a dune protection line which are caused by an action and are later in time or farther removed in distance than a direct effect, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density, or growth rate, and related effects on air and water and other natural systems, including ecosystems. "Effects" and "impacts" as used in this subchapter are synonymous. "Effects" may be ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.

(32) [(31)] Eroding area--A portion of the shoreline which is experiencing an historical erosion rate of greater than two feet per year based on published data of the University of Texas at Austin, Bureau of Economic Geology. Local governments may establish an "eroding area boundary" in beach/dune plans; this boundary shall be whichever distance landward of the line of vegetation is greater: 200 feet, or the distance determined by multiplying 50 years by the annual historical erosion rate (based on the most recent data published by the University of Texas at Austin, Bureau of Economic Geology).

(33) [(32)] Erosion--The wearing away of land or the removal of beach and/or dune sediments by wave action, tidal currents, wave currents, drainage, or wind. Erosion includes, but is not limited to, horizontal recession and scour and can be induced or aggravated by human activities.

(34) [(33)] Erosion response structure--A hard or rigid structure built for shoreline stabilization which includes, but is not limited to, a jetty, groin, breakwater, bulkhead, seawall, riprap, rubble mound, revetment, or the foundation of a structure which is the functional equivalent of these specified structures.

(35) [(34)] FEMA--The United States Federal Emergency Management Agency. This agency administers the National Flood Insurance Program and publishes the official flood insurance rate maps.

(36) [(35)] Foredunes--The first clearly distinguishable, usually vegetated, stabilized large dunes encountered landward of the Gulf of Mexico. On some portions of the Texas Gulf Coast, foredunes may also be large, unvegetated, and unstabilized. Although they may be large and continuous, foredunes are typically hummocky and discontinuous and may be interrupted by breaches and washover areas. Foredunes offer the first significant means of dissipating storm-generated wave and current energy issuing from the Gulf of Mexico. Because various heights and configurations of dunes may perform this function, no standardized physical description applies. Foredunes are distinguishable from surrounding dune types by their relative location and physical appearance.

(37) [(36)] Foredune ridge--The high continuous line of dunes which are usually well vegetated and rise sharply landward of the foredune area but may also rise directly from a flat, wave-cut beach immediately after a storm.

(38) [(37)] Habitable structure perimeter or footprint--The area of a lot covered by a structure used or usable for habitation. The habitable structure perimeter or footprint does not include incidental projecting eaves, balconies, ground-level paving, landscaping, open recreational facilities (for example, pools and tennis courts), or other similar features.

(39) [(38)] Habitable structures--Structures suitable for human habitation including, but not limited to, single or multi-family residences, hotels, condominium buildings, and buildings for commercial purposes. Each building of a condominium regime is considered a separate habitable structure, but if a building is divided into apartments, then the entire building, not the individual apartments, is considered a single habitable structure. Additionally, a habitable structure includes porches, gazebos, and other attached improvements.

(40) [(39)] Industrial facilities--Include, but are not limited to, those establishments listed in Part 1, Division D, Major Groups 20-39 and Part 1, Division E, Major Group 49 of the Standard Industrial Classification Manual as adopted by the Executive Office of the President, Office of Management and Budget (1987 ed.). However, for the purposes of this subchapter, the establishments listed in Part 1, Division D, Major Group 20, Industry Group Number 209, Industry Numbers 2091 and 2092 are not considered "industrial facilities." These establishments are listed in "Appendix I" attached to this section. Figure: 31 TAC §15.2(40)
[Figure: 31 TAC §15.2(39)]

(41) [(40)] Large-scale construction--Construction activity greater than 5,000 square feet or habitable structures greater than two stories in height. Both the area beneath the lowest habitable level of an elevated structure and a cupola (i.e. "widow's walk") with an area of 400 square feet or less on the top of the second habitable story are not considered stories for the purpose of this section. Multiple-family habitable structures are typical of this type of construction.

(42) [(41)] Line of vegetation--The extreme seaward boundary of natural vegetation which spreads continuously inland. The line of vegetation is typically used to determine the landward extent of the public beach.

(43) [(42)] Local government--A municipality, county, any special purpose district, any unit of government, or any other political subdivision of the state.

(44) [(43)] Man-made vegetated mound--A mound, hill, or ridge of sand created by the deliberate placement of sand or sand trapping devices including sand fences, trees, or brush and planted with dune vegetation.

(45) [(44)] Master plan--A plan developed by the applicant in consultation with the General Land Office, the Office of the Attorney General, the applicant or applicants, and the local government, for the development of an area subject to the beach/dune rules, as identified in §15.3 of this title (relating to Administration). The master plan shall fully describe in narrative form the proposed development and all proposed land and water uses, and shall include maps, drawings, and tables, and other information, as needed. The master plan must, at a minimum, fully describe the general geology and geography of the site, land and water use intensities, size and location of all buildings, structures, and improvements, all vehicular and pedestrian access ways, and parking or storage facilities, location and design of utility systems, location and design of any erosion response structures, retaining walls, or stormwater treatment management systems, and the schedule for all construction activities described in the master plan. The master plan shall comply with the Open Beaches Act and the Dune Protection Act. The master plan shall provide for overall compliance with the beach/dune rules, but may vary from the specific standards, means and methods provided in the beach/dune rules if the degree of dune protection and the public's right to safe and healthy use of and access to and from the public beach are preserved. If all impacts to dunes, dune vegetation and public beach use and access are accurately identified, local governments shall not require permits or certificates for construction on the individual lots within the master plan area. Master plans are intended to provide a comprehensive option for planning along the Texas coast.

(46) [(45)] Material changes--Changes in project design, construction materials, or construction methods or in the condition of the construction site which occur after an application is submitted to a local government or after the local government issues a permit or certificate. Material changes are those additional or unanticipated changes which have caused or will cause adverse effects on dunes, dune vegetation, or beach access and use, or exacerbation of erosion on or adjacent to the construction site.

(47) Meteorological Event--Atmospheric conditions or phenomena resulting in avulsion, erosion, accretion, or other impacts to the shoreline that alter the location of the line of vegetation.

(48) [(46)] Mitigation sequence--The series of steps which must be taken if dunes and dune vegetation will be adversely affected. First, such adverse effects shall be avoided. Second, adverse effects shall be minimized. Third, the dunes and dune vegetation adversely affected shall be repaired, restored, or replaced. Fourth, the dunes and dune vegetation adversely affected shall be replaced or substituted to compensate for the adverse effects.

(49) [(47)] National Flood Insurance Act--42 United States Code, §§4001, et seq.

(50) [(48)] Natural resources--Land, fish, wildlife, insects, biota, air, surface water, groundwater, plants, trees, habitat of flora and fauna, and other such resources.

(51) [(49)] Open Beaches Act--Texas Natural Resources Code, §§61.001, et seq.

(52) [(50)] Owner or operator--Any person owning, operating, or responsible for operating commercial or industrial facilities.

(53) [(51)] Permit or certificate condition--A requirement or restriction in a permit or certificate necessary to assure protection of life, natural resources, property, and adequate beach use and access rights (consistent with the Dune Protection Act) which a permittee must satisfy in order to be in compliance with the permit or certificate.

(54) [(52)] Permittee--Any person authorized to act under a permit or a certificate issued by a local government.

(55) [(53)] Person--An individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, state, municipality, commission, political subdivision, or any international or interstate body or any other governmental entity.

(56) [(54)] Pipeline--A tube or system of tubes used for the transportation of oil, gas, chemicals, fuels, water, sewerage, or other liquid, semi-liquid, or gaseous substances.

(57) [(55)] Practicable--In determining what is practicable, local governments shall consider the effectiveness, scientific feasibility, and commercial availability of the technology or technique. Local governments shall also consider the cost of the technology or technique.

(58) [(56)] Production and gathering facilities--The equipment used to recover and move oil or gas from a well to a main pipeline, or other point of delivery such as a tank battery, and to place such oil or gas into marketable condition. Included are pipelines used as gathering lines, pumps, tanks, separators, compressors, and associated equipment and roads.

(59) [(57)] Project area--The portion of a site or sites which will be affected by proposed construction.

(60) [(58)] Public beach--As used in this subchapter, "public beach" is defined in the Texas Natural Resources Code, §61.013(c).

(61) [(59)] Recreational activity--Includes, but is not limited to, hiking, sunbathing, and camping for less than 21 days. As used in §15.3(s)(2)(C) of this title (relating to Administration), recreational activities are limited to the private activities of the person owning the land and the social guests of the owner. Operation of recreational vehicles is not considered a recreational activity, whether private or public.

(62) Recreational off-highway vehicle--Has the same meaning assigned by §502.001, Transportation Code.

(63) [(60)] Recreational vehicle--A dune buggy, marsh buggy, minibike, trail bike, jeep, all terrain vehicle, recreational off-highway vehicle, or any other mechanized vehicle used for recreational purposes.

(64) [(61)] Restoration--Repair or replacement of dunes or dune vegetation.

(65) [(62)] Retaining wall--A structure designed to contain or which primarily contains material or prevents the sliding of land. Retaining walls may collapse under the forces of normal wave activity.

(66) [(63)] Sand budget--The amount of all sources of sediment, sediment traps, and transport of sediment within a defined area. From the sand budget, it is possible to determine whether sediment gains and losses are in balance.

(67) [(64)] Seawall--An erosion response structure specifically designed to or which will withstand wave forces.

(68) [(65)] Seaward of a dune protection line--The area between a dune protection line and the line of mean high tide.

(69) [(66)] Small-scale construction--Construction activity less than or equal to 5,000 square feet or habitable structures less than or equal to two stories in height. Both the area beneath the lowest habitable level of an elevated structure and a cupola (i.e. "widow's walk") with an area of 400 square feet or less on the top of the second habitable story are not considered stories for the purpose of this section. Single-family habitable structures are typical of this type of construction.

(70) [(67)] Structure--Includes, without limitation, any building or combination of related components constructed in an

ordered scheme that constitutes a work or improvement constructed on or affixed to land.

(71) [(68)] Swales--Low areas within a dune complex located in some portions of the Texas coast which function as natural rainwater collection areas and are an integral part of the dune complex.

(72) [(69)] Unique flora and fauna--Endangered or threatened plant or animal species listed pursuant to 16 United States Code Annotated, §1531 et seq., the Endangered Species Act of 1973, and/or the Parks and Wildlife Code, Chapter 68, or any plant or animal species that a local government has determined in their local beach/dune plan are rare or uncommon.

(73) [(70)] Washover areas--Low areas that are adjacent to beaches and are inundated by waves and storm tides from the Gulf of Mexico. Washovers may be found in abandoned tidal channels or where foredunes are poorly developed or breached by storm tides and wind erosion.

§15.3. Administration.

(a) (No change.)

(b) Boundary of the public beach. The public beach is defined in the Open Beaches Act, §61.013(c), and §15.2 of this title (relating to Definitions). The line of vegetation is defined in the Open Beaches Act, §61.001(5), and §15.2 of this title (relating to Definitions). The line of vegetation is typically used to determine the landward extent of the public beach. However, there are portions of the Texas coast where there is no marked vegetation line or the line is discontinuous or modified. In those portions of the coast, the line of vegetation shall be determined consistent with §15.10(b) of this title (relating to General Provisions) and the Open Beaches Act, §61.016 and §61.017.

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

(4) An individual seeking line of vegetation determination for a proposed purchase of property or for proposed construction must initially file a request with the local government having authority for Beachfront Construction Certificates/Dune Protection Permits. After review by the local government, the request and initial determination by the local government must be forwarded to the General Land Office for review and approval. [Provided, however, if the Commissioner has issued a temporary standard for demarcation of the landward boundary of the public beach as part of a disaster recovery order under §15.13 of this title (relating to Disaster Recovery Orders), an initial determination by the local government is not required.]

(5) If the commissioner has issued an order under §15.12 of this title (relating to Temporary Orders Issued by the Land Commissioner) or §15.13 of this title (relating to Disaster Recovery Orders) the line of vegetation shall be delineated in accordance with the order(s) and an initial determination by the local government is not required.

(6) [(5)] When a Beachfront Construction Certificate/Dune Protection Permit application is submitted to the General Land Office for review and comment, the line of vegetation depicted on any map, aerial photograph, or other documentation shall be subject to verification by the General Land Office.

(7) [(6)] The determination of the location of the line of vegetation by the commissioner of the General Land Office as provided by the Open Beaches Act, §§61.016 - 61.017 and 61.0171 [~~§61.016 and §61.017~~], constitutes prima facie evidence of the landward boundary of the area subject to the public easement until a court adjudication establishes the line in another place.

(c) Beachfront construction certification areas. The General Land Office [~~in conjunction with the attorney general's office,~~] has the responsibility of protecting the public's right to use and have ac-

cess to and from the public beach and of providing standards to the local governments certifying construction on land adjacent to the Gulf of Mexico consistent with such public rights. The Open Beaches Act, §61.011(d)(6), limits the geographic scope of the beachfront construction certification area to the land adjacent to and landward of public beaches and lying in the area either up to the first public road generally parallel to the public beach or to any closer public road not parallel to the beach, or the area up to 1,000 feet of mean high tide, whichever distance is greater. For this area, local governments shall prepare a beach access and use program, pursuant to the Open Beaches Act, §61.015, for inclusion in their dune protection and beach access plans to control any adverse effects of beachfront construction on public beach use and access. Applications for beachfront construction certificates shall be reviewed by local governments for consistency with their dune protection and beach access plans.

(d) - (l) (No change.)

(m) Local government authority. Local governments shall include in the plans submitted to the General Land Office [~~and the attorney general's office~~] citations of all statutes, policies, and ordinances which demonstrate the authority of the local government to implement and enforce the plan in a manner consistent with the requirements of this subchapter. Local government plans shall also demonstrate the coordination, on the local level, of the dune protection, beach access, erosion response, and flood protection programs (if participating in the National Flood Insurance Program under the National Flood Insurance Act). Each local government shall integrate these programs into one plan for the management of the beach/dune system within its jurisdiction. The General Land Office will provide written guidance on the form and content of the plan upon written request by a local government.

(n) - (r) (No change.)

(s) Acts prohibited without a dune protection permit or beachfront construction certificate. An activity requiring a dune protection permit may typically also require a beachfront construction certificate and vice versa. Local governments shall, whenever possible, issue permits and certificates concurrently when an activity requires both. In their dune protection and beach access plans, local governments may combine the dune protection permit and the beachfront construction certificate into a single permit or a two-part permit; however, they are not required to do so.

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

(5) Master plan. Local governments may adopt separate ordinances or county commissioners court orders authorizing master plans located within the geographic scope of this subchapter. These ordinances and orders shall be consistent with and address the dune protection and beach access requirements of this subchapter, the Dune Protection Act and Open Beaches Act. The ordinances and orders shall be submitted to the General Land Office [~~and the attorney general's office~~] for review and approval to ensure consistency with this subchapter. When considering approval of a master planned development or construction plans and setting conditions for operations under such plans, local governments shall consider:

(A) - (C) (No change.)

(6) - (7) (No change.)

(t) - (u) (No change.)

§15.10. General Provisions.

(a) (No change.)

(b) Boundary of the public beach. The commissioner [~~attorney general~~] shall make determinations on issues related to the location

of the boundary of the public beach and encroachments on the public beach pursuant to the requirements of the Open Beaches Act, §§61.016 - 61.017 and 51.3(b) [§61.016 and §61.017, and §15.3(b)] of this title (relating to Administration) and §15.12(e) of this title (relating to Temporary Orders Issued by the Land Commissioner). The General Land Office and the local governments will consult with the attorney general whenever questions of encroachment and boundaries arise with respect to the public beach.

(c) - (j) (No change.)

§15.11. *Repairs to Certain Houses Located Seaward of the Boundary of the Public Beach.*

(a) (No change.)

(b) Definitions. In addition to the definitions contained in §15.2 of this title (relating to Definitions), the following words and terms, as used in this section, shall have the following meanings:

(1) (No change.)

(2) Boundary of the public beach--The landward edge of the public beach, as described in §15.3(b) of this title (relating to Administration) or an order issued under §15.12(e) of this title (relating to Temporary Orders Issued by the Land Commissioner) [relating to Administration]. For purposes of this section, the location of the natural line of vegetation shall be determined by the General Land Office on a case-by-case basis. The General Land Office may conduct a field investigation and may consult with the Bureau of Economic Geology of the University of Texas at Austin when making a determination under this section regarding the [natural] line of vegetation.

(3) - (4) (No change.)

(c) Eligible houses. To find a house eligible for a permit or certificate to make repairs under this section, the Land Office must determine that:

(1) (No change.)

(2) The house was located landward of the [natural] line of vegetation before the erosion or meteorological event occurred;

(3) - (5) (No change.)

(d) For a house eligible under this section, a local government may issue a certificate or permit authorizing repair of an eligible house if the local government determines that the repair:

(1) - (2) (No change.)

(3) does not include the use of impervious material, including but not limited to concrete or fibercrete, seaward of the boundary of the public beach; [natural line of vegetation;]

(4) does not include the construction of an enclosed space below the base flood elevation and seaward of the boundary of the public beach; [natural line of vegetation;]

(5) does not include the repair, construction, or maintenance of an erosion response structure seaward of the boundary of the public beach; [natural line of vegetation;]

(6) does not occur seaward of mean high water; [include construction underneath, outside, or around the house other than for reasonable access to or structural integrity of the house, provided that such repair does not create an additional obstruction to public use of and access to the beach;] and

(7) (No change.)

(e) - (i) (No change.)

§15.12. *Temporary Orders [Order] Issued by the Land Commissioner.*

(a) Purpose. The purpose of this section is to provide standards and procedures for the temporary suspension under §61.0185 of the Texas Natural Resources Code of enforcement of the prohibition against encroachments on and interferences with the public beach easement and suspension under §61.0171 of the Texas Natural Resources Code of line of vegetation determinations where the natural line of vegetation has been obliterated as a result of a meteorological event. [the ability of a property owner to make repairs to a house while a suspension is in effect.] This rule is promulgated under the authority of §61.011(d) [§61.011(d)(7)] of the Texas Natural Resources Code.

(b) Definitions. In addition to the definitions contained in §15.2 of this title (relating to Definitions), the following words and terms, as used in this section, shall have the following meanings:

(1) Beach debris--Anything that is not native to the beach and beach/dune system, including but not limited to pilings, concrete, fibercrete, rebar, riprap, boulders, automobile parts, rubble mounds, damaged dune walkovers, garbage, and other objects, that may pose a hazard to public health and safety and/or no longer serves the purpose for which it was originally intended.

(2) Boundary of the public beach--The landward edge of the public beach, as described in §15.3(b) of this title (relating to Administration) or an order issued under this section or §15.13 of this title (relating to Disaster Recovery Orders).

(3) [(2)] The Code--The Texas Natural Resources Code.

(4) [(3)] Habitable--The condition of the premises which permits the inhabitants to live free of serious hazards to health and safety.

(5) [(4)] House--A single or multi-family structure that serves as permanent, temporary or occasional living quarters for one or more persons or families.

(c) Any order issued by the commissioner under subsection (d) or (e) of this section shall be: [The Code §61.0185 authorizes the commissioner to issue an order suspending, for a period of two years from the date of the order, the submission of a request that the attorney general file suit for enforcement under §61.018 of the Code. An order issued by the commissioner under this section shall be:]

(1) posted on the General Land Office's Internet Web Site, www.glo.texas.gov [www.glo.state.tx.us];

(2) published by the General Land Office as a miscellaneous document in the *Texas Register*; and

(3) filed [for record] by the General Land Office in the real property records of the county in which the structure [house] is located if orders for suspension of enforcement under subsection (d) of this section.

(d) Orders suspending enforcement of the prohibition against encroachments on and interferences with the public beach easement.

(1) An order for temporary suspension of enforcement under §61.0185 may be issued for a period of three years. While an order issued under this section is in effect, a local government may issue a certificate or permit authorizing repair of a house subject to the order if the local government determines that the repair:

(A) is solely to make the house habitable including re-connecting the house to utilities;

(B) does not increase the footprint of the house;

(C) does not include the use of impervious material, including but not limited to concrete or fibercrete, seaward of the natural line of vegetation;

(D) does not include the construction of an enclosed space below the base flood elevation and seaward of the natural line of vegetation;

(E) does not include the repair, construction, or maintenance of an erosion response structure seaward of the natural line of vegetation;

(F) does not occur seaward of mean high water; and

(G) does not include construction underneath, outside, or around the house other than for reasonable access to or structural integrity of the house, provided that such repair does not create an additional obstruction to public use of and access to the beach.

(2) Debris on the public beach creates a hazard to public health and safety and can threaten Gulf-facing properties. While an order issued under this section is in effect, a local government shall coordinate with littoral property owners to remove beach debris from the public beach as soon as possible. All beach debris collected from the public beach shall be removed from the beach/dune system and disposed of in an appropriate landfill.

(3) While an order issued under this section is in effect, only beach-quality sand may be placed underneath the footprint of the house and in an area up to five feet seaward of the house. The beach-quality sand must remain loose and unconsolidated, and cannot be placed in bags or other formed containment. In addition, the beach-quality sand must be an acceptable mineralogy and grain size when compared to the sediments found in the beach/dune system. The use of clay or clayey material is not allowed.

(4) While an order issued under this section is in effect, a local government shall submit the certificate or permit application for repair of a house under this section to the commissioner for review. If the commissioner does not object to or otherwise comment on the application within ten working days of receipt of the application, the local government may act on the application. Local governments shall require that all permit and certificate applicants fully disclose in the application all items and information necessary for the local government to make an affirmative determination regarding a permit or certificate for repairs. Local governments may require more information, but they shall submit to the Land Office the following information:

(A) the name, address, phone number, and, if applicable, fax number or electronic mail address of the applicant, and the name of the property owner, if different from the applicant;

(B) a complete legal description of the tract and a statement of its size in acres or square feet including the location of the property lines and a notation of the legal description of adjoining tracts;

(C) the floor plan, footprint, or elevation view of the house identifying the proposed repairs;

(D) photographs of the site that clearly show the current conditions of the site; and

(E) an accurate map, site plan, plat, or drawing of the site identifying:

(i) the site by its legal description, including, where applicable, the subdivision, block, and lot;

(ii) the location of the property lines and a notation of the legal description of adjoining tracts, and the location of any roadways, driveways, and landscaping that currently exist on the tract;

(iii) the location of any seawalls or any other erosion response structures on the tract and on the properties immediately adjacent to the tract;

(iv) the location of the house and the distance between the house and mean high tide, and the natural line of vegetation; and

(v) if known, the location and extent of any man-made vegetated mounds, restored dunes, fill activities, or any other pre-existing human modifications on the tract.

(5) While an order issued under this section is in effect, a local government is responsible for monitoring the repair of the house under this section. Any permit or certificate issued by a local government under this order expires automatically on the date the order expires. Except as provided in §15.11 of the title (relating to Repairs to Certain Houses Located Seaward of the Boundary of the Public Beach), local governments may not issue permits or certificates for repairs to houses located on the public beach easement that are not subject to an order issued under this section.

(e) Orders suspending line of vegetation determinations where the line of vegetation has been obliterated as a result of a meteorological event.

(1) The commissioner may, by order, suspend action on conducting a line of vegetation determination for a period of up to three years from the date the order is issued if the commissioner determines that the line of vegetation was obliterated as a result of a meteorological event.

(2) For the duration of the order, the public beach shall not extend inland further than 200 feet from the seaward line of mean low tide as established by a licensed state land surveyor.

(3) While an order issued under this section is in effect, a local government may issue a certificate or permit based upon the boundary of the public beach, as delineated by the commissioner under §15.13 of this title.

(4) Following the expiration of an order issued under this section, the commissioner shall make a determination regarding the line of vegetation in accordance with the Code §61.016 and §61.017, taking into consideration the effect of the meteorological event on the location of the public beach easement. The commissioner may consult with the Bureau of Economic Geology of The University of Texas at Austin or a licensed state land surveyor and consider other relevant factors when making a determination under this subsection regarding the annual erosion rate for the area of beach subject to the order issued under this section.

{(d) While an order issued under this section is in effect, a local government may issue a certificate or permit authorizing repair of a house subject to this order if the local government determines that the repair:}

{(1) is solely to make the house habitable including reconnecting the house to utilities;}

{(2) does not increase the footprint of the house;}

{(3) does not include the use of impervious material, including but not limited to concrete or fibercrete, seaward of the natural line of vegetation;}

{(4) does not include the construction of an enclosed space below the base flood elevation and seaward of the natural line of vegetation;}

[(5) does not include the repair, construction, or maintenance of an erosion response structure seaward of the natural line of vegetation;]

[(6) does not occur seaward of mean high water; and,]

[(7) does not include construction underneath, outside or around the house other than for reasonable access to or structural integrity of the house, provided that such repair does not create and additional obstruction to public use of and access to the beach.]

[(e) Debris on the public beach creates a hazard to public health and safety and can threaten Gulf-facing properties. While an order issued under this section is in effect, a local government shall coordinate with littoral property owners to remove beach debris from the public beach as soon as possible. All beach debris collected from the public beach shall be removed from the beach/dune system and disposed of in an appropriate landfill.]

[(f) While an order issued under this section is in effect, only beach-quality sand may be placed underneath the footprint of the house and in an area up to five feet seaward of the house. The beach-quality sand must remain loose and unconsolidated, and cannot be placed in bags or other formed containment. In addition, the beach-quality sand must be an acceptable mineralogy and grain size when compared to the sediments found in the beach/dune system. The use of clay or clayey material is not allowed.]

[(g) While an order issued under this section is in effect, a local government shall submit the certificate or permit application for repair of a house under this section to the commissioner for review. If the commissioner does not object to or otherwise comment on the application within ten working days of receipt of the application, the local government may act on the application. Local governments shall require that all permit and certificate applicants fully disclose in the application all items and information necessary for the local government to make an affirmative determination regarding a permit or certificate for repairs. Local governments may require more information, but they shall submit to the Land Office the following information:]

[(1) the name, address, phone number, and, if applicable, fax number or electronic mail address of the applicant, and the name of the property owner, if different from the applicant;]

[(2) a complete legal description of the tract and a statement of its size in acres or square feet including the location of the property lines and a notation of the legal description of adjoining tracts;]

[(3) the floor plan, footprint or elevation view of the house identifying the proposed repairs;]

[(4) photographs of the site which clearly show the current conditions of the site; and]

[(5) an accurate map, site plan, plat or drawing of the site identifying:]

[(A) the site by its legal description, including, where applicable, the subdivision, block, and lot;]

[(B) the location of the property lines and a notation of the legal description of adjoining tracts, and the location of any roadways, driveways and landscaping that currently exist on the tract;]

[(C) the location of any seawalls or any other erosion response structures on the tract and on the properties immediately adjacent to the tract;]

[(D) the location of the house and the distance between the house and mean high tide, and the natural line of vegetation; and,]

[(E) if known, the location and extent of any man-made vegetated mounds, restored dunes, fill activities, or any other pre-existing human modifications on the tract.]

[(h) While an order issued under this section is in effect, a local government is responsible for monitoring the repair of the house under this section. Any permit or certificate issued by a local government under this order expires automatically on the date the order expires. Except as provided in §15.11, local governments may not issue permits or certificates for repairs to houses located on the public beach easement that are not subject to an order issued under this section.]

§15.13. *Disaster Recovery Orders.*

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

(c) Disaster recovery order. The commissioner may issue a disaster recovery order pursuant to this section to authorize temporary standards for stabilization and repair of structures, dune restoration, and other minimum measures needed to mitigate for adverse effect to the public beach, public access points, and dune areas caused by a damaging declared or natural disaster. The disaster recovery order shall identify the nature of the disaster, the name of the disaster and the time and location of landfall (if applicable), any coastal county or counties to which the order applies, the date of issuance, and the expiration date [of the order]. The order is effective upon issuance by the commissioner. Notice of the order issued under this section shall be:

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

(d) (No change.)

(e) Definitions. In addition to the definitions contained in §15.2 of this title (relating to Definitions), the following words and terms, as used in this section, shall have the following meanings:

(1) (No change.)

(2) Boundary of the public beach--The landward edge of the public beach, as described in §15.3(b) of this title (relating to Administration). For purposes of this section, the commissioner may provide local governments with a temporary standard that includes a demarcation of the landward boundary of the public beach based on a line of constant elevation to use when issuing beachfront construction certificates and dune protection permits in locations where the natural line of vegetation has been severely damaged by the disaster that precipitated the recovery order. [If the commissioner provides such a temporary standard, the standard shall be publicized on the GLO's website and local governments shall be given adequate notice of the temporary standard and the duration of its effectiveness.]

(3) - (10) (No change.)

(11) Recovery period--A period of time commencing with the issuance of a disaster recovery order under this section and ending with the expiration of the order, during which temporary standards for stabilization and repair of structures and dune restoration are in effect [to assist a local government in restoring beach access and dune protection].

(12) - (13) (No change.)

(14) Restoration Area--With respect to a dune restoration project on the public beach, an area extending to the line of vegetation as delineated by the commissioner in an order under this subsection or an order issued under §15.12(c) of this title (relating to Temporary Orders Issued by the Land Commissioner). [no more than 30 feet seaward of the post-storm landward boundary of the public beach.]

(15) (No change.)

(f) Recovery repair and recovery stabilization of structures on the public beach.

(1) - (2) (No change.)

(3) A local government may grant authorization in accordance with this section for recovery repair of a residential structure that encroaches or may encroach on the public beach, but only if the structure is an eligible house under §15.11 of this title (relating to Repairs to Certain Houses Located Seaward of the Boundary of the Public Beach) and is not subject to a pending enforcement action under this subchapter, the Open Beaches Act (Texas Natural Resources Code, Chapter 61), or the Dune Protection Act (Texas Natural Resources Code, Chapter 63). An enforcement action includes the filing of a suit in district court, ~~[or]~~ the referral of a matter for enforcement to the attorney general or other public prosecutor, the initiation of an enforcement action by the commissioner, or the issuance of a citation by a local government for a violation of its dune protection and beach access plan.

(4) - (7) (No change.)

(g) - (i) (No change.)

(j) Authorized beach access and dune protection measures.

(1) If a local beach access and dune protection plan includes a variance that permits the use of fibercrete within 200 feet of the line of vegetation in an eroding area, the local government may:

(A) use the landward toe of a restored dune for determining the area in which the use of fibercrete is allowed as provided in the variance unless natural dunes form further landward. In eroding areas where there is no dune or the dune has been obliterated by the disaster that precipitated the order, the provisions of §15.6(f)(3) of this title (relating to Concurrent Dune Protection and Beachfront Construction Standards) apply until a restored dune has been established in the area as determined by a local government.

(B) allow construction underneath, outside, or around the house that includes fibercrete or other materials necessary to restore reasonable access to a house for disabled persons; provided that such access existed prior to the disaster that is the subject of an order under this section. This provision also applies to a house that has become located on the beach or where there is no dune.

~~{(1) If a local beach access and dune protection plan includes a variance that permits the use of fibercrete within 200 feet of the line of vegetation in an eroding area, under this section the landward toe of a restored dune may be used for determining the area in which the use of fibercrete is allowed as provided in the variance unless natural dunes form further landward. In eroding areas where there is no dune or the dune has been obliterated by the disaster that precipitated the order, the provisions of §15.6(f)(3) of this title (relating to Concurrent Dune Protection and Beachfront Construction Standards) apply until a restored dune has been established in the area as determined by a local government.}~~

~~{(2) If a local beach access and dune protection plan includes a variance that permits the use of fibercrete within 200 feet of the line of vegetation in an eroding area, the local government may allow construction underneath, outside, or around the house that includes fibercrete or other materials necessary to restore reasonable access to a house for disabled persons; provided that such access existed prior to the disaster that is the subject of an order under this section. This provision also applies to a house that has become located on the beach or where there is no dune.}~~

(2) ~~[(3)]~~ A local government may provide temporary access to beaches from off-beach parking areas by directing the public to the nearest existing pathways to minimize the effects on dunes and

dune vegetation until dunes and walkovers are re-established or rebuilt. Temporary pathways shall be conspicuously marked as beach access paths.

(3) ~~[(4)]~~ A local government may, without a plan amendment, temporarily close beach access points damaged beyond repair or temporarily blocked by emergency shore protection projects to prevent damage to infrastructure. In order to comply with this rule a local government must notify the commissioner in writing of the temporary closure of such damaged beach access point within 10 calendar days and specify the duration of the closure. The local government must ensure that the period of limited beach access in that area does not exceed the duration of the disaster recovery order and must submit to the commissioner a timeline for amending the local plan or a remedy to restore access no later than six months prior to the expiration of the disaster recovery order issued under this section.

(k) - (o) (No change.)

(p) GLO review. A local government shall submit the certificate or permit applications for recovery repair, ~~[recovery repair,]~~ recovery dune restoration, or any other activity authorized under this section to the commissioner for review. If the commissioner does not object to or otherwise comment on the application within ten working days of receipt of an application, the local government may act on the application. Local governments shall require that all permit and certificate applicants fully disclose in the application all items and information necessary for the local government to make a determination regarding a permit or certificate for repairs. Local governments may require more information, but the following information shall be submitted to the GLO:

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

(5) an accurate map, site plan, plat or drawing of the site identifying:

(A) - (C) (No change.)

(D) the location of the house and the distance between the house and mean high tide, and the ~~[natural]~~ line of vegetation;

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

(6) - (7) (No change.)

(q) - (r) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 31, 2014.

TRD-201401426

Larry Laine

Chief Clerk, Deputy Land Commissioner

General Land Office

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 475-1859



TITLE 34. PUBLIC FINANCE

PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 71. CREDITABLE SERVICE

34 TAC §§71.2, 71.17, 71.19, 71.23, 71.29, 71.31

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Texas Administrative Code (TAC) §§71.2, 71.17, 71.19, 71.23, 71.29, and 71.31, concerning Membership Waiting Period for Employee Class, Credit for Unused Accumulated Leave, Transfer of Service between the Teacher Retirement System of Texas (TRS) and the Employees Retirement System of Texas (ERS), Acceptance of Rollovers and Transfers from Other Plans, Purchase of Additional Service Credit, and Credit Purchase Option for Certain Waiting Period Service.

As part of ERS' statutorily required duty to review its rules, ERS has determined that these rules should be amended in accordance with applicable legislation, and to more effectively administer programs for which ERS is responsible.

Section 71.2 is proposed to be amended to clarify that the waiting period required for certain persons to join the employee class includes individuals who leave state service and withdraw their contributions to the retirement system. A person who leaves state service is still a member of the employee class so long as the individual did not withdraw his or her retirement contributions. Therefore, upon adoption of this rule amendment, when the member returns to state service, he/she will receive credit for service and both the member and state will make required contributions as soon as employment or office holding begins. This amendment is proposed because state law now permits ERS to share member records, such as membership in the retirement system, with another governmental entity having a need for the information to perform the purposes of ERS, such as a payroll officer processing a member returning to state service. Without this member information, agency payroll officers would not have the knowledge as to whether or not a new employee had previous state service or had refunded previous state service.

Section 71.17 is proposed to be amended to reflect that ERS may accept electronic certification of leave totals from agencies. State agencies are able to track and certify leave totals electronically, which is faster and more convenient than the existing process.

Section 71.19 is proposed to be amended to clarify that a member who has transferred service credit under Texas Government Code, Chapter 805, may not return to service in a position covered by ERS during the month immediately after retirement from a position covered by ERS, or Teacher Retirement System (TRS) after retirement from a position with TRS.

Section 71.23 is proposed to be amended to reflect that ERS may accept transfers or rollover of funds from traditional IRAs to establish service credit.

Section 71.29 is proposed to be amended to allow members to purchase additional service credit in blocks smaller than 12 months if the member is attempting to become eligible for any retirement.

Section 71.29 and §71.31 are proposed to be amended to provide that purchased service credit is not used to determine salary for an annuity. Because this credit is calculated on an actuarial basis, it does not have an associated salary. Section 71.29 is also amended to apply this to all annuities.

Section 71.29 and §71.31 are also proposed to be amended to adopt by reference the new actuarial service credit tables adopted by the ERS Board of Trustees on Tuesday, February 25, 2014. The new tables are necessary because of assumptions adopted by the board on February 26, 2013, following an

actuarial experience study, as well as 2013 legislative changes to the retirement plans administered by ERS.

Ms. Paula A. Jones, General Counsel and Chief Compliance Officer, has determined that for the first five-year period the rules are in effect, there may be a fiscal implication for state government as a result of enforcing the rules or administering the rules with regard to the amendment of §71.2. To the extent members with funds on account with ERS are reemployed by or begin office holding with the state following a break in service, then there would be a fiscal impact to the employing agency to pay the state share of contributions for retirement service credit. However, this is the same contribution that is already required for other state employees, and it is not possible at this time to determine in advance what that exact amount might be. The economic cost to persons who are required to comply with the rules as proposed would be to pay their member's share of retirement service credit. To Ms. Jones' knowledge, small businesses and local government should not be affected.

Ms. Jones also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules include the information provided above, and also will simplify administration of the Employees Retirement System, amend the rules to reflect statutory changes, enhance benefits for state employees, and increase accuracy in actuarially determined service purchases.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is May 12, 2014, at 10:00 a.m.

The amendments are proposed under the Texas Government Code, §815.102, which authorizes the ERS Board of Trustees to adopt rules for the administration of the funds of the retirement system and the transaction of any business of the board. Amendments are also proposed under Texas Government Code, §815.105, which provides authorization for the ERS Board of Trustees to adopt mortality, service, and other tables it considers necessary for the retirement system.

No other statutes are affected by the proposed amendments.

§71.2. *Membership Waiting Period for Employee Class.*

(a) For an individual who begins employment or office holding on or after September 1, 2003, membership in the employee class begins on the 91st day after the end of a 90 calendar day waiting period.

(b) For purposes of this section, an individual who is not considered to be a member and is subject to the 90-day waiting period includes[~~;~~]

~~[(1) an individual with a break in employment or office holding for at least one full calendar month during which a contribution was not made; or]~~

~~[(2) an individual who has withdrawn contributions for previous service credited in the employee class.~~

(c) In determining the date of eligibility for membership in the employee class for an employee who is subject to the waiting period, the following provisions apply:

(1) the system shall count the date of employment as the first day of the 90-day waiting period;

(2) the date of employment means the date on which an individual begins to perform service or hold office.

(d) Contributions for membership service in the employee class begin on the first day of the calendar month following completion of the 90-day waiting period.

(e) Service credit for service performed during the 90-day waiting period described by this section may be established at the actuarial present value as provided in §71.31 of this chapter and Texas Government Code [Tex. Gov't Code] §813.514.

(f) Waiting periods prior to September 1, 1973 are considered membership service not previously established and may be established as provided in §71.14.

§71.17. Credit for Unused Accumulated Leave.

(a) Unused accumulated leave is creditable only in the employee class of membership and only so long as the last day of employment occurs during the month in which the member dies or the member's retirement becomes effective.

(b) Before the amount of service credit can be determined, an authorized state agency official must certify electronically or on a form prescribed by the Employees Retirement System of Texas (ERS) the amount of unused accumulated leave to the credit of the member on the last day of employment.

(c) Eligible leave credit will become effective as service credit only after retirement or death. Subject to that limitation and upon receipt of a certification pursuant to subsection (b) of this section, [the] ERS shall grant any service credit to which a retiree is thereby entitled. An increase in the computation of an annuity because of leave credit shall be effective from the time of certification.

(d) Leave creditable as provided in this section includes only earned annual vacation leave entitlement and sick leave entitlement. A member transferring TRS service to [the] ERS for the purpose of retirement will receive credit for leave as provided in this section only if the member holds a position in the employee class of membership in [the] ERS during the effective month of retirement. The percentage value of all service creditable in the employee class of membership shall not exceed 100%.

§71.19. Transfer of Service between the Teacher Retirement System of Texas (TRS) and the Employees Retirement System of Texas (ERS).

(a) Purpose. These rules are intended to implement the provisions of the Government Code, Chapter 805, concerning the transfer of credit between [the] TRS and [the] ERS, and to provide a systematic method of funding the actuarial value of the annuity resulting from transferred service.

(b) Forms.

(1) Applications for transfer will be made using forms prescribed by [the] ERS.

(2) [The] ERS will cooperate with [the] TRS in an effort to make such application forms for [the] ERS comparable to those used by [the] TRS.

(c) Notice.

(1) A person who elects to transfer service credit pursuant to these rules must file the appropriate form to make such transfer not more than 90 days prior to the person's retirement effective date, but not later than said effective date.

(2) [The] ERS will notify [the] TRS of the pending transfer not later than 30 days following said effective date.

(d) Manner of transfer.

(1) Service credit and assets will be transferred through electronic and hard copy documentation pursuant to these rules, and [the] ERS will maintain records of such transfers permanently.

(2) Any transfer of service credit to [the] ERS must reflect years of credit, average salary, periods of service, method of calculation, and the manner used to calculate the time period involved, including any military credit purchased.

(3) Any transfer of service credit to [the] ERS must include specific data regarding the pre-tax and after-tax contributions by the person, [penalty] interest owed, earned interest, and any other dollar amount which will be part of the transfer.

(4) Assets to fund the portion of the annuity attributable to service with the TRS will be transferred to [the] ERS pursuant to agreement with [the] TRS.

(5) Service transferred from [the] TRS will be established in an employee class account for the benefit of the member.

(e) Transfer of funds. [The] ERS and [the] TRS agree on the following method of transferring funds. Each system shall certify on a monthly basis the total dollar amount of annuities paid by the system which are attributable to service transferred pursuant to the Government Code, Chapter 805. The amount certified shall exclude any portion of annuities paid consisting of post-retirement increases. Each system shall remit to the other system the amount certified within 30 days of receipt of such certification. It is recognized that adjustments will be made from month-to-month as a result of such things as administrative errors, the death of the annuitant or a beneficiary, return-to-work, and recovery from disability by an annuitant. The systems will jointly agree on the administrative and accounting procedures to be established in order to ensure the transfer of funds pursuant to this section.

(f) Purchase of refunded service.

(1) A member of [the] TRS who canceled membership in [the] ERS by taking a refund of his individual account may repurchase his service credit for the purpose of making a transfer at any time prior to retirement. Such persons do not have to become a contributing member of [the] ERS in order to purchase such canceled service credit.

(2) A person who cancels membership in [the] ERS by taking a refund of his individual account must meet the general requirements for reinstatement or purchase of service credit in [the] ERS.

(g) Military credit. Any transferred military service which would result in a member receiving service credit in excess of that permitted under [the] ERS rules will not be accepted.

(h) Termination of membership. The transfer of ERS credit to [the] TRS will terminate membership in [the] ERS, and will cancel all rights to benefits from [the] ERS based on that service.

(i) Service in the month following retirement. In accordance with rules adopted by the retirement systems under Texas Government Code, Chapter 805, as applicable, a [A] retirement shall be canceled, service credit transfer canceled, and membership reinstated if an ERS retiree, [a member,] who transferred service from TRS and retired pursuant to this chapter, holds a position covered by the retirement system at which the retiree was last employed during the month following retirement [with the retirement system on which benefits are based]. A retirement shall be canceled and membership reinstated if a retiring member has a commitment from his present employer to be rehired. At the time of retirement, a retiring member must disclose to the retirement system any commitment from his present employer to be rehired.

§71.23. Acceptance of Rollovers and Transfers from Other Plans.

Subject to procedures developed by the Employees Retirement System of Texas (ERS), [the] ERS shall accept an eligible rollover distribution or a direct transfer of funds from another qualified plan or conduit or traditional IRA in payment of all or a portion of any deposit a member is permitted to make with [the] ERS for credit for service. The procedures developed by [the] ERS shall condition the acceptance of a rollover or transfer from another qualified plan or conduit or traditional IRA on the receipt from the other plan, or conduit or traditional IRA of information necessary to enable [the] ERS to determine the eligibility of any transferred funds for tax-free rollover treatment or other treatment under federal income tax law.

§71.29. *Purchase of Additional Service Credit.*

(a) An eligible member may establish equivalent membership service credit authorized by §813.513, Texas Government Code, as provided in this section. The provisions of §71.14 of this title (relating to Payments to Establish or Reestablish Service Credit) do not apply to credit established under this section.

(b) A member is eligible to establish credit under this section in the membership class in which the member holds a position if the member:

- (1) has 120 months of service credit for one or more periods of time during which the member held a position in a membership class and the required contributions were made;
- (2) is actively contributing to the system at the time credit is established; and
- (3) is not eligible to establish other credit or service.

(c) An eligible member shall deposit with the system in a lump sum a contribution in the amount determined by the system to be the actuarial present value of the benefit attributable to the credit established under this section. The tables recommended by the actuaries and adopted by the board shall be used by the system to determine the actuarial present value. The additional service credit tables are adopted by reference and made a part of this rule for all purposes. The 2009 additional service credit tables apply to service purchase calculations performed on or after September 1, 2009, and are those tables adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. The 2010 additional service credit tables apply only to those employees hired by the state of Texas on or after September 1, 2009, as defined in §73.2(c) of this title (relating to Determination of Date of Hire for Retirement Benefit Eligibility). The 2010 additional service credit tables apply to service purchase calculations performed on or after September 1, 2010, and are those tables adopted by the board on February 23, 2010, based on legislative changes to the retirement plan effective September 1, 2009. The 2014 additional service credit tables apply to service purchase calculations performed on or after September 1, 2014, and are those tables adopted by the board on February 25, 2014, based on assumptions adopted by the board on February 26, 2013, and on legislative changes to the retirement plan effective September 1, 2013. For service purchase calculations performed prior to September 1, 2014 [2010], the previously adopted tables apply. Copies of these tables are available from the System's executive director, Employees Retirement System of Texas at 200 E. 18th Street, P.O. Box 13207, Austin, Texas 78711-3207. The actuarial present value shall be based on:

- (1) the member's age on the date of the deposit required by this subsection;
- (2) the earliest date on which the member will become eligible to retire and receive a service retirement annuity after establishing credit under this section; and

(3) the future employment, compensation, investment and retirement benefit assumptions recommended by the actuaries and adopted by the board.

(d) Credit shall be established in increments of 12 months of credit, except that a member who may become eligible to retire by establishing fewer than 12 months of credit may establish the minimum number of months of credit necessary for the member to meet retirement eligibility [~~become eligible to retire~~].

(e) A member who establishes credit under this section shall certify that the member is not eligible to establish other credit or service and shall waive any and all right to establish such credit or service that the member had on the date of the deposit required by subsection (c) of this section. This subsection does not apply to service credit transferred as authorized by Chapter 805, Texas Government Code.

(f) Credit established under this section may not be used [~~to compute the amount of a disability retirement annuity, or~~] to determine average monthly compensation for the purpose of computing an [a service retirement] annuity.

(g) A member who withdraws contributions and cancels credit established under this section may not reestablish such credit under §813.102, Texas Government Code, but may again establish credit as provided in this section.

(h) The provisions of §813.503, Texas Government Code, do not apply to credit established under this section.

§71.31. *Credit Purchase Option for Certain Waiting Period Service.*

(a) An eligible member may establish service credit for service performed during the waiting period as authorized by §813.514, Texas Government Code, and as provided in this section. The provisions of §71.14 of this title (relating to Payments to Establish or Reestablish Service Credit) do not apply to service credit established under this section.

(b) A member is eligible to establish service credit under this section if the member:

- (1) holds a position in the employee class;
- (2) has completed the waiting period;
- (3) has made a retirement contribution in accordance with §813.201, Texas Government Code; and
- (4) makes application for the establishment of service credit and payment of the required contributions in accordance with procedures developed by ERS.

(c) An eligible member shall deposit with the system in a lump sum a contribution in the amount determined by the system to be the actuarial present value of the benefit attributable to the service credit established under this section. The tables recommended by the system's actuary and adopted by the board shall be used to determine the actuarial present value. The waiting period service credit tables are adopted by reference and made a part of this rule for all purposes. The 2009 waiting period service credit tables apply to service purchase calculations performed on or after September 1, 2009, and are those tables adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. The 2010 waiting period service credit tables apply only to those employees hired by the state of Texas on or after September 1, 2009, as defined in §73.2(c) of this title (relating to Determination of Date of Hire for Retirement Benefit Eligibility). The 2010 waiting period service credit tables apply to service purchase calculations performed on or after September 1, 2010, and are those tables adopted by the board on February 23, 2010, based on legislative changes to the retirement plan effective September 1, 2009.

The 2014 waiting period service credit tables apply to service purchase calculations performed on or after September 1, 2014, and are those tables adopted by the board on February 25, 2014, based on assumptions adopted by the board on February 26, 2013, and on legislative changes to the retirement plan effective September 1, 2013. For service purchase calculations performed prior to September 1, 2014 [2010], the previously adopted tables apply. Copies of these tables are available from the System's executive director, Employees Retirement System of Texas at 200 E. 18th Street, P.O. Box 13207, Austin, Texas 78711-3207.

(d) Actuarial present value shall be based on:

(1) the member's age on the date of the deposit required by this subsection;

(2) the earliest date on which the member will become eligible to retire and receive a service retirement annuity after establishing service credit under this section; and

(3) the future employment, compensation, investment and retirement benefit assumptions recommended by the system's actuary and adopted by the board.

(e) Waiting period service credit shall be established in increments of one month.

(f) This section does not apply to service credit transferred as authorized by Texas Government Code, Chapter 805.

(g) A member who withdraws contributions and cancels service credit established under this section may not reestablish such credit under §813.102, Texas Government Code, but may again establish credit only as provided by this section.

(h) Credit established under this section may not be used to determine average monthly compensation for the purpose of computing an annuity.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 31, 2014.

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Paula A. Jones

General Counsel and Chief Compliance Officer

Employees Retirement System of Texas

Earliest possible date of adoption: May 11, 2014

For further information, please call: (877) 275-4377



CHAPTER 73. BENEFITS

34 TAC §§73.2, 73.21, 73.25, 73.29, 73.45

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Texas Administrative Code (TAC) by amending §§73.2, 73.21, 73.25, and 73.29, concerning, Determination of Date of Hire for Retirement Benefit Eligibility, Reduction Factor for Age and Retirement Option, Payment to an Estate and Spousal Consent Requirements and by adding new §73.45, concerning Overpayment or Improper Payment of Benefits.

As part of ERS' ongoing statutory responsibility to review its rules, the following amendments are proposed. Section 73.2 is proposed to be amended to provide guidance for employees who may be affected by 2013 legislative changes that created a new benefit structure for those hired on or after September 1, 2013.

Section 73.21 is proposed to be amended to adopt by reference the new actuarial service credit tables adopted by the ERS Board of Trustees on Tuesday, February 25, 2014. The new tables are necessary because of assumptions adopted by the board on February 26, 2013, following an actuarial experience study, as well as 2013 legislative changes to the retirement plans administered by ERS.

Section 73.25 is proposed to be amended to revise references to the former Texas Probate Code, which was recodified by the legislature effective January 1, 2014, to be called the Texas Estates Code.

Section 73.29 is proposed to be amended to clarify that spousal consent is required when a member elects to choose a non-spouse as the beneficiary of a proportionate retirement benefit. Spousal consent is currently required for retirements when a standard annuity is selected or a non-spouse is named as a beneficiary.

Section 73.45 is proposed to be added to require individuals who receive overpayments or improper payments of ERS benefits to pay interest on the overpayment or improper payment beginning 30 days after written notice by ERS of the overpayment or improper payment. Such benefits are paid from funds held in trust, and in accordance with its fiduciary duty, the ERS Board of Trustees proposes new §73.45 to require interest payments on overpayments and improper payments to reimburse the trust for the value of funds paid in such a manner.

Ms. Paula A. Jones, General Counsel and Chief Compliance Officer, has determined that for the first five-year period the rules are in effect, there will be no fiscal implication for state government or local government as a result of enforcing or administering the rules. There are no known anticipated economic costs to persons who are required to comply with the rules as proposed, unless they fail to reimburse the system within 30 days of notice that they are required to repay ERS for improper payments or overpayments they received. And to her knowledge, small businesses should not be affected.

Ms. Jones also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules includes the information stated above, and also includes revising the rules to reflect recent statutory changes, enhances financial protections of the trust fund for the benefit of its members, and increases accuracy in actuarially determining annuity calculations.

Comments on the proposed rule amendments and new section may be submitted to Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is May 12, 2014, at 10:00 a.m.

The amendments and new section are proposed under Texas Government Code, §815.102, which authorizes the ERS Board of Trustees to adopt rules for the administration of the funds of the retirement system and the transaction of any business of the board. The amendments and new section are also proposed under Texas Government Code, §815.105, which provides authorization for the ERS Board of Trustees to adopt mortality, service and other tables it considers necessary for the retirement system.

No other statutes are affected by the proposed amendments and new section.

§73.2. *Determination of Date of Hire for Retirement Benefit Eligibility.*

(a) To be considered hired by the state of Texas on or before August 31, 2009, an employee holding a position included in the employee class of membership:

(1) must be a member of the retirement system on or before August 31, 2009, and thereafter; or

(2) must have been continuously employed by the state of Texas since on or before August 31, 2009, and deposited with the Employees Retirement System of Texas at least one contribution immediately upon completion of the membership waiting period provided by Texas Government Code, §812.003(d) before being terminated for any reason from state employment.

(b) If the employee terminates state employment without having made a contribution to ERS to establish membership as provided by this section, and subsequently attains employment in the employee class of membership, that employee will not be considered to have been hired on or before August 31, 2009, for determination of eligibility for retirement benefits.

(c) To be considered hired by the state of Texas on or after September 1, 2009, an employee holding a position included in the employee class of membership:

(1) must be hired by the state of Texas on or after September 1, 2009, and not meet the requirements in subsection (a) of this section; or

(2) meets the requirements in subsection (b) of this section.

(d) To be considered hired by the state of Texas on or before August 31, 2013, an employee holding a position included in the employee class of membership:

(1) must be a member of the retirement system on or before August 31, 2013, and thereafter; or

(2) must have been continuously employed by the state of Texas since on or before August 31, 2013, and deposited with the Employees Retirement System of Texas at least one contribution immediately upon completion of the membership waiting period provided by Texas Government Code, §812.003(d) before being terminated for any reason from state employment.

(e) If the employee terminates state employment without having made a contribution to ERS to establish membership as provided by this section, and subsequently attains employment in the employee class of membership, that employee will not be considered to have been hired on or before August 31, 2013, for determination of eligibility for retirement benefits.

(f) To be considered hired by the state of Texas on or after September 1, 2013, an employee holding a position included in the employee class of membership:

(1) must be hired by the state of Texas on or after September 1, 2013, and not meet the requirements in subsection (d) of this section; or

(2) meets the requirements in subsection (e) of this section.

§73.21. *Reduction Factor for Age and Retirement Option.*

(a) Actuarial assumptions, mortality tables, and reduction factors used for calculation of benefits are those adopted by the board and apply to forms and effective dates of annuities specified by the board. Such assumptions, tables, and factors are incorporated in this rule by reference and are a part of this rule for all purposes. Copies of the tables

are available from the executive director of the Employees Retirement System of Texas at P.O. Box 13207, Austin, Texas 78711-3207.

(b) The 1999 reduction factors for optional forms of retirement annuities apply to retirements effective on or after September 30, 1999 and prior to September 30, 2009, and are those factors adopted by the board December 8, 1999, based on assumptions adopted by the board December 9, 1998. The factors apply to annuities first payable January 1, 2000 through August 31, 2009. The 2009 reduction factors for optional forms of retirement annuities apply to retirements effective on or after September 30, 2009, and are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. The 2009 reduction factors apply to retirements first effective on or after September 30, 2009, and before September 1, 2014. The 2014 reduction factors for optional forms of retirement annuities apply to retirements effective on or after September 1, 2014, and are those tables adopted by the board on February 25, 2014, based on assumptions adopted by the board on February 26, 2013, and further based on legislative changes to the retirement plan effective September 1, 2013. [thereafter.] For retirements prior to September 1, 2014 [30, 2009], the previously adopted factors apply.

(c) The actuaries have developed reduction factors for early retirement or death in accordance with the mortality tables adopted by the board. [Such tables are incorporated in this rule by reference and are a part of this rule for all purposes.] The 2009 reduction factors for early retirement or death apply to retirements effective on or after September 30, 2009, and apply to deaths first reported to ERS on or after September 1, 2009, and are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. The 2010 reduction factors for early retirement or death apply only to those employees hired by the state of Texas on or after September 1, 2009, as defined in §73.2(c) of this chapter (relating to Determination of Date of Hire for Retirement Benefit Eligibility). The 2010 reduction factors apply to retirements effective on or after September 30, 2010, and apply to deaths first reported to ERS on or after September 1, 2010, and are those factors adopted by the board on February 23, 2010, based on legislative changes to the retirement plan effective September 1, 2009. The 2014 reduction factors for early retirement or death apply to retirements effective on or after September 1, 2014, and deaths first reported to ERS on or after September 1, 2014, and are those tables adopted by the board on February 25, 2014, based on assumptions adopted by the board on February 26, 2013, and on legislative changes to the retirement plan effective September 1, 2013. For retirements prior to September 1, 2014 [30, 2010] and deaths first reported to ERS prior to September 1, 2014 [2010], the previously adopted factors apply.

(d) The 2000 reduction factors for the partial lump sum option apply to retirements effective on or after January 1, 2000 through August 31, 2009, and are those factors adopted by the board December 8, 1999, based on assumptions adopted by the board December 9, 1998. The 2009 reduction factors for the partial lump sum option apply to retirements effective on or after September 30, 2009 and deaths first reported to ERS on or after September 1, 2009, and are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. The 2014 reduction factors for partial lump sum option apply to a retirement effective on or after September 1, 2014, and are those tables adopted by the board on February 25, 2014, based on assumptions adopted by the board on February 26, 2013, and on legislative changes to the retirement plan effective September 1, 2013. For retirements occurring prior to September 1, 2014 [30, 2009] and deaths first reported to ERS prior to September 1, 2014 [2009], the previously adopted factors apply.

(e) The 2005 reduction factors for a standard nonoccupational disability retirement annuity apply to a disability retirement application received by the System on or after September 1, 2005, and are those factors adopted by the board on August 24, 2005, based on assumptions adopted by the board on December 10, 2003. The 2009 reduction factors for a standard nonoccupational disability retirement annuity apply to a disability retirement based on the effective date of a retirement that is effective on or after September 30, 2009, and are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. The 2010 reduction factors for a standard nonoccupational disability retirement annuity apply only to those employees hired by the state of Texas on or after September 1, 2009, as defined in §73.2(c) of this chapter. The 2010 reduction factors apply to a disability retirement based on the effective date of a retirement that is effective on or after September 30, 2010, and are those factors adopted by the board on February 23, 2010, based on legislative changes to the retirement plan effective September 1, 2009. The 2014 reduction factors for a standard nonoccupational disability retirement annuity apply to a disability retirement based on the effective date of a retirement that is on or after September 1, 2014, and are those tables adopted by the board on February 25, 2014, based on assumptions adopted by the board on February 26, 2013, and on legislative changes to the retirement plan effective September 1, 2013. For disability retirements based on an effective date of retirement that is effective prior to September 1, 2014 [30, 2010], the previously adopted factors apply.

§73.25. *Payment to an Estate.*

(a) Payment due to an estate will be made upon receipt of a certified copy of one of the following:

- (1) letters testamentary which are issued to a person named executor or administrator of an estate;
- (2) an order admitting a will to probate as muniment of title;
- (3) an affidavit filed with the county court under the small estates provisions of Chapter 205, Texas Estates Code [the Texas Probate Code §137];
- (4) a judgment to declare heirship under the provisions of Chapter 202, Texas Estates Code [the Texas Probate Code §54].

(b) If none of the requirements in subsection (a) of this section have been or will be obtained and the amount payable is \$7,500 or less, then payment may be made to the estate of the decedent at his or her last known address or in care of a member of the decedent's family; or in the alternative, payment may be made in accordance with other documentation supplied by the heirs, provided the retirement system has reviewed and approved the documentation and obtained satisfactory releases from the heirs.

§73.29. *Spousal Consent Requirements.*

(a) The selection by a member of a service retirement annuity other than a joint and survivor annuity that pays benefits to the spouse of the member on the death of the member, is not effective unless the member's spouse consents to the selection or it is established to the satisfaction of the system that:

- (1) there is no spouse; or
- (2) the spouse cannot be located.

(b) Should the spouse of the member be judicially declared incompetent, the consent required by this section shall be given by the spouse's legal guardian. The consent of a spouse who is incapable of giving his or her consent as required by this section may be given by a legal representative of the spouse only if the executive director or a person designated by the executive director determines:

(1) that the spouse is incapable of giving his or her consent; and

(2) the person or persons qualify as the legal representative of the spouse.

(c) The consent required by this section must be in writing on a form prescribed by the Employees Retirement System of Texas and acknowledged before a notary public.

(d) The provisions of this section apply only to service retirement annuities and proportionate retirement benefits.

§73.45. *Overpayment or Improper Payment of Benefits.*

An individual who receives an overpayment or an improper payment of a benefit from the retirement system may be liable for the amount of the overpayment or improper payment, plus interest, accruing at a rate of five percent per annum beginning on the 30th day after written notice by ERS of the overpayment or improper payment. ERS may, in its discretion, decline to charge interest under this rule if the overpayment was due to an error by ERS, or if the cost of calculating, assessing and collecting the interest may reasonably exceed the value of the interest.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Paula A. Jones

General Counsel and Chief Compliance Officer

Employees Retirement System of Texas

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For further information, please call: (877) 275-4377



CHAPTER 77. JUDICIAL RETIREMENT

34 TAC §77.11, §77.21

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Texas Administrative Code (TAC) §77.11 and §77.21, concerning Reduction Factors for Age and Retirement Options--Judicial Retirement System of Texas Plan One (JRS-I) and Judicial Retirement System of Texas Plan Two (JRS-II), and Purchase of Additional Service Credit.

As part of ERS' ongoing statutory responsibility to review its rules, the following amendments are proposed.

Section 77.11 and §77.21 are proposed to be amended to adopt by reference the new actuarial service credit tables adopted by the ERS Board of Trustees on Tuesday, February 25, 2014. The new tables are necessary because of assumptions adopted by the board on February 26, 2013, following an actuarial experience study, as well as 2013 legislative changes to the retirement plans administered by ERS.

Section 77.21 is also proposed to be amended to clarify that a member of the Judicial Retirement System of Texas Plan Two may purchase equivalent service credit only if the member has 180 months of service. This amendment is proposed to more closely align with the credit purchase option established in Texas Government Code §838.108 and for purposes of meeting retirement eligibility under Texas Government Code §839.101(a)(3).

Ms. Paula A. Jones, General Counsel and Chief Compliance Officer, has determined that for the first five-year period the rules

are in effect, there will be no fiscal implication for state government or local government as a result of enforcing or administering the rules. There are no known anticipated economic costs to persons who are required to comply with the rules as proposed, and, to her knowledge, small businesses should not be affected.

Ms. Jones also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules include the information provided above, and also will align the rules more closely with the applicable statutes, amend the rules to reflect statutory changes, and increase accuracy in actuarially determined service purchases.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is May 12, 2014, at 10:00 a.m.

The amendments are proposed under the Texas Government Code, §§815.102, 838.108(f) and 840.002, which provide authorization for the ERS Board of Trustees to adopt rules necessary to carry out its statutory duties and responsibilities, to administer the credit purchase option and to administer the funds of the retirement system. The amendments are further authorized under Texas Government Code §815.105 and §840.005, which provide authorization for the ERS Board of Trustees to adopt mortality, service, and other tables it considers necessary for the retirement system.

No other statutes are affected by the proposed amendments.

§77.11. *Reduction Factors for Age and Retirement Options--Judicial Retirement System of Texas Plan One (JRS-I) and Judicial Retirement System of Texas Plan Two (JRS-II).*

(a) Tables for calculation of optional factors.

(1) The 1981 reduction factors for optional forms of retirement annuities are independent of the gender of the member and of the beneficiary and are based on the GA-51 male mortality table projected with Scale C to 1970 with an age set forward of one year for retiring members and an age set back of four years for beneficiaries. The interest assumption is 5.0%.

(2) The 1992 reduction factors for optional forms of retirement annuities are independent of the gender of the member and the beneficiary and are based on the 1983 group annuity mortality table. The interest rate assumption is 8.5%.

(3) The reduction factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008, for optional forms of retirement annuities are independent of the gender of the member and the beneficiary and apply to retirements effective on or after September 30, 2009. For retirements first effective prior to September 1, 2009, the previously adopted factors apply.

(4) The reduction factors adopted by the board on February 25, 2014, based on assumptions adopted by the board on February 26, 2013, and on legislative changes to the retirement plan effective September 1, 2013, are independent of the gender of the member and the beneficiary and apply to retirements effective on or after September 1, 2014. For retirements first effective prior to September 1, 2014, the previously adopted factors apply.

(5) [(4)] Copies of these tables are available from the executive director of the Employees Retirement System of Texas at 18th and Brazos Streets, P.O. Box 13207, Austin, Texas 78711-3207. The

option tables, along with the adjustments described in this subsection are adopted by reference and made a part of this rule for all purposes.

(b) Option factors. The 2009 reduction factors for optional annuities for service retirement, disability retirement, and death benefit plans under the JRS-I and JRS-II plans apply to retirements effective on or after September 1, 2009, and are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. For retirements first effective prior to September 1, 2009, the previously adopted factors apply. The 2014 reduction factors for optional annuities for service retirement, disability retirement, and death benefit plans under the JRS-I and JRS-II plans apply to retirements effective on or after September 1, 2014, and are those tables adopted by the board on February 25, 2014, based on assumptions adopted by the board on February 26, 2013, and on legislative changes to the retirement plan effective September 1, 2013. For retirements first effective prior to September 1, 2014, the previously adopted factors apply. All option factors have been developed by the actuaries and are adopted by reference subject to the limitations of this subsection. The reduction factors are available from the executive director of the Employees Retirement System of Texas at 18th and Brazos Streets, P.O. Box 13207, Austin, Texas 78711-3207.

(c) Formula for JRS-II reduction factors for death before age 65.

(1) A death benefit annuity of the Judicial Retirement System of Texas Plan Two on behalf of a member dying before age 65 while not eligible for an unreduced service retirement benefit is reduced for each whole or partial calendar month that occurs during the period from the date of death to the 65th birthday, including the months that contain the dates of death and birthday. For the first 120 months (ages 55-64), the annuity is reduced by one-third of 1.0% per month. For the next 60 months (ages 50-54), the annuity is reduced by one-fourth of 1.0% per month. For the next 60 months (ages 45-49), the annuity is reduced by one-sixth of 1.0% per month. For the next 120 months (ages 35-44), the annuity is reduced by one-twelfth of 1.0% per month.

(2) A death benefit annuity on behalf of a member dying before age 65 while eligible for an unreduced service retirement benefit shall not be reduced for age.

(3) JRS-II reduction factors for death before age 65 have been developed by the actuaries and are adopted by reference subject to the limitations of this subsection. The reduction factors that apply to deaths of members prior to age 65 and that occur on or after September 1, 2009, are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. For deaths occurring prior to September 1, 2009, the previously adopted factors apply. The reduction factors that apply to deaths of members prior to age 65 and that occur on or after September 1, 2014, are those factors adopted by the board on February 25, 2014, based on assumptions adopted by the board on February 26, 2013, and on legislative changes to the retirement plan effective September 1, 2013. For deaths occurring prior to September 1, 2014, the previously adopted factors apply. The set of reduction factors is available from the executive director of the Employees Retirement System of Texas at 18th and Brazos Streets, P.O. Box 13207, Austin, Texas 78711-3207.

(d) Reserve factors. The reserve factors for JRS-II are adopted by reference and made a part of this rule for all purposes. The reserve factors apply to periods beginning on or after September 1, 2009, and are those factors adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. For periods occurring prior to September 1, 2009, the previously adopted factors apply. Copies of these tables are available from the executive direc-

tor of the Employees Retirement System of Texas at 18th and Brazos Streets, P.O. Box 13207, Austin, Texas 78711-3207.

(e) Dollar limitations for maximum annual benefit. Service retirement annuities shall conform to dollar limitations and applicable adjustments under the Internal Revenue Code of 1986, §415 (26 United States Code §415) as determined by the federal commissioner of internal revenue.

§77.21. *Purchase of Additional Service Credit.*

(a) The provisions of this section apply only to the Judicial Retirement System of Texas Plan Two (JRS-II).

(b) An eligible member may establish equivalent membership service credit authorized by §838.108, Texas Government Code, as provided in this section. The provisions of §77.15 of this title (relating to Payments to Establish or Reestablish Service Credit) do not apply to service credit established under this section.

(c) A member is eligible to establish service credit under this section in the membership class in which the member holds a position if the member:

(1) has 180 [~~120~~] months of service credit for one or more periods of time during which the member held a position as a judge and the required contributions were made;

(2) is a member of the system at the time credit is established; and

(3) is not eligible to establish other credit or service.

(d) An eligible member shall deposit with the system in a lump sum a contribution in the amount determined by the system to be the actuarial present value of the benefit attributable to the credit established under this section. The tables recommended by the system's actuary and adopted by the board shall be used by the system to determine the actuarial present value. The 2009 additional service credit tables for JRS-II are adopted by reference and made a part of this rule for all purposes. The additional service credit tables apply to service purchase calculations performed on or after September 1, 2009, and are those tables adopted by the board on February 24, 2009, based on assumptions adopted by the board on May 13, 2008. The 2014 additional service credit tables apply to service purchase calculations performed on or after September 1, 2014, and are those tables adopted by the board on February 25, 2014, based on assumptions adopted by the board on February 26, 2013, and on legislative changes to the retirement plan effective September 1, 2013. For service purchase calculations performed prior to September 1, 2014 [~~2009~~], the previously adopted tables apply. Copies of these tables are available from the executive director of the Employees Retirement System of Texas at 18th and Brazos Streets, P.O. Box 13207, Austin, Texas 78711-3207.

(e) Actuarial present value shall be based on:

(1) the member's age on the date of the deposit required by this subsection;

(2) the earliest date on which the member will become eligible to retire and receive a service retirement annuity after establishing credit under this section; and

(3) the future employment, compensation, investment and retirement benefit assumptions recommended by the actuaries and adopted by the board.

(f) Credit shall be established in whole year increments of credit.

(g) A member who establishes credit under this section shall certify that the member is not eligible to establish other credit or service

and shall waive any and all right to establish such credit or service that the member had on the date of the deposit required by subsection (d) of this section.

(h) Credit established under this section may not be used to compute the amount of a disability retirement annuity.

(i) A member who withdraws contributions and cancels credit established under this section may not reestablish such credit under §838.102, Texas Government Code, but may again establish credit as provided in this section.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 31, 2014.

TRD-201401420

Paula A. Jones

General Counsel and Chief Compliance Officer
Employees Retirement System of Texas

Earliest possible date of adoption: May 11, 2014

For further information, please call: (877) 275-4377



CHAPTER 85. FLEXIBLE BENEFITS

34 TAC §§85.1, 85.3, 85.7, 85.9, 85.11

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Texas Administrative Code (TAC) §§85.1, 85.3, 85.7, 85.9, and 85.11, concerning Introduction and Definitions, Eligibility and Participation, Enrollment, Payment of Claims from Reimbursement Accounts, and Administration.

ERS administers a flexible spending account (FSA) program, called the TexFlex plan. An FSA allows an employee to set aside a portion of earnings to pay for or be reimbursed for two kinds of qualified expenses, dependent and health care expenses, in a tax favorable manner.

ERS has determined that the proposed amendments to §§85.1, 85.3, 85.7, 85.9, and 85.11 would simplify plan administration and benefit TexFlex plan participants in a manner permitted by the Internal Revenue Code.

Section 85.3 is proposed to be amended to allow an employee to decrease health care reimbursement contributions to TexFlex as a result of any qualifying life event, if the decrease is consistent with the qualifying life event. The amendment will provide TexFlex participants with more flexibility and the ability to decrease the amount of fees they are required to pay on a monthly basis. The proposed amendments also provide that TexFlex participants who terminate employment are no longer required to continue making health care reimbursement contributions to TexFlex for the rest of the plan year unless they choose otherwise. Previously, participants who left state employment were committed to contribute to the plan for the entire plan year. This change will also provide participants with more flexibility in how they wish to participate in TexFlex following their termination of state employment.

Section 85.7 is proposed to be amended to provide a permissive, rather than mandatory, requirement that TexFlex participants be provided with reimbursement reports that are otherwise currently available to participants online. TexFlex participants already have access to an interactive and secure website to review

claims and transactions. This change will benefit participants of the plan by saving the administrative expense of preparing reports that may not be desired by all participants.

Finally, §§85.1, 85.3, 85.7, 85.9, and 85.11 are proposed to be amended to update the rules to benefit TexFlex participants as permitted by a recent change to the Internal Revenue Code. Currently, participants in the TexFlex healthcare reimbursement plan are entitled to an approximately two and one-half month grace period after the plan year ends, during which the participant can continue to submit claims for reimbursement for eligible expenses. At the end of the grace period, any remaining balance is forfeited.

IRS Notice 2013-71 now allows plans to implement an alternative to the grace period. Under this change, a plan may instead permit participants to carry over up to \$500 in unspent contributions to the immediately following plan year. ERS conducted a survey of TexFlex participants. Almost 13,000 participants responded, and 78% responded that they would prefer the \$500 carryover. The proposed amendments to these sections would implement the change beginning with the 2015 plan year, effective September 1, 2014, and will not impact individuals who previously planned to take advantage of the grace period in the current plan year, which will continue to run until November 15, 2014. The IRS will not permit both options to be utilized at the same time.

Ms. Paula A. Jones, General Counsel and Chief Compliance Officer, has determined that for the first five-year period the rules are in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the rules. To Ms. Jones' knowledge, there are no known anticipated economic costs to persons who are required to comply with the rules as proposed, and, to her knowledge, small businesses should not be affected.

Ms. Jones also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules include the reasons stated above, and also would better serve state employees by reducing potential forfeitures to the TexFlex program, and provide greater flexibility to TexFlex participants.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, General Counsel and Chief Compliance Officer, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is May 12, 2014, at 10:00 a.m.

The amendments are proposed under the Texas Insurance Code, §1551.052 and §1551.206, which provide authorization for the ERS Board of Trustees develop, implement, and administer a cafeteria plan, and to adopt necessary rules.

No other statutes are affected by the proposed amendments.

§85.1. Introduction and Definitions.

(a) Summary. The purpose of these rules is to govern the flexible benefits program. These rules constitute the Plan document for the State of Texas Employees Flexible Benefit Program (TexFlex). The flexible benefits plan (the plan) includes reimbursement account arrangements with optional benefits available for selection by participants as described in the plan and these rules. The plan is intended to be qualified under the Internal Revenue Code (the Code), §125, as amended from time to time, and is intended to continue as long as it qualifies under §125 and is advantageous to the state and institutions of

higher education employees. Optional benefits offered under the plan for individual selection consist only of a choice between cash and certain statutory nontaxable fringe benefits as defined in the Code, §125, and regulations promulgated under the Code, §125.

(b) Applicability of rules.

(1) These rules are applicable only to employees as defined in these rules, and terminated employees, as described in §85.3(b)(1)(B) and (C) of this title (relating to Eligibility and Participation).

(2) An employee who retired or separated from employment prior to September 1, 1988, shall not be entitled to benefits under the provisions of the plan and these rules, unless the employee is rehired and then becomes eligible for benefits.

(c) Definitions. The following words and terms when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise, and wherever appropriate, the singular includes the plural, the plural includes the singular, and the use of any gender includes the other gender.

(1) Act--The state law that authorized the establishment of a flexible benefits plan and is designated in the Texas Insurance Code, Chapter 1551, as amended.

(2) Account--A record keeping account established by the Employees Retirement System of Texas or its designee in the name of each participant for the purpose of accounting for contributions made to the account and benefits paid to a participant.

(3) Active duty--The expenditure of time and energy in the service of an employer as defined in these rules. An employee will be considered to be on active duty on each day of a regular paid vacation or on a non-work day, on which the employee is not disabled, if the employee was on active duty on the last preceding work day.

(4) Board of trustees--The board of trustees of the Employees Retirement System of Texas (ERS).

(5) Code--The Internal Revenue Code, as amended from time to time.

(6) Compensation--A participant's base salary, including amounts that would otherwise qualify as compensation but are not received directly by the participant pursuant to a good faith, voluntary, written or electronic salary reduction agreement in order to finance payments to a deferred compensation or tax sheltered annuity program specifically authorized by state law or to finance benefit options under this plan, plus longevity and hazardous duty pay and including non-monetary compensation, the value of which is determined by the Employees Retirement System of Texas, but excluding overtime pay.

(7) Debit Card--A bank issued convenience card or similar technology approved by the plan administrator and permitted to be used by participants as an optional method to pay for eligible transactions. Use of the card is governed by the plan administrator and issuing financial institution. The card is referred to as the Flex Debit Card.

(8) Dependent--An individual who qualifies as a dependent under the Code, §152, and when applicable taking into account the Code, §105, or any individual who is:

(A) a dependent of the participant who is under the age of 13 and with respect to whom the participant is entitled to an exemption under the Code, §151, or, is otherwise, a qualifying individual as provided in the Code, §21; or

(B) a dependent or spouse of the participant who is physically or mentally incapable of caring for himself or herself.

(9) Dependent care reimbursement account--The bookkeeping account maintained by the plan administrator or its designee used for crediting contributions to the account and accounting for benefit payments from the account.

(10) Dependent care reimbursement plan--A separate plan under the Code, §129, adopted by the board of trustees, and designed to provide payment or reimbursement for dependent care expenses as described in §85.5(c) of this title (relating to Benefits).

(11) Dependent care expenses--Expenses incurred by a participant which:

(A) are incurred for the care of a dependent of the participant;

(B) are paid or payable to a dependent care service provider or to the participant as reimbursement for such expenses; and

(C) are incurred to enable the participant to be gainfully employed for any period for which there are one or more dependents with respect to the participant. Dependent care expenses shall not include expenses incurred for the services outside the participant's household for the care of a dependent, unless such dependent is a dependent under the age of 13 with respect to when the participant is entitled to a tax deduction under the Code, §151, or a dependent who is physically or mentally incapable of self support. In the event that the expenses are incurred outside the dependent's household, the dependent must spend at least eight hours each day in the participant's household. Dependent care expenses shall be deemed to be incurred at the time the services to which the expenses relate are rendered.

(12) Dependent care service provider--A person or a dependent care center (as defined in the Code, §21) who provides care or other services described in the definition of "dependent care expenses" in this section, but shall not include:

(A) a related individual described in the Code, §129; or

(B) a dependent care center which does not meet the requirements of the Code, §21.

(13) Effective date of the plan--September 1, 1988.

(14) Election form--A paper or electronic form provided by the Employees Retirement System of Texas that is an agreement by and between the employer and the participant, entered into prior to an applicable period of coverage, in which the participant agrees to a reduction in compensation for purposes of purchasing benefits under the plan.

(15) Eligible employee--An employee who has satisfied the conditions for eligibility to participate in the plan in accordance with the plan and §85.3(a)(1), and (b)(1) of this title (relating to Eligibility and Participation), and, to the extent necessary, a retired or terminated employee who is entitled to benefit payments under the plan.

(16) Employee--A person who is eligible to participate in the Texas Employees Group Benefits Program as an employee.

(17) Employer--The State of Texas, its agencies, commissions, institutions of higher education, and departments, or other governmental entity whose employees are authorized to participate in the Texas Employees Group Benefits Program.

(18) Expenses incurred--Expenses for services received or performed and for which the participant is legally responsible.

(19) Executive director--The executive director of the Employees Retirement System of Texas.

(20) Flexible benefit dollars--The dollars available to a participant which may be used for purposes of purchasing benefits under the plan.

(21) Grace period--A two (2) month and 15 day period, adopted by the TexFlex plan pursuant to IRS Notice 2005-42, immediately following the end of the plan year during which participants may continue to incur expenses for reimbursement from the prior year account balance. The grace period does not apply to a plan year that begins on or after September 1, 2014.

(22) Health care expenses--Any expenses incurred by a participant, or by a spouse or dependent of such participant, for health care as described in or authorized in accordance with the Code, §105 and §213, but only to the extent that the participant or other person incurring the expense is not reimbursed for the expense by insurance or other means. The types of expenses include, but are not limited to, amounts paid for hospital bills, doctor bills, prescription drugs, hearing exams, vision exams, and eye exams.

(23) Health care reimbursement account--The bookkeeping account maintained by the plan administrator or its designee used for crediting contributions to the account and accounting for benefit payments from the account.

(24) Health care reimbursement plan--A separate plan, under the Code, §105, adopted by the board of trustees, and designed to provide health care expense reimbursement as described in §85.5(b) of this title (relating to Benefits).

(25) Institution of higher education--All public community/junior colleges, senior colleges or universities, or any other agency of higher education within the meaning and jurisdiction of the Education Code, Chapter 61, except the University of Texas System and the Texas A&M University System.

(26) Leave of absence without pay--The status of an employee who is certified monthly by an agency or institution of higher education administrator to be absent from duty for an entire calendar month, and who does not receive any compensation for that month.

(27) Option--Any specific benefit offering under the plan.

(28) Participant--An eligible employee who has elected to participate in the plan for a period of coverage.

(29) Period of coverage--The plan year during which coverage of benefits under the plan is available to and elected by a participant; however, an employee who becomes eligible to participate during the plan year may elect to participate for a period lasting until the end of the current plan year. In such case, the interval commencing on such employee's entry date and ending as of the last day of the current period of coverage shall be deemed to be such participant's period of coverage.

(30) Plan--The flexible benefits plan established and adopted by the board of trustees pursuant to the laws of the state of Texas and any amendments which may be made to the plan from time to time. The plan is referred to herein as TexFlex, and is comprised of a dependent care reimbursement plan, a health care reimbursement plan and an insurance premium conversion plan.

(31) Plan administrator--The board of trustees of the Employees Retirement System of Texas or its designee.

(32) Plan year--A 12-month period beginning September 1 and ending August 31.

(33) Run-out period--The period following the end of the plan year between September 1 and December 31, during which partic-

ipants may file claims for reimbursement of expenses incurred during the plan year [and grace period].

(34) **Statutory nontaxable benefit**--A benefit provided to a participant under the plan, which is not includable in the participant's taxable income by reason of a specific provision in the Code and is permissible under the plan in accordance with the Code, §125.

(35) **Spouse**--The person to whom the participant is married. Spouse does not include a person separated from the participant under a decree of divorce, or annulment.

(36) **TexFlex**--The flexible benefits plan adopted by the board of trustees.

(37) **Texas Employees Group Benefits Program**--The employee insurance benefits program administered by the Employees Retirement System of Texas, pursuant to the Texas Insurance Code, Chapter 1551. The program consists of health, voluntary accidental death and dismemberment, optional term life, dependent term life, short and long term disability, and dental insurance coverages.

(38) **Third Party Administrator or TPA**--The vendor, administrator or firm selected by the plan administrator to perform the day-to-day administrative responsibilities of the TexFlex program for participants of the Texas Employees Group Benefits Program who enroll in either the health care reimbursement plan, dependent care reimbursement plan or both.

§85.3. *Eligibility and Participation.*

(a) **Dependent care reimbursement plan.**

(1) **Eligibility.** Any employee eligible to participate in the Texas Employees Group Benefits Program may elect to participate in the dependent care reimbursement account.

(2) **Participation.**

(A) An employee who is eligible under paragraph (1) of this subsection may elect to participate by completing and submitting an election form either in writing or electronically on, or within 30 days after, the date on which the employee begins active duty. An employee, upon executing an election form for participation, either in writing or electronically, shall be deemed to have consented to and be bound by all the terms, conditions, and limitations of the plan, any and all amendments hereto, any administrative rules adopted by the plan administrator, and any decision or determinations made by the plan administrator with respect to the participant's eligibility, obligations, rights and benefits available under the plan. An election made on the date on which the employee begins active duty becomes effective on that date. An election made after the date on which the employee begins active duty becomes effective on the first day of the month following the date on which the employee begins active duty.

(B) An employee who is otherwise eligible to participate in the Texas Employees Group Benefits Program but who declined participation in the dependent care reimbursement account prior to the beginning of a plan year, and who, after the beginning of a plan year, has a qualifying life event, as defined in §85.7(c) of this title (relating to Enrollment), may elect to participate in the dependent care reimbursement account as provided in §85.7(c).

(C) A qualifying life event as defined in §85.7(c) of this title (relating to Enrollment) will permit a change or revocation of participation during the plan year as provided in §85.7(c).

(D) An eligible employee shall have an opportunity to enroll or change benefit options during the annual enrollment period. The annual enrollment period shall be prior to the beginning of a new

plan year. Elections and changes in elections made during the annual enrollment period become effective on the first day of the plan year.

(E) The plan administrator shall maintain and update the participant enrollment records. Any and all changes will be communicated to the TPA via weekly file transfer protocol (FTP), tapes or other selected media.

(3) **Duration of participation.**

(A) An employee's election to participate or to waive participation in the dependent care reimbursement plan shall be irrevocable for the plan year unless there is a qualifying life event as defined in §85.7(c) of this title (relating to Enrollment).

(B) An employee returning to active duty following termination of employment, or following a period of approved leave without pay, during the same plan year shall reinstate the election in effect on the employee's last previous active duty date. Reinstatement becomes effective on the date on which the employee resumes active duty, unless the employee requests a change in election as provided in §85.7(c) of this title (relating to Enrollment).

(b) **Health care reimbursement plan.**

(1) **Eligibility.**

(A) Any employee eligible to participate in the Texas Employees Group Benefits Program may elect to participate in a health care reimbursement account.

(B) Prior to September 1, 2014, an [Aa] employee whose employment has been terminated, voluntarily or involuntarily, and who had a health care reimbursement account at the time of termination, shall retain the health care reimbursement account for the applicable period of election. The terminated employee must pre-pay, on a monthly basis, the elected amount and any administrative fee for the plan year. Payments are due on the first day of each month and must be received no later than the 30th day of the month. Failure to pay will automatically cancel enrollment.

(C) On and after September 1, 2014, the employee's period of coverage ends on the date of termination of employment.

(2) **Participation.**

(A) An employee who is eligible under paragraph (1) of this subsection may elect to participate by completing and submitting an election form either in writing or electronically on, or within 30 days after, the date on which the employee begins active duty. An employee, upon executing an election form for participation, either in writing or electronically, shall be deemed to have consented to and be bound by all the terms, conditions, and limitations of the plan, any and all amendments hereto, any administrative rules adopted by the plan administrator, and any decision or determinations made by the plan administrator with respect to the participant's eligibility, obligations, rights and benefits available under the plan. An election made on the date on which the employee begins active duty becomes effective on that date. An election made after the date on which the employee begins active duty becomes effective on the first day of the month following the date on which the employee begins active duty.

(B) An employee who is eligible but who declined participation in the health care reimbursement account prior to the beginning of a plan year, and who, after the beginning of a plan year, has a qualifying life event, as defined in §85.7(c) of this title (relating to Enrollment), may elect to participate in a health care reimbursement account as provided in §85.7(c).

(C) A qualifying life event as defined in §85.7(c) of this title (relating to Enrollment) will permit the following changes in election during the plan year, as provided in §85.7(c):

(i) an increase in the election amount, if the increase is consistent with the qualifying life event; or

(ii) a decrease in the election or election amount [~~or cancellation of participation~~], if the decrease is consistent with the qualifying life event [~~is a change in marital status or the death of the spouse or a dependent child of the employee~~].

(D) An eligible employee shall have an opportunity to enroll or to change benefit options during the annual enrollment period. The annual enrollment period shall be prior to the beginning of a new plan year. Elections and changes in elections made during the annual enrollment period become effective on the first day of the plan year.

(E) The plan administrator shall maintain and update the participant enrollment records. Any and all changes will be communicated to the TPA via weekly file transfer protocol (FTP), tapes or other selected media.

(3) Duration of participation.

(A) Except as otherwise provided in subparagraph (C)(ii) of paragraph (2), or subparagraph (D) of this paragraph, an employee's election to or not to participate in a health care reimbursement account shall be irrevocable for the plan year.

(B) An employee returning to active duty following termination of employment, or following a period of leave without pay, during the same plan year shall reinstate the election in effect on the employee's last previous active duty date. Reinstatement becomes effective on the date on which the employee resumes active duty, unless the employee requests a change in election as provided in §85.7(c) of this title (relating to Enrollment) or a different requirement is imposed by the Family and Medical Leave Act of 1993 (FMLA).

(C) For plan years beginning before September 1, 2014, an ~~[An]~~ employee who is enrolled in a health care reimbursement account who terminates employment during the plan year must retain the health care account for the remainder of the plan year and prepay premiums or make monthly premium payments due for the remainder of the plan year, as described in paragraph (1)(B) of this subsection.

(D) For plan years beginning on and after September 1, 2014, an employee who is enrolled in a health care reimbursement account who terminates employment during the plan year does not retain the health care account for the remainder of the plan year. The employee's period of coverage ends on the date of termination. An employee may only file a claim for reimbursement for expenses incurred before the date of termination.

(E) [~~(D)~~] Notwithstanding any provision to the contrary in this Plan, if an employee goes on a qualifying unpaid leave under the Family Medical Leave Act (FMLA), to the extent required by the FMLA, the plan administrator will continue to maintain the employee's health care reimbursement account on the same terms and conditions as though he were still an active employee (i.e., the plan administrator or its designee will continue to provide benefits to the extent the employee opts to continue his coverage). If the employee opts to continue his coverage, the employee shall pay his or her contribution in the same manner as a participant on the non-FMLA leave, including payment with after-tax dollars while on leave. The employee may also be given the option to pre-fund all or a portion of the contribution for the expected duration of the leave on a pre-tax salary reduction basis out of his pre-leave compensation by making a special election to that effect prior to the date such compensation would normally be made available

to him (provided, however, that pre-tax dollars may not be utilized to fund coverage during the next plan year).

§85.7. *Enrollment.*

(a) Election of benefits.

(1) An eligible employee may elect to participate in the health care and/or dependent care reimbursement accounts within the flexible benefits plan by making an election and executing an election form or enrolling electronically.

(2) An employee who becomes eligible after the beginning of a plan year has 30 days from the date of eligibility to elect or decline benefits by executing an election form.

(3) By enrolling in the plan, the employee agrees to a reduction in compensation or agrees to after-tax payments equal to the participant's share of the cost and any fees for each reimbursement account selected.

(4) An election to participate in a reimbursement plan must be for a specified dollar amount plus any administrative fee.

(5) An annual enrollment period will be designated by the Employees Retirement System of Texas and shall be prior to the beginning of a new plan year. The annual enrollment period shall provide an opportunity to change and to elect or decline benefit options.

(6) An active employee who is enrolled in reimbursement accounts immediately prior to the annual enrollment period will be automatically re-enrolled with the same elections and contribution amounts for the new plan year unless the active employee takes action during the annual enrollment period to change contribution amounts or to decline participation.

(b) Effects of failure to elect.

(1) If the Employees Retirement System of Texas does not receive an election form from an eligible employee to participate in the reimbursement accounts by the due date, it shall be deemed an express election and informed consent by the eligible employee to:

(A) receive cash compensation as a benefit by reason of failure to purchase optional benefits in lieu of cash compensation; or

(B) in the case of automatic re-enrollment during the annual enrollment period, to continue participation in the reimbursement accounts with the same contributions for the new plan year.

(2) To the extent an eligible employee does not elect the maximum permissible participation amounts hereunder, he shall be deemed to have elected cash compensation.

(c) Benefit election irrevocable except for qualifying life event.

(1) An election to participate shall be irrevocable for the plan year unless a qualifying life event occurs, and the change in election is consistent with the qualifying life event. The plan administrator may require documentation in support of the qualifying life event.

(2) A qualifying life event occurs when an employee experiences one of the following changes:

(A) change in marital status;

(B) change in dependent status;

(C) change in employment status;

(D) change of address that results in loss of benefits eligibility;

(E) change in Medicare or Medicaid status, or Children's Health Insurance Program (CHIP) status;

(F) significant cost of benefit or coverage change imposed by a third party provider other than a provider through the Texas Employees Group Benefits Program; or

(G) change in coverage ordered by a court.

(3) An election form requesting a change in election must be submitted on, or within 30 days after, the date of the qualifying life event, provided, however, a change in election due to CHIP status under paragraph (2) of this subsection must be submitted on, or within 60 days after, the change in CHIP status.

(4) A change in election as provided in this subsection becomes effective on the first day of the month following the date of the qualifying life event.

(d) Payment of flexible benefit dollars.

(1) Flexible benefit dollars from an active duty employee shall be recovered through payroll withholding at least monthly during the plan year and remitted to the Employees Retirement System of Texas for the purpose of purchasing benefits. For the health care reimbursement account only, and except as otherwise provided in §85.3(b)(3)(D) of this title (relating to Eligibility and Participation), flexible benefit dollars from employees on leave without pay status or who have insufficient funds for any month shall be recovered through direct after-tax payment from the employee or upon the return of the employee to active duty status from payroll withholding, for the total amount due.

(2) An employee's flexible benefit dollars with respect to any month during the plan year shall be equal to the authorization on the employee's election form plus any administrative fees.

(3) Flexible benefit dollars received by the Employees Retirement System of Texas shall be credited to the participant's dependent care reimbursement account and/or health care reimbursement account, as appropriate.

(e) Forfeiture of account balances.

(1) The amount credited to a participant's reimbursement account for each benefit election for any plan year will be used to reimburse or pay qualified expenses incurred during the eligible employee's period of coverage in such plan year [and the grace period], if the claim is electronically adjudicated or if the participant files a correctly completed claim for reimbursement on or before December 31 following the close of the plan year.

(2) Except as provided by subsection (g) of this section, any [Any] balances remaining after payment of all timely and correctly filed claims postmarked no later than December 31 following the close of the plan year [and the grace period], shall be forfeited by the participant and be available to pay administrative expenses of the flexible benefits program.

(f) Reimbursement report to participant. The plan administrator or its designee may [shall] provide to the participant periodic reports on each reimbursement account, showing the account transactions (disbursements and balances) during the plan year [and the grace period]. These reports may be provided periodically through electronic means.

(g) Carryover of unexpended balances. Pursuant to IRS Notice 2013-71, for a plan year beginning on or after September 1, 2014, a participant may carry over up to \$500 of unspent flexible benefit plan dollars to the immediately following plan year. The flexible benefit dollars carried over may be used to pay or reimburse incurred expenses under the health care reimbursement plan during the entire plan year

to which the dollars are carried over. A participant is entitled to carry over a maximum of \$500, and any balance in excess of this amount is forfeited as provided by subsection (e) of this section.

§85.9. *Payment of Claims from Reimbursement Accounts.*

(a) Claim for reimbursement.

(1) Claims for reimbursement of expenses incurred during an eligible employee's period of coverage in the plan year [~~or during the grace period~~] may be submitted at any time during the plan year [~~or grace period~~], but not later than December 31 following the close of the plan year.

(2) Claims shall be paid to the extent of available flexible benefit dollars allocable to the applicable type of expenses and shall only be paid out of flexible benefit dollars for the plan year, [~~which may include the grace period,~~] in which the expense was incurred. The TPA shall compare the participant's available balance and the amount of the expense to make certain that claims are paid according to the provisions of the Code and these rules.

(3) Expenses incurred prior to becoming a participant or after the last day of a plan year [~~or the grace period~~], shall not be covered by this plan. A terminated participant may continue to file claims for eligible expenses incurred during the employee's period of coverage within the plan year [~~and grace period~~], if applicable, to exhaust reimbursement account balances no later than December 31 following the close of the plan year.

(4) Claims shall be submitted in a manner prescribed by the Employees Retirement System of Texas or its designee, accompanied by such bills, receipts or other proof of incurring the expense as the plan administrator or its designee may require.

(5) A claim form must be submitted each time reimbursement or payment is requested, unless using the debit card.

(6) The dependent care and health care reimbursement accounts are separate accounts, and funds from one account may not be used to reimburse expenses of the other account.

(b) Debit Card transactions.

(1) Debit card payments for eligible expenses incurred during a participant's period of coverage in the plan year [~~and the grace period~~] may occur at any time during the plan year [~~and the grace period, but not later than November 15th~~].

(2) Transactions shall be processed to the extent of available flexible benefit dollars allocable to the applicable type of expenses and shall only be paid out of flexible benefit dollars for the plan year[~~;~~ ~~which may include the grace period,~~] in which the expense was incurred. The TPA shall compare the participant's available balance and the amount of the expense to make certain that claims are paid according to the provisions of the Code and these rules.

(3) Expenses incurred prior to becoming a participant shall not be covered by this plan. Expenses incurred by a participant may be covered only in the plan year[~~;~~ ~~which may include the grace period,~~] in which the expense is actually incurred. Upon a participant's termination, the debit card will be automatically deactivated. Paper claims may be filed for eligible expenses incurred during the participant's period of coverage within the plan year[~~;~~ ~~and the grace period, if applicable,~~] in which he was a participant. All claims for reimbursement from account balances must be filed no later than December 31 immediately following the close of the plan year.

(4) Participants may be required to submit bills, receipts or other proof of incurring the expense as the plan administrator or its designee may require.

(5) Reimbursements or payments made using the debit card may require additional supporting documentation as may be requested by the plan administrator or its designee, and the participant must maintain his own records to substantiate the eligibility of all expenses for individual income tax purposes, if necessary.

(c) Reimbursement of claims to participants.

(1) Payment of eligible expenses shall be made directly to the participant by the plan administrator or its designee unless payment for dependent or health care expenses is made directly to the applicable provider through use of a debit card, other similar technology, or other means approved by the plan administrator.

(2) The plan administrator may establish or waive the minimum payment as deemed necessary.

(3) Reimbursements to participants or dependent care providers shall be made at least once each month.

(4) Dependent care reimbursement shall at no time exceed the greater of the balance of the participant's account for the plan year at the time of the reimbursement, or an amount equal to the monthly salary reduction amount.

(5) Health care reimbursement shall at no time exceed the eligible employee's election for the eligible period of coverage in the plan year.

(d) Participant's responsibility.

(1) An employee or former employee will be held liable for any overpayments of benefits as a participant in the reimbursement accounts. The method of repayment shall be determined by the plan administrator or its designee, and until full restitution is made by the participant, no further claims payment from any TexFlex accounts will be made to the participant by the plan administrator or its designee.

(2) A health care reimbursement account participant who goes on leave without pay or has insufficient funds during the plan year is liable for the monthly health care election amount and must pay for it with after-tax dollars, unless as described in §85.3(b)(3)(D) of this title (relating to Eligibility and Participation). Should the participant fail to contribute to the account with after-tax dollars, upon the participant's return to active duty, payroll deduction will be required to recover the election amounts due.

§85.11. Administration.

(a) Plan administration. The flexible benefits plan is administered by the board of trustees of the Employees Retirement System of Texas. The board of trustees of the Employees Retirement System of Texas may designate and contract with a TPA to perform the day-to-day administrative responsibilities of the TexFlex plan. The TPA shall perform its duties as specified in its contract with the plan administrator, the Code, rules and all applicable state and federal laws and regulations.

(b) Plan administrator.

(1) The plan administrator shall administer all aspects of the plan.

(2) The plan administrator shall:

(A) make decisions on administrative matters concerning the plans;

(B) adopt and amend rules pursuant to the authority granted in Chapter 1551 and ensure that all rules, forms and procedures are consistent with state and federal law;

(C) enter into necessary contracts;

(D) take whatever action that it deems necessary to ensure compliance with applicable state and federal laws and regulations and the sections in this chapter; and

(E) review and approve all marketing materials or correspondence from the TPA to participants prior to publication or distribution.

(c) Third Party Administrator (TPA). The TPA shall perform all day-to-day administrative duties as assigned by the plan administrator.

(d) Miscellaneous provisions.

(1) The participation in the plan of an employee is subject to changes in applicable state and federal laws and regulations and the sections in this chapter.

(2) The plan year begins on September 1 of each year and ends on August 31. The run-out period for filing claims for services used during the plan year [and the grace period], ends on December 31. [The grace period begins at the end of the plan year and ends two (2) months and 15 days later.]

(3) The mailing address of the plan administrator is: Plan Administrator, TexFlex Plan, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207.

(4) If a provision in the sections in this chapter conflicts with a federal law, rule, or regulation governing the plan, then the law, rule, or regulation prevails over the provision.

(5) The participation of an employee in the plan does not give the employee a legal or equitable right against the participant's employing state agency, institution of higher education, the plan administrator, TPA or the state of Texas except as provided in the sections in this chapter. The plan does not affect the terms of employment between a participant and the participant's employing state agency or institution of higher education.

(6) If [Except for the grace period, if] a time limit is expressed in terms of a number of days and the last day of the time limit falls on a weekend or holiday recognized by the state of Texas for observance by state employees, the last day of the time period shall be the first business day after the weekend or holiday. [The end of the grace period shall be the actual day on which it falls, even if it is a weekend or holiday.]

(7) The sections in this chapter prevail over any document used in the administration of the plan that has provisions or requirements which conflict with the sections.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 31, 2014.

TRD-201401421

Paula A. Jones

General Counsel and Chief Compliance Officer

Employees Retirement System of Texas

Earliest possible date of adoption: May 11, 2014

For further information, please call: (877) 275-4377



TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 3. ADMINISTRATIVE RESPONSIBILITIES OF STATE FACILITIES

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §3.101, concerning definitions; and new §3.701, concerning electronic monitoring; §3.702, concerning information regarding electronic monitoring; §3.703, concerning request to conduct electronic monitoring; §3.704, concerning annual consent of other individuals; §3.705, concerning capacity to request or consent to electronic monitoring; §3.706, concerning conducting electronic monitoring; §3.707, concerning required facility notice and accommodation; and §3.708, concerning reporting abuse, neglect, or exploitation, in new Subchapter G, Electronic Monitoring, of Chapter 3, Administrative Responsibilities of State Facilities.

BACKGROUND AND PURPOSE

The purpose of the proposed amendment and new sections is to implement Senate Bill 33, 83rd Legislature, Regular Session, 2013, which requires a state supported living center and the intermediate care facility for individuals with an intellectual disability component of the Rio Grande State Center to permit an individual or an individual's legally authorized representative (LAR) to monitor the individual's bedroom through the use of electronic monitoring. The proposed rules describe requirements for requesting, consenting to, and conducting electronic monitoring in a facility. The proposal requires an individual or the LAR who wants to install an electronic monitoring device to complete a DADS request form and give the form to the director of the facility in which the individual resides. Also, the individual or the LAR must obtain permissions from each roommate or roommate's LAR using a DADS consent form, which includes a release of the facility from any civil liability for violation of the person's privacy rights in connection with the use of the electronic monitoring device. In addition, a person who conducts electronic monitoring must post and maintain a conspicuous notice at the entrance of the bedroom in which monitoring is being conducted and must pay for all costs associated with conducting the monitoring, other than the cost of electricity. The proposed rules also require an individual or an individual's LAR to complete and sign a form that contains information about electronic monitoring. The proposed rules require a facility to post a notice regarding electronic monitoring and make reasonable physical accommodations for electronic monitoring. The proposed rules also require abuse, neglect, or exploitation that is suspected or known from viewing or listening to a tape or recording obtained from electronic monitoring to be reported to the Department of Family and Protective Services (DFPS) and the director of the facility in which the alleged abuse, neglect or exploitation occurred.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §3.101 provides definitions of terms used in new Subchapter G, including "bedroom," "covert electronic monitoring," "electronic monitoring," and "electronic monitoring device." In addition, minor editorial changes have been made to make references to Texas statutes consistent and to include the full term for the acronym "ICF/IID."

Proposed new §3.701 describes the allowed use and prohibitions governing the use of electronic monitoring.

Proposed new §3.702 requires an informational form concerning electronic monitoring to be completed and signed by an individual or an individual's LAR.

Proposed new §3.703 provides the requirements and procedures for an individual or an individual's LAR to request authorization to conduct electronic monitoring in the individual's bedroom.

Proposed new §3.704 describes the requirements for an individual or an individual's LAR to obtain consent on behalf of any individual who shares a bedroom with the requesting individual. It also requires a facility to maintain a copy of the consent form in the active portion of the clinical records of the individual consenting to the electronic monitoring.

Proposed new §3.705 requires the interdisciplinary team of an individual who has not been judicially declared to lack the capacity to request or consent to electronic monitoring to determine if the individual has capacity to request or consent to electronic monitoring.

Proposed new §3.706 requires a facility director who receives properly completed forms for electronic monitoring to authorize electronic monitoring in accordance with the proposed new Subchapter G. In addition, the section requires a person conducting electronic monitoring to post and maintain a conspicuous notice at the entrance to the bedroom in which the monitoring is being conducted. The section also requires the person to ensure that the electronic monitoring is conducted in plain view; that the electronic monitoring device is installed and maintained in a manner that is safe for individuals, employees, and visitors; and that the electronic monitoring complies with any condition placed on it by a person giving consent. The section also sets forth requirements for a tape or recording made by an electronic monitoring device. The section requires a person conducting electronic monitoring to pay for all costs associated with conducting the monitoring, other than the cost of electricity.

Proposed new §3.707 describes the notice of electronic monitoring that a facility must post and requires a facility to make reasonable physical accommodation for electronic monitoring.

Proposed new §3.708 requires a person who suspects abuse, neglect, or exploitation based on viewing or listening to a tape or recording from an electronic monitoring device to report the allegation to DFPS and the director of the facility in which the alleged abuse, neglect or exploitation occurred. A person must provide the original tape or recording to DFPS. The section requires a person who sends more than one tape or recording to DFPS to identify each tape or recording on which the person believes an incident of abuse or exploitation or evidence of neglect may be found. The section also states that a person is encouraged to identify the place on the tape or recording that an incident of abuse or exploitation or evidence of neglect may be found.

FISCAL NOTE

James Jenkins, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendment and new sections are in effect, enforcing or administering the amendment and new sections does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendment and new sections will not have an adverse economic effect on small

businesses or micro-businesses, because conducting electronic monitoring is optional, so no costs have to be incurred to comply with the amendment and new sections.

PUBLIC BENEFIT AND COSTS

Scott Schalchlin DADS Assistant Commissioner for State Supported Living Centers, has determined that, for each year of the first five years the amendment and new sections are in effect, the public benefit expected as a result of enforcing the amendment and new sections is enhancing an individual's safety by describing in rule the requirements and conditions for electronic monitoring.

Mr. Schalchlin anticipates that there will be an economic cost to persons who conduct electronic monitoring but conducting electronic monitoring is optional, so no costs are required to be incurred to comply with the amendment and new sections. The amendment and new sections will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Eric Moorad at (512) 438-3169 in DADS State Supported Living Centers. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-13R14, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 13R14" in the subject line.

SUBCHAPTER A. DEFINITIONS

40 TAC §3.101

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The amendment implements Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021.

§3.101. Definitions.

The following words and terms, when used in this chapter [(relating to Administrative Responsibilities of State Facilities)], have the following meanings, unless the context clearly indicates otherwise:

(1) Administrative death review--An administrative, quality-assurance activity related to the death of an individual to identify non-clinical problems requiring correction and opportunities to improve the quality of care at a facility.

(2) Allegation--A report by a person suspecting or having knowledge that an individual has been or is in a state of abuse, neglect, or exploitation as defined in this chapter.

(3) Alleged offender--An individual who was committed or transferred to a facility:

(A) under Texas Code of Criminal Procedure, Chapters 46B or 46C, as a result of being charged with or convicted of a criminal offense; or

(B) under Texas Family Code, Chapter 55, as a result of being alleged by petition or having been found to have engaged in delinquent conduct constituting a criminal offense.

(4) Applicant--A person who has applied to be an employee, volunteer, or unpaid professional intern.

(5) Attending physician--The physician who has primary responsibility for the treatment and care of an individual.

(6) Bedroom--The room at a facility in which an individual usually sleeps.

(7) [(6)] Behavioral crisis--An imminent safety situation that places an individual or others at serious risk of violence or injury if no intervention occurs.

(8) [(7)] CANRS--The client abuse and neglect reporting system maintained by DADS Consumer Rights and Services.

(9) [(8)] Chemical restraint--Any drug prescribed or administered to sedate an individual or to temporarily restrict an individual's freedom of movement for the purpose of managing the individual's behavior.

(10) [(9)] Child--An individual less than 18 years of age who is not and has not been married and who has not had the disabilities of minority removed pursuant to [the] Texas Family Code, Chapter 31.

(11) [(10)] Clinical death review--A clinical, quality-assurance, peer review activity related to the death of an individual and conducted in accordance with statutes that authorize peer review in Texas to identify clinical problems requiring correction and opportunities to improve the quality of care at a facility.

(12) [(11)] Clinical practice--The demonstration of professional competence in nursing, dental, pharmacy, or medical practice as described in the relevant chapter of the Texas Occupations Code.

(13) [(12)] Confirmed--Term used to describe an allegation that DFPS determines is supported by a preponderance of the evidence.

(14) [(13)] Contractor--A person who contracts with a facility to provide services to an individual, including an independent school district that provides educational services at the facility.

(15) [(14)] Conviction--The adjudication of guilt for a criminal offense.

(16) Covert electronic monitoring--Electronic monitoring that is not open and obvious, and that is conducted when the director of the facility in which the monitoring is being conducted has not been informed about the device by the individual, by a person who placed the device in the bedroom, or by a person who uses the device.

(17) [(15)] Crisis intervention--The use of interventions, including physical, mechanical, or chemical restraint, in a behavioral

crisis, after less restrictive measures have been determined to be ineffective or not feasible.

(18) [(46)] Crisis intervention plan--A component of the individual support plan (ISP) action plan that provides instructions for staff on how to effectively and safely use restraint procedures, as long as they are needed to prevent imminent physical injury in a behavioral crisis when less restrictive prevention or de-escalation procedures have failed and the individual's behavior continues to present an imminent risk of physical injury. The plan is developed with input from the PCP and direct support professionals familiar with the individual and the individual and LAR and includes a description of how the individual behaves during a behavioral crisis, along with information about the types of restraints that have been most effective with the individual, staff actions to be avoided because they have been ineffective in the past in preventing or reducing the need for restraints, the restraint's maximum duration, a description of the behavioral criteria for determining when the imminent risk of physical injury abates, and reporting requirements. A crisis intervention plan is not considered a therapeutic intervention. It is implemented only to ensure that restraint procedures are carried out effectively and safely and may be adjusted depending upon the individual's progress in the ISP action plan.

(19) [(47)] DADS--Department of Aging and Disability Services.

(20) [(48)] Deferred adjudication--Has the meaning given to "community supervision" in Texas Code of Criminal Procedure, §42.12, Section 2.

(21) [(49)] Designated representative--A person designated by an individual or an individual's LAR to be a spokesperson or advocate for the individual.

(22) [(20)] DFPS--Department of Family and Protective Services.

(23) [(21)] Director--The director of a facility or the director's designee.

(24) [(22)] Direct support professional--An unlicensed employee who directly provides services to an individual.

(25) Electronic monitoring--The placement of an electronic monitoring device in an individual's bedroom and making a tape or a recording with the device.

(26) Electronic monitoring device (EMD)--A device that:

(A) includes:

(i) a video surveillance camera; and

(ii) an audio device designed to acquire communications or other sounds; and

(B) does not include an electronic, mechanical, or other device that is specifically used for the nonconsensual interception of wire or electronic communications.

(27) [(23)] Employee--A person employed by DADS whose assigned duty station is at a facility.

(28) [(24)] Facility--A state supported living center or the intermediate care facility for individuals with an intellectual disability [ICF/IID] component of the Rio Grande State Center.

(29) [(25)] Family member--An individual's parent, spouse, children, or siblings.

(30) [(26)] Forensic facility--A facility designated under Texas Health and Safety Code (THSC), §555.002(a) for the care of high-risk alleged offenders.

(31) [(27)] Guardian--An individual appointed and qualified as a guardian of the person under [the] Texas Estates [Probate] Code, Title 3 [Chapter XX].

(32) [(28)] High-risk alleged offender--An alleged offender who has been determined to be at risk of inflicting substantial physical harm to another person in accordance with THSC §555.003.

(33) [(29)] Inconclusive--Term used to describe an allegation leading to no conclusion or definite result by DFPS due to lack of witnesses or other relevant evidence.

(34) [(30)] Independent mortality review organization--An independent organization designated in accordance with Texas Government Code, Chapter 531, Subchapter U, to review the death of an individual.

(35) [(31)] Individual--A person with a developmental disability receiving services from a facility.

(36) [(32)] Individual support plan (ISP)--An integrated, coherent, person-directed plan that reflects an individual's preferences, strengths, needs, and personal vision, as well as the protections, supports, and services the individual will receive to accomplish identified goals and objectives.

(37) [(33)] Interdisciplinary team (IDT)--A team consisting of an individual, the individual's legally authorized representative (LAR) and qualified developmental disability professional, other professionals dictated by the individual's strengths, preferences, and needs, and staff who regularly and directly provide services and supports to the individual. The team is responsible for assessing the individual's treatment, training, and habilitation needs and making recommendations for services based on the personal goals and preferences of the individual using a person-directed planning process, including recommendations on whether the individual is best served in a facility or community setting.

(38) [(34)] Legally adequate consent--Consent received from a person who has legal status that meets the statutory requirements for comprehension of information and voluntariness as specified in THSC §591.006.

(39) [(35)] Legally authorized representative (LAR)--A person authorized by law to act on behalf of an individual, including a parent, guardian, or managing conservator of a minor individual, or a guardian of an adult individual.

(40) [(36)] Life-sustaining medical treatment--Treatment that, based on reasonable medical judgment, sustains the life of an individual and without which the individual will die. The term includes both life-sustaining medications and artificial life support such as mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration. The term does not include the administration of pain management medication or the performance of a medical procedure considered necessary to provide comfort care or any other medical care provided to alleviate an individual's pain.

(41) [(37)] Mechanical restraint--Any device attached or adjacent to an individual's body that he or she cannot easily remove that restricts freedom of movement or normal access to his or her body. The term does not include a protective device.

(42) [(38)] Medical emergency--Any illness or injury that requires immediate assessment and treatment by medical staff for conditions considered to be life threatening, including, but not limited to, respiratory or cardiac arrest, choking, extreme difficulty in breathing, status epilepticus, allergic reaction to an insect sting, snake bite, extreme pain in the chest or abdomen, poisoning, hemorrhage, loss of

consciousness, sudden loss of function of a body part, injuries resulting in broken bones, possible neck or back injuries, or severe burns.

(43) [(39)] Medical intervention--Treatment by a licensed medical doctor, osteopath, podiatrist, dentist, physician assistant, or advanced practice nurse in accordance with general acceptable clinical practice.

(44) [(40)] Medical restraint--A health-related protection prescribed by a primary care provider (PCP) or dentist that is necessary for the conduct of a specific medical or dental procedure, or is only necessary for protection during the time that a medical or dental condition exists, for the purpose of preventing an individual from inhibiting or undoing medical or dental treatment. Medical restraint includes pre-treatment sedation.

(45) [(41)] Medical restraint plan--A component of the ISP action plan that provides instructions for staff on how to effectively and safely carry out medical restraint procedures. The plan is developed with input from the PCP or dentist and meaningful input from the individual and LAR and includes a description of the individual's behaviors that do not allow for a safe and effective implementation of needed medical or dental procedures, information about the types of restraints that have been most effective with the individual, a description of the criteria for releasing the restraint, and reporting requirements. A medical restraint plan is not considered a therapeutic intervention and may be adjusted depending upon the individual's progress in the ISP action plan.

(46) [(42)] Mental health services provider--Has the meaning assigned in [the] Texas Civil Practice and Remedies Code, Chapter 81.

(47) [(43)] Peer review--A review of clinical or professional practice of a doctor, pharmacist, licensed vocational nurse, or registered nurse conducted by his or her professional peers.

(48) [(44)] Perpetrator--A person who has committed an act of abuse, neglect, or exploitation.

(49) [(45)] Person--Includes a corporation, organization, governmental subdivision or agency, or any other legal entity.

(50) [(46)] Physical restraint--Any manual method that restricts freedom of movement or normal access to one's body, including hand or arm holding to escort an individual over his or her resistance to being escorted. Physical restraint does not include brief and limited use of physical guidance, positioning, or prompting techniques used to redirect an individual or assist, support, or protect the individual during a functional therapeutic or physical exercise activity; response blocking and brief redirection used to interrupt an individual's limbs or body without the use of force so that the occurrence of challenging behavior is prevented; holding an individual, without the use of force, to calm or comfort, or hand holding to escort an individual from one area to another without resistance from the individual; and response interruption used to interrupt an individual's behavior, using facility-approved techniques.

(51) [(47)] Physician on duty--The physician designated by the facility's medical director to provide medical care or respond to emergencies outside regular working hours.

(52) [(48)] Positive behavior support plan (PBSP)--A comprehensive, individualized plan that contains intervention strategies designed to modify the environment, teach or increase adaptive skills, and reduce or prevent the occurrence of target behaviors through interventions that build on an individual's strengths and preferences, without using aversive or punishment contingencies.

(53) [(49)] Preponderance of the evidence--The greater weight of evidence, or evidence that is more credible and convincing to the mind.

(54) [(50)] Primary care provider (PCP)--A physician, advanced practice nurse, or physician assistant who provides primary care to a defined population of patients. The PCP is involved in health promotion, disease prevention, health maintenance, and diagnosis and treatment of acute and chronic illnesses.

(55) [(51)] Primary contact--The person designated as the primary contact of an alleged victim of abuse, neglect, or exploitation, if the alleged victim is an adult with an intellectual disability who is unable to authorize the disclosure of protected health information and does not have a guardian.

(56) [(52)] Prone restraint--Any physical or mechanical restraint that places the individual in a face-down position. Prone restraint does not include when an individual is placed in a face-down position as a necessary part of a medical intervention, or when an individual moves into a prone position during an incident of physical restraint, if staff immediately begin an adjustment to restore the individual to a standing, sitting, or side-lying position or, if that is not possible, immediately release the person. Prone restraint is prohibited.

(57) [(53)] Protection and advocacy organization--The protection and advocacy agent for Texas designated in accordance with the Code of Federal Regulations, Title 45, §1386.20.

(58) [(54)] Protective mechanical restraint for self-injurious behavior--A type of mechanical restraint applied before an individual engages in self-injurious behavior, for the purpose of preventing or mitigating the danger of the self-injurious behavior because there is evidence that the targeted behavior can result in serious self-injury when it occurs and intensive, one-to-one supervision and treatment have not yet reduced the danger of self-injury. Examples include, but are not limited to, protective head gear for head banging, arm splints for eye gouging, or mittens for hand-biting. The term does not include medical restraints or protective devices.

(59) [(55)] Protective mechanical restraint plan for self-injurious behavior--A component of the ISP action plan that provides instructions for staff on how to effectively and safely apply the protective mechanical restraint that is used to prevent or mitigate the effects of serious self-injurious behavior. The plan is developed with input from direct support professionals familiar with the individual and meaningful input from the individual and LAR, and includes a description of the individual's self-injurious behaviors, the type of restraint to be used, the restraint's maximum duration, and the circumstances to apply and remove the restraint. The plan must identify any low-risk situations when the restraint may be safely removed, what staff should do during those situations to continue to protect the individual from harm, and adjustments in staff instructions as progress is made for gradually eliminating the use of the restraints, including details on any specialized staff training and reporting. The plan is not considered a therapeutic intervention and is adjusted depending upon the individual's progress in the ISP action plan and an evaluation by the PCP that the individual's behavior is no longer at the dangerous level that is producing serious self-injury.

(60) [(56)] Registered nurse--A nurse licensed by the Texas Board of Nursing to practice professional nursing in Texas.

(61) [(57)] Registries--

(A) The [the] Nurse Aide Registry maintained by DADS in accordance with §94.12 of this title (relating to Findings and Inquiries) [§94.10 of this title (relating to Registry, Findings, and Inquiries)]; and

(B) The [the] Employee Misconduct Registry maintained by DADS in accordance with Chapter 93 of this title (relating to Employee Misconduct Registry (EMR)).

(62) [~~(58)~~] Reporter--A person who reports an allegation of abuse, neglect, or exploitation.

(63) [~~(59)~~] Restraint monitor--A designated facility employee who has received competency-based training and demonstrated proficiency in the application and assessment of restraints, who has experience working directly with individuals with developmental disabilities, and who is trained to conduct a face-to-face assessment of the individual who was restrained and the staff involved in the restraint to review the application and results of the restraint.

(64) [~~(60)~~] Retaliation--An action intended to inflict emotional or physical harm or inconvenience on a person including harassment, disciplinary action, discrimination, reprimand, threat, and criticism.

(65) [~~(61)~~] SSLC--A state supported living center.

(66) [~~(62)~~] State office mortality review--A quality assurance activity to review data related to the death of an individual to identify trends, best practices, training needs, policy changes, or facility or systemic issues that need to be addressed to improve services at facilities.

(67) [~~(63)~~] Supine restraint--Any physical or mechanical restraint that places the individual on his or her back. Supine restraint does not include when an individual is placed in a supine position as a necessary part of a medical restraint, or when an individual moves into a supine position during an incident of physical restraint, if staff immediately begin an adjustment to restore the individual to a standing, sitting, or side-lying position or, if that is not possible, immediately release the person. Supine restraint does not include persons who have freedom of movement in a hospital bed or dental chair that is at a reclined position. Supine restraint is prohibited.

(68) [~~(64)~~] Unconfirmed--Term used to describe an allegation that DFPS determines is not supported by the preponderance of evidence.

(69) [~~(65)~~] Unfounded--Term used to describe an allegation that DFPS determines is spurious or patently without factual basis.

(70) [~~(66)~~] Unusual incident--An event or situation that seriously threatens the health, safety, or life of an individual.

(71) [~~(67)~~] Volunteer--A person who is not part of a visiting group, who has active, direct contact with an individual, and who does not receive compensation from DADS other than reimbursement for actual expenses.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 27, 2014.

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Lorri Haden

Acting General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 438-3734



SUBCHAPTER G. ELECTRONIC MONITORING

40 TAC §§3.701 - 3.708

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The new sections implement Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021.

§3.701. Electronic Monitoring.

(a) A facility must permit an individual or an individual's LAR to conduct electronic monitoring if the individual or LAR complies with the requirements for conducting electronic monitoring in this subchapter.

(b) A facility must not refuse to admit an individual and must not discharge an individual from the facility because the individual or individual's LAR requests authorization to conduct electronic monitoring.

(c) A facility must not discharge an individual because covert electronic monitoring is conducted by or on behalf of an individual.

§3.702. Information Regarding Electronic Monitoring.

(a) An individual or an individual's LAR must complete and sign the DADS Information Regarding Electronic Monitoring form.

(1) For an individual admitted to a facility on or after August 1, 2014, the individual or individual's LAR must complete and sign the form as part of the admission process.

(2) For an individual admitted to a facility before August 1, 2014, the individual or individual's LAR must complete and sign the form by August 1, 2015.

(b) A facility must maintain a copy of a completed and signed DADS Information Regarding Electronic Monitoring form in the active portion of an individual's clinical record.

§3.703. Request to Conduct Electronic Monitoring.

(a) To conduct electronic monitoring, an individual or an individual's LAR must request authorization to do so by using the DADS Request for Authorized Electronic Monitoring form. The form must be signed and dated by the person described in subsection (b) of this section and given to the director of the facility in which the individual resides.

(b) A request to conduct electronic monitoring may be made:

(1) only by an individual, if the individual's IDT determines that the individual has capacity to request electronic monitoring in accordance with §3.705 of this subchapter (relating to Capacity to Request or Consent to Electronic Monitoring) and the individual has not been judicially declared to lack the required capacity;

(2) only by the guardian of an individual, if the individual has been judicially declared to lack capacity to request electronic monitoring; or

(3) only by an LAR, other than the guardian, of an individual if the individual's IDT determines that the individual does not have capacity to request electronic monitoring in accordance with §3.705 of this subchapter, but the individual has not been judicially declared to lack capacity to request electronic monitoring.

(c) A facility may move an individual to a different bedroom to accommodate a request for electronic monitoring.

(d) A facility must maintain a completed and signed copy of the DADS *Request for Electronic Monitoring* form in the active portion of the clinical record of the individual requesting authorization to conduct electronic monitoring.

§3.704. *Annual Consent of Other Individuals.*

(a) An individual or an individual's LAR who requests to conduct electronic monitoring must obtain consent annually on behalf of any individual who shares a bedroom with the requesting individual, using the DADS *Roommate Consent or Refusal of Electronic Monitoring* form. To provide consent, the form must be signed and dated by a person described in subsection (b) of this section and given to the director of the facility in which the individual resides.

(b) Consent to conduct electronic monitoring may be given:

(1) only by an individual who shares a bedroom with the requesting individual, if the individual's IDT determines that the individual has capacity to consent to electronic monitoring in accordance with §3.705 of this subchapter (relating to Capacity to Request or Consent to Electronic Monitoring) and the individual has not been judicially declared to lack the required capacity;

(2) only by the guardian of an individual who shares a bedroom with the requesting individual, if the individual has been judicially declared to lack capacity to provide consent to conduct electronic monitoring; or

(3) only by an LAR, other than the guardian, of an individual who shares a bedroom with the requesting individual, if the individual's IDT determines that the individual does not have capacity to consent to electronic monitoring in accordance with §3.705 of this subchapter, but the individual has not been judicially declared to lack capacity to consent to electronic monitoring.

(c) Consent given in accordance with this section may be conditioned on:

(1) pointing the camera away from the consenting individual, when the proposed EMD is a video surveillance camera;

(2) limiting or prohibiting the use of an audio EMD;

(3) limiting or prohibiting the use of a tape or recording made by an EMD; or

(4) limiting or prohibiting the use of an EMD in any other way described on the DADS *Roommate Consent or Refusal of Electronic Monitoring* form.

(d) If an individual who has not yet consented to electronic monitoring moves into a bedroom in which electronic monitoring is being conducted, the electronic monitoring must cease until consent is obtained from or on behalf of the individual in accordance with this section.

(e) If more than a year has elapsed since consent was given by or on behalf of an individual who shares a bedroom with an individual conducting electronic monitoring, the electronic monitoring must cease until consent is obtained in accordance with this section.

(f) A facility must maintain a copy of the DADS *Roommate Consent or Refusal of Electronic Monitoring* form in the active portion

of the clinical records of the individual consenting to electronic monitoring.

§3.705. *Capacity to Request or Consent to Electronic Monitoring.*

The IDT of an individual who has not been judicially declared to lack the capacity to request or consent to electronic monitoring determines if the individual has capacity to request or consent to electronic monitoring. The facility must document the determination made in the active portion of the individual's clinical record.

§3.706. *Conducting Electronic Monitoring.*

(a) A director who receives a completed DADS *Request for Electronic Monitoring* form and, if applicable, the DADS *Roommate Consent or Refusal of Electronic Monitoring* form, must review the forms to determine if they are properly completed. If they are properly completed, the director authorizes electronic monitoring to be conducted in accordance with this subchapter.

(b) A person conducting electronic monitoring must post and maintain a conspicuous notice at the entrance to the bedroom in which the monitoring is being conducted. The notice must state that the bedroom is being monitored by an EMD.

(c) A person conducting electronic monitoring must ensure that:

(1) the electronic monitoring is conducted in plain view;

(2) an EMD is installed and maintained in a manner that is safe for individuals, employees, and visitors, and that meets the requirements of applicable safety codes and laws;

(3) electronic monitoring complies with any condition placed on it by a person giving consent in accordance with §3.704 of this subchapter (relating to Annual Consent of Other Individuals);

(4) a tape or recording made by the EMD shows the time and date that the recorded events occurred;

(5) a tape or recording made by the EMD is not edited or artificially enhanced; and

(6) if the contents of a recording are transferred from the original format to another technological format, a qualified professional performs the transfer and the content of the tape or recording is not altered.

(d) A person conducting electronic monitoring must pay for all costs associated with conducting the monitoring, including the cost to install, maintain, repair, and remove the EMD, and to post and remove the notice required by subsection (b) of this section, other than the cost of electricity.

§3.707. *Required Facility Notice and Accommodation.*

(a) A facility must post a notice at the main facility entrance titled "Electronic Monitoring." The notice must state, in large, easy-to-read type, "The bedrooms of some individuals may be monitored electronically by or on behalf of those individuals. Monitoring may not be open and obvious."

(b) A facility must make reasonable physical accommodation for electronic monitoring, which includes providing:

(1) a reasonably secure place to mount an EMD; and

(2) access to power sources for an EMD.

§3.708. *Reporting Abuse, Neglect, or Exploitation.*

(a) If based on a person's viewing of or listening to a tape or recording obtained through electronic monitoring, the person has cause to believe that an individual is in a state of abuse, neglect, or exploitation or has been abused, neglected, or exploited, the person must:

(1) report the suspected or known abuse, neglect, or exploitation to DFPS and the director of the facility in which the alleged abuse, neglect or exploitation occurred immediately, if possible, but in no case more than one hour after the person knows or suspects that abuse, neglect, or exploitation has occurred; and

(2) provide the original tape or recording to DFPS.

(b) A person who sends more than one tape or recording to DFPS must identify each tape or recording on which the person believes an incident of abuse or exploitation or evidence of neglect may be found. A person is encouraged to identify the place on the tape or recording that an incident of abuse or exploitation or evidence of neglect may be found.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 27, 2014.

TRD-201401366

Lorri Haden

Acting General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: May 11, 2014

For further information, please call: (512) 438-3734



WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 16. ECONOMIC REGULATION

PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 45. MARKETING PRACTICES SUBCHAPTER C. STANDARDS OF IDENTITY FOR MALT BEVERAGES

16 TAC §45.73

The Texas Alcoholic Beverage Commission withdraws the proposed amendment to §45.73, which appeared in the December 13, 2013, issue of the *Texas Register* (38 TexReg 8987).

Filed with the Office of the Secretary of State on March 26, 2014.

TRD-201401316
Martin Wilson
Assistant General Counsel
Texas Alcoholic Beverage Commission
Effective date: March 26, 2014
For further information, please call: (512) 206-3489



16 TAC §45.82

The Texas Alcoholic Beverage Commission withdraws the proposed amendment to §45.82, which appeared in the December 13, 2013, issue of the *Texas Register* (38 TexReg 8988).

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Assistant General Counsel
Texas Alcoholic Beverage Commission
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16 TAC §45.92

The Texas Alcoholic Beverage Commission withdraws proposed new §45.92, which appeared in the February 28, 2014, issue of the *Texas Register* (39 TexReg 1315).

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For further information, please call: (512) 206-3489



16 TAC §45.93

The Texas Alcoholic Beverage Commission withdraws proposed new §45.93, which appeared in the February 28, 2014, issue of the *Texas Register* (39 TexReg 1317).

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TRD-201401319
Martin Wilson
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For further information, please call: (512) 206-3489



SUBCHAPTER D. ADVERTISING AND PROMOTION--ALL BEVERAGES

16 TAC §45.110

The Texas Alcoholic Beverage Commission withdraws the proposed amendment to §45.110 which appeared in the February 28, 2014, issue of the *Texas Register* (39 TexReg 1318).

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TRD-201401320
Martin Wilson
Assistant General Counsel
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For further information, please call: (512) 206-3489



SUBCHAPTER F. ANNUAL FILING BY RESIDENT AND NONRESIDENT BREWERS AND MANUFACTURERS

16 TAC §45.140

The Texas Alcoholic Beverage Commission withdraws proposed new §45.140, which appeared in the December 6, 2013, issue of the *Texas Register* (38 TexReg 8731).

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TRD-201401321

Martin Wilson

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Effective date: March 26, 2014

For further information, please call: (512) 206-3489



ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 356. MEDICAID AND CHIP ELECTRONIC HEALTH INFORMATION

SUBCHAPTER B. MEDICAID ELECTRONIC HEALTH RECORD INCENTIVE PAYMENT PROGRAM

1 TAC §356.202

The Texas Health and Human Services Commission (HHSC) adopts new §356.202, concerning Audit Review and Recoupment, related to the Texas Medicaid Electronic Health Record (EHR) Incentive Program, without changes to the proposed text as published in the January 24, 2014, issue of the *Texas Register* (39 TexReg 348) and will not be republished.

Background and Justification

The American Recovery and Reinvestment Act of 2009 (Public Law 111-5), Division B, Title IV, Section 4201, Medicaid Provider Health Information Technology (HIT) Adoption and Operation Payments, authorizes states, at their option, to provide incentive payments to Medicaid providers for the adoption and meaningful use of certified electronic health record (EHR) technology.

In February 2011, the Texas Health and Human Services Commissions (HHSC) implemented a Medicaid EHR Incentive Program in accordance with the applicable provisions in 42 Code of Federal Regulations Part 495, Subpart D. The purpose of the incentive program is to promote the adoption and meaningful use of certified electronic health record technology to eligible Texas Medicaid providers.

HHSC audits the providers who have received incentive payments through the Texas Medicaid EHR Incentive Program. The adopted rule explains that the audit review process for payments made through the EHR Incentive Program is no greater than that which is described in 1 TAC §354.1450 and that HHSC may recoup overpayments made through the Texas Medicaid EHR Incentive Program.

Comments

During the 30-day comment period, which ended February 23, 2014, HHSC received no comments regarding the proposed new rule.

Legal Authority

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

HHSC with rulemaking authority; and Texas Human Resources Code, §32.021, and Texas Government Code, §531.021, which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 31, 2014.

TRD-201401431

Jack Stick

Chief Counsel

Texas Health and Human Services Commission

Effective date: April 20, 2014

Proposal publication date: January 24, 2014

For further information, please call: (512) 424-6900



CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

The Texas Health and Human Services Commission (HHSC) adopts new §§371.1301, 371.1303, 371.1305, 371.1307, and 371.1309, concerning Investigations. These sections apply to investigations for Medicaid and other health and human services (HHS) programs in Texas. HHSC also adopts amendments to §§371.1601, 371.1603, 371.1605, 371.1607, 371.1609, 371.1611, 371.1613, 371.1615, and 371.1617, concerning General Provisions; §§371.1653, 371.1655, 371.1659, 371.1663, 371.1667, and 371.1669, concerning Grounds for Enforcement; and §§371.1703, 371.1705, 371.1707, 371.1709, 371.1711, 371.1713, 371.1715, 371.1717, and 371.1719, concerning Administrative Actions and Sanctions. Sections 371.1301, 371.1303, 371.1305, 371.1307, 371.1309, 371.1601, 371.1603, 371.1605, 371.1609, 371.1611, 371.1653, 371.1655, 371.1659, 371.1663, 371.1667, 371.1669, 371.1705, 371.1707, 371.1709, 371.1715, 371.1717, and 371.1719 are adopted without changes to the proposed text as published in the January 24, 2014, issue of the *Texas Register* (39 TexReg 349) and will not be republished. Sections 371.1607, 371.1613, 371.1615, 371.1617, 371.1703, 371.1711, and 371.1713 are adopted with changes to the proposed text as published in the January 24, 2014, issue of the *Texas Register* (39 TexReg 349). The text of the rules will be republished.

Background and Justification

The new rules in Chapter 371, Subchapter F, and the amendments to Subchapter G are adopted in light of recent state legislation affecting Texas Government Code Chapter 531, Human

Resources Code Chapters 32 and 36; and Texas Health and Safety Code §62.1561, concerning Prohibition of Certain Health Care Providers. Specifically, these rules implement various provisions of three bills enacted in the 83rd Regular Legislative Session: Senate Bills 8, 746, and 1803. See Act of May 27, 2013, 83rd Legislature, Regular Session, Chapter 1311 (Senate Bill 8); Act of May 22, 2013, 83rd Legislature, Regular Session, Chapter 622 (Senate Bill 1803); Act of May 21, 2013, 83rd Legislature, Regular Session, Chapter 572 (Senate Bill 746).

The amendments also incorporate federal and state requirements by including enforcement provisions implementing federal Health Insurance Portability and Accountability Act (HIPAA) regulations contained in 45 C.F.R. Part 164 that consolidated the privacy, security, and HITECH regulations and became effective in March 2013, and the Texas Medical Records Privacy Act contained in Texas Health and Safety Code Chapter 181.

Finally, the new rules and amendments are being revised to delete unnecessary language, revise or eliminate obsolete terminology, and to provide better and more helpful organization.

Public Comment

HHSC conducted a public hearing to receive comments on the proposed rules. The 30-day comment period ended February 24, 2014. During this period, HHSC received comments regarding the new rules and amendments from the Texas Dental Association, Texas Medical Association, and Texas Psychological Association. A summary of comments relating to the rules and HHSC's responses follows.

Comment: Concerning §371.1613, one commenter recommended clarification that, where a provider does not choose to go through the informal review process, the provider does not waive his or her right to administrative appeal.

Response: HHSC disagrees that clarification is needed in the rule. The rule specifies that the informal resolution process is discretionary and that a provider "may" request an initial informal resolution meeting (IRM). The rule further requires that a provider affirmatively request an appeal under §371.1615. No changes were made in response to this comment.

Comment: Concerning §371.1613(d) and (g), one commenter recommended clarification of the sentence in "Documentary evidence or written argument that may be submitted is not necessarily controlling upon the OIG."

Response: HHSC disagrees that any clarification is required. HHSC is entitled to review and weigh the merits of any documentary materials submitted by a provider during informal resolution meetings as part of possible settlement discussions. No changes were made in response to this comment.

Comments: Concerning §371.1709, one commenter recommended incorporating good cause exceptions currently in federal law (for not imposing a hold or reducing the amount of the hold).

Response: HHSC acknowledges this comment and believes that this exception is made clear under federal law and set forth in applicable federal regulations, but will add the "good cause" exception to §371.1709(f)(5)(H) in response to this comment.

Comment: One commenter submitted a letter in support of the rule and the definitive timelines for investigations stated in the rules, notice requirements to providers subject to investigation, investigator training, and the creation of the new dental director position.

Response: HHSC acknowledges and appreciates the comment. No changes were made in response to this comment.

Comment: A commenter expressed a desire that a psychologist be involved in the preliminary and full investigative process where the provider under review was a psychologist. As stated by the commenter, another psychologist may determine whether another psychologist's work meets the medical necessity standard, is of acceptable quality, and is consistent with the community standards for the profession.

Response: HHSC acknowledges this comment; however, HHSC feels that adding the language regarding review by a psychologist is not required by SB 1803. HHSC does consult as necessary with other healthcare professionals for the review of any complaint or allegation. No changes were made in response to this comment.

HHSC made the following changes to clarify or to correct wording in the proposed text as published:

Section 371.1607(79) replaces the word "explained" with "described" and a correction is made to the referenced statute.

Section 371.1613(a) and (d) replaces the word "including" with "or." Section 371.1613(e) adds the phrase "if a person is entitled to such hearing, and" for clarification. Section 371.1613(h) adds the phrase "if applicable" for clarification.

Section 371.1615(a) and (b)(3)(B) replaces the word "including" with "or." Section 371.1615(b)(1) adds the word "at" and deletes the phrase "of overpayment" for clarification and grammatical completeness. Section 371.1615(b)(2) adds the phrase "after receipt" for clarification and grammatical completeness. Section 371.1615(b)(4) adds language to clarify the location or forum for a hearing. Section 371.1615(e) adds the phrase "or notice of a payment hold" for clarification.

Section 371.1617(a)(1) adds the phrase "or notice of a payment hold" for clarification.

Section 371.1703(f)(2) adds the word "final" for clarification.

Section 371.1709(f)(5)(H) adds the phrase "or as otherwise determined to be 'good cause' as defined in 42 CFR §455.23(e)."

Section 371.1711(d)(2) is revised to make clear that the request for a potential overpayment/recoupment administrative hearing must be made after receipt of a final notice.

Section 371.1713(d)(2) adds the word "final" for clarification.

SUBCHAPTER F. INVESTIGATIONS

1 TAC §§371.1301, 371.1303, 371.1305, 371.1307, 371.1309

Statutory Authority

The new rules are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Human Resources Code §32.0322, which directs HHSC to establish certain provider screening, disclosure, and verification criteria by rule. In addition, Texas Government Code §531.102(g)(4) requires HHSC and the State Office of Administrative Hearings to jointly adopt rules regarding security that a provider must advance before a payment hold administrative hearing; and

§531.102(g)(7), which requires HHSC, in consultation with the state's Medicaid fraud control unit, to establish exclusions from payment holds.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 26, 2014.

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Jack Stick

Chief Counsel

Texas Health and Human Services Commission

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Proposal publication date: January 24, 2014

For further information, please call: (512) 424-6900



SUBCHAPTER G. ADMINISTRATIVE ACTIONS AND SANCTIONS DIVISION 1. GENERAL PROVISIONS

1 TAC §§371.1601, 371.1603, 371.1605, 371.1607, 371.1609, 371.1611, 371.1613, 371.1615, 371.1617

Statutory Authority

The amendments are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Human Resources Code §32.0322, which directs HHSC to establish certain provider screening, disclosure, and verification criteria by rule. In addition, Texas Government Code §531.102(g)(4) requires HHSC and the State Office of Administrative Hearings to jointly adopt rules regarding security that a provider must advance before a payment hold administrative hearing; and §531.102(g)(7), which requires HHSC, in consultation with the state's Medicaid fraud control unit, to establish exclusions from payment holds.

§371.1607. *Definitions.*

For purposes of this subchapter, the following terms have the meanings assigned as follows:

(1) **Abuse**--A practice by a provider that is inconsistent with sound fiscal, business, or medical practices and that results in an unnecessary cost to the Medicaid program; the reimbursement for services that are not medically necessary or that fail to meet professionally recognized standards for health care; or a practice by a recipient that results in an unnecessary cost to the Medicaid program.

(2) **Address of record**--An HHS provider's current mailing or physical address, including a working fax number, as provided to the appropriate health and human service program's claims administrator or as required by contract, statute, or regulation; a non-HHS provider's last known address as reflected by the records of the United States Postal Service or the Texas Secretary of State's records for business organizations, if applicable.

(3) **Affiliate; affiliate relationship**--A person who:

(A) has a direct or indirect ownership interest (or any combination thereof) of 5% or more in the person;

(B) is the owner of a whole or part interest in any mortgage, deed of trust, note or other obligation secured (in whole or in part) by the entity that interest is equal to or exceeds 5% of the value of the property or assets of the person;

(C) is an officer or director of the person, if the person is a corporation;

(D) is a partner of the person, if the person is organized as a partnership;

(E) is an agent or consultant of the person;

(F) is a consultant of the person and can control or be controlled by the person or a third party can control both the person and the consultant;

(G) is a managing employee of the person, that is, a person (including a general manager, business manager, administrator or director) who exercises operational or managerial control over a person or part thereof, or directly or indirectly conducts the day-to-day operations of the person or part thereof;

(H) has financial, managerial, or administrative influence over the operational decisions of a person;

(I) shares any identifying information with a person, including tax identification numbers, social security numbers, bank accounts, telephone number, business address, national provider numbers, Texas provider numbers, and corporate or franchise name; or

(J) has a former relationship with the person as described in subparagraphs (A) - (I) of this paragraph, but is no longer described, because of a transfer of ownership or control interest to an immediate family member or a member of the person's household of this section within the previous five years if the transfer occurred after the affiliate received notice of an audit, review, investigation, or potential adverse action, sanction, board order, or other civil, criminal, or administrative liability.

(4) **Agent**--Any person, company, firm, corporation, employee, independent contractor, or other entity or association legally acting for or in the place of another person or entity.

(5) **Allegation of fraud**--Allegation of Medicaid fraud received by HHSC from any source that has not been verified by the state, including an allegation based on:

(A) a fraud hotline complaint;

(B) claims data mining;

(C) data analysis processes; or

(D) a pattern identified through provider audits, civil false claims cases, or law enforcement investigations.

(6) **At the time of the request**--Immediately upon request and without delay.

(7) **Audit**--A financial audit, attestation engagement, performance audit, compliance audit, economy and efficiency audit, effectiveness audit, special audit, agreed-upon procedure, nonaudit service, or review conducted by or on behalf of the state or federal government. An audit may or may not include site visits to the provider's place of business.

(8) **Auditor**--The qualified person, persons, or entity performing the audit on behalf of the state or federal government.

(9) Business day--A day that is not a Saturday, Sunday, or state legal holiday. In computing a period of business days, the first day is excluded and the last day is included. If the last day of any period is a Saturday, Sunday, or state legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.

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

(11) CHIP--The Texas Children's Health Insurance Program or its successor.

(12) Claim--

(A) A written or electronic application, request, or demand for payment by the Medicaid or other HHS program for health care services or items; or

(B) A submitted request, demand, or representation that states the income earned or expense incurred by a provider in providing a product or a service and that is used to determine a rate of payment under the Medicaid or other HHS program.

(13) Claims administrator--The entity designated by an operating agency to process and pay Medicaid or HHS program provider claims.

(14) Closed-end contract--A contract or provider agreement for a specific period of time. It may include any specific requirements or provisions deemed necessary by OIG to ensure the protection of the program. It must be renewed for the provider to continue to participate in the Medicaid or other HHS program.

(15) CMS--The Centers for Medicare & Medicaid Services or its successor. CMS is the federal agency responsible for administering Medicare and overseeing state administration of Medicaid and CHIP.

(16) Commission--The Texas Health and Human Services Commission or its successor or designee.

(17) Controlled substance--"Controlled substance" as defined by the Texas Controlled Substances Act (Texas Health and Safety Code, Chapter 481) or its successor and the Federal Controlled Substances Act (21 U.S.C. §802(a)(6) et seq.) or its successor.

(18) Conviction or convicted--Means that:

(A) a judgment of conviction has been entered against an individual or entity by a federal, state, or local court, regardless of whether:

(i) there is a post-trial motion or an appeal pending; or

(ii) the judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed;

(B) a federal, state, or local court has made a finding of guilt against an individual or entity;

(C) a federal, state, or local court has accepted a plea of guilty or nolo contendere by an individual or entity; or

(D) an individual or entity has entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld.

(19) Costs related to an administrative appeal--Such costs include:

(A) the hourly State Office of Administrative Hearings (SOAH) or other administrative hearing process costs;

(B) court reporter costs and the costs of transcripts and copies of transcripts developed in preparation for, during, or after the hearing;

(C) OIG's or other agency's costs associated with discovery, including the costs of depositions, subpoenas, service of process, and witness expenses;

(D) witness expenses incurred at any time related to the administrative appeal, including during discovery or the case in chief;

(E) travel and per diem for witnesses and OIG or other staff and witness fee;

(F) cost of preparation time, including salaries, travel and per diem, any additional costs associated with the appeal hearing or the preparation for the appeal hearing;

(G) all other reasonable costs, including attorney's fees, associated with any further litigation of the case and the preparation for that litigation; and

(H) costs incurred during the investigation or audit of a case.

(20) Credible allegation of fraud--An allegation of fraud that has been verified by the state. An allegation is considered to be credible when the commission has verified that the allegation has indicia of reliability and has carefully reviewed all allegations, facts, and evidence. The commission will act judiciously on a case-by-case basis.

(21) Day--A calendar day.

(22) Delivery of a health care item or service--Includes the provision of any item or service to an individual to meet his or her physical, mental or emotional needs or well-being, whether or not reimbursed under Medicare, Medicaid, or any federal health care program.

(23) Exclusion--The suspension of a provider or any person from being authorized under the Medicaid program to request reimbursement of items or services furnished by that specific provider.

(24) Executive Commissioner--The Executive Commissioner of the Texas Health and Human Services Commission or its successor.

(25) False statement or misrepresentation--Any statement or representation that is inaccurate, incomplete, or not true.

(26) Federal financial participation (FFP)--The federal government's share of a state's expenditures under the Medicaid and other HHS programs and other benefit programs.

(27) Federal health care program--Any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the federal employee health insurance program under Chapter 89 of Title 5, United States Code).

(28) Field work--With respect to an investigation or audit, field work may include site visits to the provider as well as consultation with expert reviewers, HHS staff subject matter experts, and other state or federal agencies.

(29) Fraud--Any act that constitutes fraud under applicable federal or state law, including any intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to that person or some other person. Fraud may include any acts prohibited by the Texas Human Resources Code Chapter 36 or Texas Penal Code Chapter 35A.

(30) **Furnished**--Items or services provided or supplied, directly or indirectly, by any individual or entity. This includes items and services manufactured, distributed, or otherwise provided by individuals or entities that do not directly submit claims to Medicare, Medicaid, or any federal health care program, but that supply items or services to providers, practitioners, or suppliers who submit claims to these programs for such items or services. This term does not include individuals and entities that submit claims directly to these programs for items and services ordered or prescribed by another individual or entity.

(A) **"Directly"**--The provision of items and services by individuals or entities (including items and services provided by them, but manufactured, ordered, or prescribed by another individual or entity) who submit claims to Medicare, Medicaid, or any federal health care program.

(B) **"Indirectly"**--The provision of items and services manufactured, distributed, or otherwise supplied by individuals or entities who do not directly submit claims to Medicare, Medicaid, or other federal health care programs, but that provide items and services to providers, practitioners, or suppliers who submit claims to these programs for such items and services.

(31) **Health information**--Any information, whether oral or recorded in any form or medium, that is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse, and that relates to:

(A) the past, present, or future physical or mental health or condition of an individual;

(B) the provision of health care to an individual; or

(C) the past, present, or future payment for the provision of health care to an individual.

(32) **Health maintenance organization (HMO)**--A public or private organization organized under state law that is a federally qualified HMO or that meets the definition of HMO within this state's Medicaid plan.

(33) **HHS**--Health and human services. Means:

(A) a health and human services agency under the umbrella of the Commission or its successor, including the Commission;

(B) a program or service provided under the authority of the Commission, including Medicaid and CHIP; or

(C) a health and human services agency, including those agencies delineated in Texas Government Code §531.001.

(34) **Immediate family member**--A person's spouse (husband or wife); natural or adoptive parent; child or sibling; stepparent, stepchild, stepbrother or stepsister; father-, mother-, daughter-, son-, brother- or sister-in-law; grandparent or grandchild; or spouse of a grandparent or grandchild.

(35) **Indirect ownership interest**--Any ownership interest in an entity that has an ownership interest in another entity. The term includes an ownership interest in any entity that has an indirect ownership interest in the entity at issue.

(36) **Inducement**--An attempt to entice or lure an action on the part of another in exchange for, without limitation, cash in any amount, entertainment, any item of value, a promise, specific performance, or other consideration.

(37) **"Item" or "service"** includes--

(A) Any item, device, medical supply or service provided to a patient:

(i) that is listed in an itemized claim for program payment or a request for payment; or

(ii) for which payment is included in other federal or state health care reimbursement methods, such as a prospective payment system; and

(B) In the case of a claim based on costs, any entry or omission in a cost report, books of account, or other documents supporting the claim.

(38) **Knew or should have known**--A person, with respect to information, knew or should have known when a person had or should have had actual knowledge of information, acted in deliberate ignorance of the truth or falsity of the information, or acted in reckless disregard of the truth or falsity of the information. Proof of a person's specific intent to commit a program violation is not required in an administrative proceeding to show that a person acted knowingly.

(39) **Managed care plan**--A plan under which a person undertakes to provide, arrange for, pay for, or reimburse, in whole or in part, the cost of any health care service. A part of the plan must consist of arranging for or providing health care services as distinguished from indemnification against the cost of those services on a prepaid basis through insurance or otherwise. The term does not include an insurance plan that indemnifies an individual for the cost of health care services.

(40) **Managing employee**--An individual, regardless of the person's title, including a general manager, business manager, administrator, officer, or director, who exercises operational or managerial control over the employing entity, or who directly or indirectly conducts the day-to-day operations of the entity.

(41) **MCO**--Managed care organization. Has the meaning described in §353.2 of this title (relating to Definitions), and for purposes of this chapter includes an MCO's special investigative unit under Texas Government Code §531.113(a)(1), and any entity with which the MCO contracts for investigative services under Texas Government Code §531.113(a)(2).

(42) **MCO provider**--An association, group, or individual health care provider furnishing services to MCO members under contract with an MCO.

(43) **Medicaid or Medicaid program**--The Texas medical assistance program established under Human Resources Code Chapter 32 and regulated in part under Title 42 CFR Part 400 or its successor.

(44) **Medicaid-related funds**--Any funds that:

(A) a provider obtains or has access to by virtue of participation in Medicaid; or

(B) a person obtains through embezzlement, misuse, misapplication, improper withholding, conversion or misappropriation of funds that had been obtained by virtue of participation in Medicaid.

(45) **Medicaid Provider Integrity Division (MPI)**--The division within OIG that investigates provider or contractor fraud and abuse in Medicaid and other HHS programs or its successor.

(46) **Medical assistance**--Includes all of the health care and related services and benefits authorized or provided under state or federal law for eligible individuals of this state.

(47) **Member of household**--An individual who is sharing a common abode as part of a single-family unit, including domestic employees, partners, and others who live together as a family unit.

(48) MFCU--The Medicaid Fraud Control Unit of the Texas Office of the Attorney General or its successor.

(49) OAG--Office of the Attorney General of Texas or its successor.

(50) OIG--Office of the Inspector General, or its successor, within the Health and Human Services Commission.

(51) OMB--The Federal Office of Management and Budget or its successor.

(52) Operating agency--A state agency that operates any part of the Medicaid or other HHS program.

(53) Overpayment--The amount paid by Medicaid or other HHS program or the amount collected or received by a person by virtue of the provider's participation in Medicaid or other HHS program that exceeds the amount to which the provider or person is entitled under §1902 of the Social Security Act or other state or federal statutes for a service or item furnished within the Medicaid or other HHS programs. This includes:

(A) any funds collected or received in excess of the amount to which the provider is entitled, whether obtained through error, misunderstanding, abuse, misapplication, misuse, embezzlement, or improper retention or fraud;

(B) recipient trust funds and funds collected by a person from recipients if collection was not allowed by Medicaid or other HHS program policy; or

(C) questioned costs identified in a final audit report that found that claims or cost reports submitted in error resulted in money paid in excess of what the provider is entitled to under an HHS program, contract, or grant.

(54) Ownership interest--A direct or indirect ownership interest (or any combination thereof) of 5% or more in the equity in the capital, the stock, the profits, or other assets of a person or any mortgage, deed, trust or note, or other obligation secured in whole or in part by the property or assets of the person.

(55) Payment hold (suspension of payments)--An administrative sanction that withholds all or any portion of payments due a provider until the matter in dispute, including all investigation and legal proceedings, between the provider and the Commission or an operating agency or its agent(s) are resolved. This is a temporary denial of reimbursement under the Medicaid or other HHS program for items or services furnished by a specified provider.

(56) Person--Any legally cognizable entity, including an individual, firm, association, partnership, limited partnership, corporation, agency, institution, MCO, Special Investigative Unit, CHIP participant, trust, non-profit organization, special-purpose corporation, limited liability company, professional entity, professional association, professional corporation, accountable care organization, or other organization or legal entity.

(57) Person with a disability--An individual with a mental, physical, or developmental disability that substantially impairs the individual's ability to provide adequately for the person's care or his or her own protection, and:

(A) who is 18 years of age or older; or

(B) who is under 18 years of age and who has had the disabilities of minority removed.

(58) Physician--An individual licensed to practice medicine in this state, a professional association composed solely of physicians, a partnership composed solely of physicians, a single

legal entity authorized to practice medicine owned by two or more physicians, or a nonprofit health corporation certified by the Texas Medical Board under Chapter 162, Texas Occupations Code.

(59) Practitioner--A physician or other individual licensed or certified under state law to practice the individual's profession.

(60) Prima facie--Sufficient to establish a fact or raise a presumption unless disproved.

(61) Probationary contract--A contract or provider agreement for any period of time. It may include any special requirements or provisions deemed necessary by OIG to ensure the protection of the program. It must be renewed by OIG for the provider to continue to participate in the program. It may also be referred to as a provisional contract, depending upon the terminology used by the provider's agency and program area.

(62) Professionally recognized standards of health care--Statewide or national standards of care, whether in writing or not, that professional peers of the individual or entity whose provision of care is an issue, recognize as applying to those peers practicing or providing care within the state of Texas.

(63) Program violation--A failure to comply with a Medicaid or other HHS provider contract or agreement, the Texas Medicaid Provider Procedures Manual or other official program publications, or any state or federal statute, rule, or regulation applicable to the Medicaid or other HHS program, including any action that constitutes grounds for enforcement as delineated in this subchapter that forms the basis for an investigation, audit, or other review or that results in a notice of potential or final adverse action for cause.

(64) Provider--Any person, including an MCO and its subcontractors, that:

(A) is furnishing Medicaid or other HHS services under a provider agreement or contract in force with a Medicaid or other HHS operating agency;

(B) has a provider or contract number issued by the Commission or by any HHS agency or program or their designee to provide medical assistance, Medicaid, or any other HHS service in any HHS program, including CHIP, under contract or provider agreement with the Commission, its designee, or an HHS agency; or

(C) provides third-party billing services under a contract or provider agreement with the Commission or its designee.

(65) Provider agreement--A contract, including any and all amendments and updates, with Medicaid or other HHS program to subcontract services, or with an MCO to provide services.

(66) Provider screening process--The process that a person participates in to become eligible to participate and enroll as a provider in Medicaid or other HHS program. This process includes enrollment under this chapter or Chapter 352 of this title, 42 CFR Part 1001, or other processes delineated by statute, rule or regulation.

(67) Provisional contract--A contract or provider agreement for any period of time. It may include any special requirements or provisions deemed necessary by OIG to ensure the protection of the program. It must be renewed by OIG for the provider to continue to participate in the program. It may also be referred to as a probationary contract, depending upon the terminology used by the provider's agency and program area.

(68) Reasonable request--Request for access, records, documentation or other items deemed necessary or appropriate by OIG or a Requesting Agency to perform an official function, and made by a

properly identified agent of OIG or a Requesting Agency during hours that a person, business, or premises is open for business.

(69) Recipient--A person eligible for and covered by the Medicaid or any other HHS program.

(70) Records and documentation--Records and documents in any form, including electronic form, which include:

(A) medical records, charting, other records pertaining to a patient, radiographs, laboratory and test results, molds, models, photographs, hospital and surgical records, prescriptions, patient or client assessment forms, and other documents related to diagnosis, treatment or service of patients;

(B) billing and claims records, supporting documentation such as Title XIX forms, delivery receipts, and any other records of services provided to recipients and payments made for those services;

(C) cost reports, documentation supporting cost reports;

(D) managed care encounter data, financial data necessary to demonstrate solvency of risk-bearing providers;

(E) ownership disclosure statements, articles of incorporation, bylaws, corporate minutes or other documentation demonstrating ownership of corporate entities;

(F) business and accounting records, business and accounting support documentation;

(G) statistical documentation, computer records and data;

(H) clinical practice records, including patient sign-in sheets, employee sign-in sheets, office calendars, daily or other periodic logs, employment records, and payroll documentation related to items or services rendered under a HHS program; and

(I) records affidavits, business records affidavits, evidence receipts, and schedules.

(71) Recoupment of overpayment--A sanction imposed to recover funds paid to a provider or person to which they were not entitled.

(72) Requesting agency--Includes OIG, the OAG or its successor's Medicaid Fraud Control Unit or Civil Medicaid Fraud Division, any other state or federal agency authorized to conduct compliance, regulatory, or program integrity functions on a provider, a person, or the services rendered by the provider or person.

(73) Restricted reimbursement--An administrative sanction that limits or denies payment of a provider's Medicaid or other HHS program claims for specific procedures for a specified time period.

(74) Risk analysis--The process of defining and analyzing the dangers to individuals, businesses, and governmental entities posed by potential natural and human-caused adverse events. A risk analysis can be either quantitative, which involves numerical probabilities, or qualitative.

(75) Sanction--Any administrative enforcement measure imposed by OIG pursuant to this subchapter other than administrative actions defined in §371.1701 of this subchapter (relating to Administrative Actions).

(76) Sanctioned entity--An entity that has been convicted of any offense described in 42 CFR §§1001.101 - 1001.401 or has been terminated or excluded from participation in Medicare, Medicaid in Texas, or any other state or federal health care program.

(77) Services--The types of medical assistance specified in §1905(a) of the Social Security Act (42 U.S.C. §1396d(a)) and other HHS program services authorized under federal and state statutes that are administered by the Commission and other HHS agencies.

(78) SIU--A Special Investigative Unit of an MCO as defined under Texas Government Code §531.113(a)(1).

(79) SOAH--The State Office of Administrative Hearings as described in Texas Government Code §2003.021.

(80) Social Security Act--Legislation passed by Congress in 1965 that established the Medicaid program under Title XIX of the Act and created the Medicare program under Title XVIII of the Act.

(81) Solicitation--Offering to pay or agreeing to accept, directly or indirectly, overtly or covertly any remuneration in cash or in kind to or from another for securing a patient or patronage for or from a person licensed, certified, or registered or enrolled as a provider or otherwise by a state health care regulatory or HHS agency.

(82) State health care program--A State plan approved under Title XIX, any program receiving funds under Title V or from an allotment to a State under such Title, any program receiving funds under Subtitle I of Title XX or from an allotment to a State under Subtitle I of Title XX, or any State child health plan approved under Title XXI.

(83) Substantial contractual relationship--A relationship in which a person has direct or indirect business transactions with an entity that, in any fiscal year, amounts to more than \$25,000 or 5 percent of the entity's total operating expenses, whichever is less.

(84) Suspension of payments (payment hold)--An administrative sanction that withholds all or any portion of payments due a provider until the matter in dispute, including all investigation and legal proceedings, between the provider and the Commission or an operating agency or its agent(s) are resolved. This is a temporary denial of reimbursement under the Medicaid or other HHS program for items or services furnished by a specified provider.

(85) System recoupment--Any recoupment to recover funds paid to a provider or other person to which they were not entitled, by means other than the imposition of a sanction under these rules. It may include any routine payment correction by an agency or an agency's fiscal agent to correct an overpayment that resulted without any alleged wrongdoing.

(86) Terminated--Means:

(A) with respect to a Medicaid or CHIP provider, a state Medicaid program or CHIP has taken an action to revoke the provider's billing privileges, and the provider has exhausted all applicable appeal rights or the timeline for appeal has expired; and

(B) with respect to a Medicare provider, supplier, or eligible professional, the Medicare program has revoked the provider or supplier's billing privileges, and the provider has exhausted all applicable appeal rights or the timeline for appeal has expired.

(87) Terminated for cause--Termination based on allegations related to fraud, program violations, integrity, or improper quality of care.

(88) Title XVIII--Title XVIII (Medicare) of the Social Security Act, codified at 42 U.S.C. §§1395, *et seq.*

(89) Title XIX--Title XIX (Medicaid) of the Social Security Act, codified at 42 U.S.C. §§1396-1, *et seq.*

(90) Title XX--Title XX (Social Services Block Grant) of the Social Security Act, codified at 42 U.S.C. §§1397, *et seq.*

(91) Title XXI--Title XXI (State Children's Health Insurance Program (CHIP)) of the Social Security Act, codified at 42 U.S.C. §§1397aa, *et seq.*

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

(93) Vendor hold--Any legally authorized hold or lien by any state or federal governmental unit against future payments to a person. Vendor holds may include tax liens, state or federal program holds, liens established by the OAG Collections Division, and State Comptroller voucher holds.

(94) Waste--Practices that a reasonably prudent person would deem careless or that would allow inefficient use of resources, items, or services.

§371.1613. *Informal Resolution Process.*

(a) A person who receives a notice of intent to impose a sanction or notice of a payment hold may request an initial informal resolution meeting (IRM) to discuss the pending allegations and initiate settlement discussions. OIG must receive a written request for an initial IRM no later than 30 days after the date the person receives notice of intent to impose the sanction or notice of a payment hold.

(b) A written request for an IRM must:

(1) be sent by certified mail to the address specified in the notice letter;

(2) arrive at the address specified in the notice of intent to impose the sanction no later than 30 days after receipt by the person of the notice;

(3) include a statement as to the specific issues, findings, and/or legal authority in the notice letter with which the person disagrees;

(4) state the basis for the person's contention that the specific issues or findings and conclusions of OIG are incorrect; and

(5) be signed by the person or an attorney for the person. No other person or party may request an IRM for or on behalf of the subject of the sanction.

(c) On timely request for an initial IRM, OIG will schedule the IRM no later than 60 days after the date OIG receives a timely request or will schedule at a later date if requested by the person or an attorney for the person. OIG will provide the person or the person's attorney notice of the time and place of the initial IRM no later than 30 days before the meeting is to be held.

(d) Within 30 days of receipt of a notice of intent to impose a sanction or notice of a payment hold, a person may also submit to OIG any documentary evidence or written argument regarding whether the sanction is warranted. Documentary evidence or written argument that may be submitted is not necessarily controlling upon the OIG, however.

(e) A written request for an initial IRM may be combined with a request for an administrative contested case hearing, if a person is entitled to such hearing, and if it meets the requirements of this subchapter. If both an initial IRM and an administrative contested case hearing have been requested, the administrative contested case hearing and all pertinent discovery, prehearing conferences, and all other issues and activities regarding the administrative contested case hearing will be abated until the informal resolution process has concluded without settlement or resolution of the issues. OIG will request that the case be docketed for an administrative contested case hearing on the sanction if no resolution is met at the conclusion of the informal resolution process.

(f) OIG will provide for a recording of an IRM at no expense to the provider who requested the meeting. The recording of an IRM will be made available to the provider who requested the meeting.

(g) A person may request a second IRM not later than 20 days after the date of the initial IRM if the sanction involves any payment hold or proposed recoupment of an overpayment or debt and any damages or penalties relating to a proposed recoupment of an overpayment or debt arising out of a fraud or abuse investigation. On receipt of a timely request, OIG will schedule the second IRM not later than 45 days after the date OIG receives the request. If requested by the provider, OIG will schedule the meeting on a later date as determined by OIG. OIG will give notice to the provider of the time and place of the second IRM no later than 20 days before the date the meeting is to be held. A provider may provide additional information before the second IRM for consideration by OIG. Additional information that may be submitted is not necessarily controlling upon the OIG, however.

(h) In the event that the IRM process does not result in settlement, OIG will issue a notice of a final sanction, if applicable, and the provider may then elect to request an administrative contested case hearing.

§371.1615. *Appeals.*

(a) A person who receives a final notice of a sanction or notice of a payment hold, may appeal the imposition of the sanction. An appeal may consist of an administrative contested case hearing.

(b) Request for hearing.

(1) A request for an administrative contested case hearing at HHSC Appeals Division or, at SOAH on a final notice of overpayment, must be received in writing by OIG no later than 15 days after the date the person receives the final notice.

(2) When a person is entitled to a payment hold hearing at SOAH, OIG must receive the written request for the hearing no later than 30 days after receipt of the notice of the payment hold.

(3) A written request for an administrative contested case hearing or payment hold hearing must:

(A) be sent by certified mail to the address specified in the notice letter;

(B) timely arrive at the address specified in the final notice of sanction or notice of payment hold;

(C) include a statement as to the specific issues, findings, and/or legal authority in the notice letter with which the person disagrees;

(D) state the basis for the person's contention that the specific issues or findings and conclusions of OIG are incorrect;

(E) specify whether the person requests an administrative contested case hearing at HHSC Appeals Division or SOAH; and

(F) be signed by the person or an attorney for the person. No other person or party may request a hearing for or on behalf of the subject of the sanction.

(4) Other than a final notice of overpayment, an administrative contested case hearing for a final notice of a sanction will be held at the HHSC Appeals Division. An administrative contested case hearing for a final notice of overpayment may be held at the HHSC Appeals Division or at SOAH. A payment hold hearing will be held at SOAH.

(5) The costs for an administrative contested case hearing or payment hold hearing held at SOAH will be borne by OIG and the

provider unless otherwise determined by the administrative law judge for good cause at the hearing.

(A) OIG and the provider will each be responsible for:

- (i) one-half of the costs charged by SOAH;
- (ii) one-half of the costs for attending and transcribing the hearing by the court reporter;
- (iii) the party's own costs related to the hearing, including the costs associated with preparation for the hearing, discovery, depositions, and subpoenas, service of process and witness expenses, travel expenses, and investigation expenses; and
- (iv) all other costs associated with the hearing that are incurred by the party, including attorney's fees.

(B) If the person or an attorney for the person submits a timely written request for an administrative contested case hearing or a payment hold hearing at SOAH, OIG will:

- (i) contact the person about scheduling the hearing;
- (ii) confer with the person or person's attorney to determine an estimate of how many days the hearing is anticipated to last;
- (iii) provide the person or person's attorney with an estimate of the costs charged by SOAH and by the court reporter for attending and transcribing the hearing based on the number of days;
- (iv) collect a security cash deposit from the person for one-half of the estimated costs in the form of either a certified or cashier's check or money order payable to OIG to be retained in an account established by OIG until OIG reimburses SOAH upon receipt of its bill;
- (v) base the payment on the schedule of estimated costs as posted on OIG's website; and
- (vi) provide an accounting of the funds expended by the person and OIG for SOAH and transcription costs upon payment to SOAH and the court reporter.

(6) OIG will contact the HHSC Appeals Division or SOAH after receipt of the security deposit, as applicable, to request that the hearing be docketed. OIG will file a docketing request not later than the 60th day after completing the informal resolution process and receiving the cash security deposit, if applicable.

(7) Administrative contested case hearings conducted by the HHSC Appeals Division will be governed by Chapter 357 of this title (relating to Hearings).

(8) Administrative contested case hearings conducted by SOAH will be governed by Chapters 155, 157, 159, 161, and 163 of this title (relating to Rules of Procedure; Temporary Administrative Law Judges; Rules of Procedure for Administrative License Suspension Hearings; Requests for Records; and Arbitration Procedures for Certain Enforcement Actions of the Texas Department of Aging and Disability Services).

(c) If a provider is subject to a payment hold and requests both an administrative contested case hearing and an informal resolution meeting, OIG will schedule and conduct the informal resolution process before setting the hearing. The hearing and all discovery will be abated until the informal resolution process has been exhausted without settlement or resolution of the payment hold.

(d) Following an administrative contested case hearing, other than a payment hold requested by the state's Medicaid fraud control unit, a provider may appeal a final administrative order by filing a petition for judicial review in a district court in Travis County.

(e) If a person who has received notice of a final sanction or notice of a payment hold fails to timely request an administrative contested case hearing, the sanction will become final and unappealable.

§371.1617. Finality and Collections.

(a) Unless otherwise provided in this subchapter, a sanction becomes final upon any of the following events:

- (1) expiration of 30 calendar days after receipt of the notice of final sanction or notice of a payment hold if no timely request for appeal of imposition of the sanction is received by OIG;
- (2) execution of a settlement agreement with OIG; or
- (3) a final order entered by the Executive Commissioner or his designee after an administrative contested case hearing.

(b) The effect of a final sanction resulting in recoupment, restricted reimbursement, assessment of damages, penalties, recoupment of audit overpayments, or other financial recovery is to create a final debt in favor of the State of Texas. Within 30 days after the date on which the sanction becomes final, the person must:

- (1) pay the amount of the overpayment, assessment of damages, penalties, or other costs;
- (2) negotiate and execute a payment plan, the terms of which are granted at the sole discretion of OIG; or
- (3) file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.

(c) If a final payment plan agreement is not executed by all parties or full restitution is not received within 30 calendar days after finality, the debt will be delinquent and one or more vendor holds may be placed on the provider's payment claims and account by HHSC, the Medicaid/CHIP division, the state Comptroller, the OAG Collection Division, or any other state agency with authority to interrupt payments in satisfaction of a debt to the state.

(d) OIG may, at its sole discretion, agree to suspend any vendor holds pending negotiations of payment plan terms.

(e) When a debt is delinquent, OIG may collect funds owed. Collection methods may include:

- (1) placing the person on prepayment or postpayment hold. Funds withheld by a payment hold may be used to satisfy any portion of an unpaid assessment of overpayments, damages, or penalties;
- (2) using a collection agency;
- (3) collecting from Medicare for Medicaid debts;
- (4) requesting the State Comptroller to place a hold on all state voucher revenue for the person from all state agencies;
- (5) requesting the OAG's Collection Division to file suit in district court or engage in other collection efforts;
- (6) requesting the OAG to seek an injunction prohibiting the person from disposing of an asset(s) identified by OIG as potentially subject to recovery due to the person's fraud or abuse;
- (7) applying any funds derived from forfeited asset(s), after offsetting any expenses attributable to the sale of those assets; and
- (8) receiving and reporting credit information on a person with outstanding debts.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Texas Health and Human Services Commission

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For further information, please call: (512) 424-6900



DIVISION 2. GROUNDS FOR ENFORCEMENT

1 TAC §§371.1653, 371.1655, 371.1659, 371.1663, 371.1667, 371.1669

Statutory Authority

The amendments are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Human Resources Code §32.0322, which directs HHSC to establish certain provider screening, disclosure, and verification criteria by rule. In addition, Texas Government Code §531.102(g)(4) requires HHSC and the State Office of Administrative Hearings to jointly adopt rules regarding security that a provider must advance before a payment hold administrative hearing; and §531.102(g)(7), which requires HHSC, in consultation with the state's Medicaid fraud control unit, to establish exclusions from payment holds.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 3. ADMINISTRATIVE ACTIONS AND SANCTIONS

1 TAC §§371.1703, 371.1705, 371.1707, 371.1709, 371.1711, 371.1713, 371.1715, 371.1717, 371.1719

Statutory Authority

The amendments are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient operation of the Medicaid program; and Texas Human Resources

Code §32.0322, which directs HHSC to establish certain provider screening, disclosure, and verification criteria by rule. In addition, Texas Government Code §531.102(g)(4) requires HHSC and the State Office of Administrative Hearings to jointly adopt rules regarding security that a provider must advance before a payment hold administrative hearing; and §531.102(g)(7), which requires HHSC, in consultation with the state's Medicaid fraud control unit, to establish exclusions from payment holds.

§371.1703. Termination of Enrollment or Contract.

(a) OIG may terminate the enrollment or contract of a person by debarment, suspension, revocation, or other deactivation of participation, as appropriate. OIG may terminate a person's enrollment or contract if it determines that the person committed an act for which a person is subject to administrative actions or sanctions.

(b) When OIG establishes the following by prima facie evidence, OIG must terminate the enrollment or contract from the Medicaid program or any other HHS program of:

(1) a provider or any person with an ownership interest in the provider has been convicted of a criminal offense related to that person's involvement with the Medicare, Medicaid, or CHIP program in the last ten years;

(2) a provider that is terminated or revoked for cause, excluded, or debarred under Title XVIII of the Social Security Act or under the Medicaid program or CHIP program of any other state;

(3) a provider that fails to permit access to any and all provider locations for unannounced or announced on-site inspections required during the provider screening process as provided by rule;

(4) a provider when any person with an ownership or control interest or who is an agent or managing employee of the provider fails to submit timely and accurate information, including fingerprints if required by CMS or state rule, and cooperate with any and all screening methods required during the provider screening process as provided by rule, statute, rule, or regulation;

(5) a provider that fails to submit sets of fingerprints in a form and manner to be provided by rule;

(6) a person that fails to repay overpayments under the Medicaid program or CHIP;

(7) a person that owns, controls, manages, or is otherwise affiliated with and has financial, managerial, or administrative influence over a provider who has been suspended or prohibited from participating in Medicare, Medicaid or CHIP;

(8) a provider that fails to identify or disclose in the provider screening process for any HHS program:

(A) all persons with a direct or indirect ownership or control interest, as defined by 42 CFR §455.101;

(B) all information required to be disclosed in accordance with 42 CFR §1001.1101, 42 CFR chapter 455, or other by statute, rule, or regulation; or

(C) all agents or subcontractors of the provider:

(i) if the provider or a person with an ownership interest in the provider has an ownership interest in the agent or subcontractor; or

(ii) if the provider engages in a business transaction with the agent or subcontractor that meets the criteria specified by 42 CFR §455.105; or

(9) a provider that has been excluded or debarred from participation in a state or federally funded health care program as a result of:

(A) a criminal conviction or finding of civil or administrative liability for committing a fraudulent act, theft, embezzlement, or other financial misconduct under a state or federally funded health care program; or

(B) a criminal conviction for committing an act under a state or federally funded health care program that caused bodily injury to:

- (i) a person who is 65 years of age or older;
- (ii) a person with a disability; or
- (iii) a person under 18 years of age.

(c) When OIG establishes the following by prima facie evidence, OIG may terminate the enrollment or contract from the medical assistance program or any other HHS program of:

(1) a provider if a criminal history check reveals a prior criminal conviction;

(2) a provider that has failed to bill for medical assistance or refer clients for medical assistance within a 12-month period;

(3) a provider that has been excluded or debarred from participation in any federally funded health care program not described in subsection (b)(2) of this section;

(4) a provider that has falsified any information on its application for enrollment as determined by OIG;

(5) a provider whose identity on an application for enrollment cannot be verified by OIG;

(6) a person that commits a program violation;

(7) a person that is affiliated with a person who commits a program violation;

(8) a person that commits an act for which sanctions, damages, penalties, or liability could be or are assessed by OIG; or

(9) a person that may be terminated for any other reason specified by statute or regulation.

(d) Exceptions.

(1) OIG need not terminate participation if the person or provider voluntarily resigned from participation under Title XVIII of the Social Security Act or under the Medicaid program or CHIP program of any other state, and the resignation was not in lieu of or to avoid exclusion, termination, or any other sanction.

(2) OIG need not terminate participation based on a conviction described in subsection (b)(1) of this section, a termination described in subsection (b)(2) of this section, or a failure to allow access described in subsection (b)(3) of this section if OIG:

(A) determines that termination is not in the best interests of the Medicaid program; and

(B) documents that determination and the rationale in writing.

(e) Notice. Notice of termination includes:

- (1) a description of the termination;
- (2) the basis for the termination;
- (3) the effect of the termination;

(4) the duration of the termination;

(5) whether re-enrollment will be required after the period of termination; and

(6) a statement of the person's right to request an informal resolution meeting or an administrative hearing regarding the imposition of the termination.

(f) Due process.

(1) After receiving a notice of termination, a person has a right to the informal resolution process in accordance with §371.1613 of this subchapter (relating to Informal Resolution Process).

(2) A person may request an administrative hearing after receipt of a final notice of termination in accordance with §371.1615 of this subchapter (relating to Appeals). OIG must receive the written request for a hearing no later than the 15 days after the date the person receives the notice.

(g) Scope and effect of termination.

(1) A person's enrollment agreement or contract will be nullified on the effective date of the termination.

(2) Once a person has been terminated, no items or services furnished will be reimbursed by the Medicaid or other HHS program during the period of termination.

(3) When the termination period expires, the person may need to re-enroll in order to participate as a provider in the Medicaid or other HHS program. Re-enrollment will require the provider to meet all applicable screening requirements, including the payment of any application fees. Re-enrollment will be required if the person was terminated for any grounds in subsection (b) or (c)(1) - (3) of this section.

(4) A person may be terminated from participation in the Medicare program and in the Medicaid program of every other state as a result of the termination.

(5) If, after the effective date of the termination, a terminated person submits or causes to be submitted claims for services or items furnished within the period of termination, the person may be liable to repay any submitted claims or subject to civil monetary penalty liability under §1128A(a)(1)(D), and criminal liability under §1128B(a)(3) of the Social Security Act in addition to sanctions or penalties by OIG.

(6) The termination will become effective and final on the date reflected on the notice of termination in the following circumstances:

(A) OIG determines that the person subject to termination may be placing the health or safety of persons receiving services under Medicaid at risk;

(B) the person who is subject to termination fails:

(i) to grant immediate access to OIG or to a Requesting Agency upon reasonable request;

(ii) to allow OIG or a Requesting Agency to conduct any duties that are necessary to the performance of their official functions; or

(iii) to provide to OIG or a Requesting Agency as requested copies or originals of any records, documents, or other items, as determined necessary by OIG or the Requesting Agency.

(7) If the person timely filed a written request for an administrative hearing, the effective date of termination is the date the hearing officer's or administrative law judge's decision to uphold the termina-

tion becomes final; however, if the administrative law judge upholds a termination for grounds described in paragraph (6) of this subsection, the effective date will be made retroactive to the date of the notice of termination.

(8) Unless otherwise provided in this section, the termination will become final as provided in §371.1617(a) of this subchapter (relating to Finality and Collections).

(h) Reinstatement.

(1) OIG may reinstate a provider's enrollment if OIG finds:

(A) good cause to determine that it is in the best interest of the medical assistance program; and

(B) the person has not committed an act that would require revocation of a provider's enrollment or denial of a person's application to enroll since the person's enrollment was revoked.

(2) OIG must support a determination made under this section with written findings of good cause for the determination.

§371.1711. *Recoupment of Overpayments and Debts.*

(a) OIG recovers overpayments made to providers within the Medicaid or other HHS programs, whether the overpayment resulted from error by the provider, the claims administrator, or an operating agency, misunderstanding, or a program violation.

(b) Application. OIG may recoup from any person if it determines that the person committed an act for which a person is subject to administrative actions or sanctions, including the following:

(1) commits a program violation that leads to the payment of an overpayment;

(2) has failed to pay a debt owed to Medicare or to any Medicaid program as the result of fraudulent or abusive actions by a person participating in such program;

(3) is affiliated with a person who commits a program violation that leads to the payment of an overpayment;

(4) commits an act for which sanctions, damages, penalties, or liability could be or are assessed by OIG; or

(5) who causes or receives an overpayment.

(c) Notice.

(1) Notice of Proposed Recoupment of Overpayment or Debt. When OIG proposes to recoup overpayments or debts, it gives written notice of its intent to recoup by sending a notice of proposed recoupment of overpayment or debt. A notice of proposed recoupment of overpayment or debt includes:

(A) a description of the recoupment, including the amount of the potential identified overpayment;

(B) the basis for the recoupment;

(C) the effect of the recoupment;

(D) the duration of the recoupment; and

(E) a statement of the person's right to request an informal resolution meeting (IRM).

(2) Notice of any proposed recoupment of an overpayment or debt and any damages or penalties related to a proposed recoupment of an overpayment or debt arising out of a fraud or abuse investigation will include:

(A) the specific basis for the overpayment or debt;

(B) a description of facts and supporting evidence;

(C) a representative sample of any documents that form the basis for the overpayment or debt;

(D) the extrapolation methodology;

(E) the calculation of the overpayment or debt amount;

(F) the amount of damages and penalties, if applicable; and

(G) a description of administrative and judicial due process remedies, including the provider's right to seek informal resolution, a formal administrative appeal hearing, or both.

(3) Final notice of overpayment and notice of recoupment of debt. A final notice of overpayment and a notice of recoupment of debt includes:

(A) a description of the recoupment, including the amount of the identified final overpayment or debt;

(B) the basis of the recoupment;

(C) the effect of the recoupment;

(D) the duration of the recoupment;

(E) the requirements of the person for repayment of the overpayment or debt; and

(F) a statement of the person's right to request a formal administrative appeal hearing regarding the recoupment.

(d) Due process.

(1) After receiving a notice of proposed recoupment or overpayment of debt, a person has a right to the informal resolution process in accordance with §371.1613 of this subchapter (relating to Informal Resolution Process).

(2) A person may request an administrative appeal hearing after receipt of a final notice of potential recoupment in accordance with §371.1615 of this subchapter (relating to Appeals). OIG must receive the written request for an appeal no later than 15 days after the date the person receives final notice.

(e) Scope and effect of recoupment. The person who is the subject of a recoupment of overpayment or recoupment of a debt is responsible for payment of all overpayment amounts or debts assessed, plus OIG's and other HHS program's costs related to an administrative appeal and all investigative and administrative costs related to the investigation that resulted in recoupment, if applicable. A final notice of overpayment will become final as provided in §371.1617(a) of this subchapter (relating to Finality and Collections).

§371.1713. *Restricted Reimbursement.*

(a) Application. OIG may restrict the reimbursement of claims for specific procedures, specific services, or both if it determines that the person committed an act for which a person is subject to administrative actions or sanctions, including the following:

(1) commits a program violation;

(2) is affiliated with a person who commits a program violation; or

(3) commits an act for which sanctions, damages, penalties, or liability could be or are assessed by OIG.

(b) Other reasons. OIG may also restrict the reimbursement of claims for specific procedures, specific services, or both, for any other reason specified by statute or regulation.

(c) Notice. Notice of restricted reimbursement includes:

- (1) a description of the restricted reimbursement;
- (2) the basis for the restricted reimbursement;
- (3) the effect of the restricted reimbursement;
- (4) the duration of the restricted reimbursement; and
- (5) a statement of the person's right to request an informal resolution meeting (IRM) or an administrative hearing regarding the imposition of the restricted reimbursement.

(d) Due process.

(1) After receipt of a notice of restricted reimbursement, a person has a right to the informal resolution process in accordance with §371.1613 of this subchapter (relating to Informal Resolution Process).

(2) A person may request an administrative appeal hearing after receipt of a final notice of restricted reimbursement in accordance with §371.1615 of this subchapter (relating to Appeals). OIG must receive the written request for an appeal no later than 15 days after the date the person receives the notice.

(e) Scope and effect of restricted reimbursement.

(1) Once a person is placed on restricted reimbursement, payment of Medicaid or other HHS program claims for specific procedures or services will be limited or denied indefinitely or for a specified period of time.

(2) A person may be eligible to be paid for certain other services during the time the person is on restricted reimbursement.

(3) The restricted reimbursement will become effective and final on the date reflected on the notice of restricted reimbursement in the following circumstances:

(A) OIG determines that the person subject to restricted reimbursement may be placing the health or safety of persons receiving services under Medicaid at risk; or

(B) a person who is subject to restricted reimbursement fails:

(i) to grant immediate access to OIG or to a Requesting Agency upon reasonable request;

(ii) to allow OIG or a Requesting Agency to conduct any duties that are necessary to the performance of their official functions; or

(iii) to provide to OIG or a Requesting Agency as requested copies or originals of any records, documents, or other items, as determined necessary by OIG or the Requesting Agency.

(4) If the person timely filed a written request for appeal, the effective date of restricted reimbursement is the date the hearing officer's or administrative law judge's decision to uphold the restricted reimbursement becomes final; however, if the administrative law judge upholds a restricted reimbursement for grounds described in paragraph (3) of this subsection, the effective date will be made retroactive to the date of the notice of restricted reimbursement.

(5) Unless otherwise provided in this section, the restricted reimbursement will become final as provided in §371.1617(a) of this subchapter (relating to Finality and Collections).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 26, 2014.

TRD-201401336
 Jack Stick
 Chief Counsel
 Texas Health and Human Services Commission
 Effective date: April 15, 2014
 Proposal publication date: January 24, 2014
 For further information, please call: (512) 424-6900



TITLE 10. COMMUNITY DEVELOPMENT
PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION
SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.1

The Texas Department of Housing and Community Affairs ("Department") adopts new §1.1, regarding Reasonable Accommodation Requests, without changes to the proposed text as published in the December 27, 2013, issue of the *Texas Register* (38 TexReg 9427) and it will not be republished.

REASONED JUSTIFICATION. The purpose of the rule is to provide the process for requesting a Reasonable Accommodation. The adopted new rule provides applicable definitions, a process whereby a written request may be made, and the required contents of the request and provides for submission of the request to the Executive Director or his designee.

The Department accepted public comments between December 27, 2013, and January 29, 2014. No comments were received concerning the new section.

The Board approved the final order adopting the new section on February 20, 2014.

STATUTORY AUTHORITY. The new section is adopted pursuant to Texas Government Code Annotated §2306.053 which generally authorizes the Department to adopt rules and, more specifically, Texas Government Code Annotated §2306.092 which authorizes the Department to promulgate rules regarding its programs.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 25, 2014.

TRD-201401304
 Timothy K. Irvine
 Executive Director
 Texas Department of Housing and Community Affairs
 Effective date: April 14, 2014
 Proposal publication date: December 27, 2013
 For further information, please call: (512) 475-3959



10 TAC §1.2

The Texas Department of Housing and Community Affairs ("Department") adopts amendments to §1.2, regarding Department Complaint System, without changes to the proposed text as published in the December 27, 2013, issue of the *Texas Register* (38 TexReg 9428). The section will not be republished. The purpose of the amendment is to clarify responsibilities and definitions, as well as updating the rule to reflect needed changes in Department practices and to comply with Texas Government Code §2306.066(a) - (c), which requires the Department to have a policy to handle complaints. A separate notice was simultaneously published in the December 27, 2013, issue of the *Texas Register* (38 TexReg 9427) to provide notification of a four-year rule review in accordance with Texas Government Code §2001.039.

REASONED JUSTIFICATION. The purpose of the amendment is to clarify responsibilities and definitions, as well as updating the rule to reflect needed changes in Department practices and to comply with Texas Government Code §2306.066(a) - (c), which requires the Department to have a policy to handle complaints.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS. Public comments were accepted from December 27, 2013, through January 29, 2014. No public comments were received.

The Board approved the adoption of these amendments on February 20, 2014.

STATUTORY AUTHORITY. The amendment is adopted pursuant to Texas Government Code Annotated §2306.053, which generally authorizes the Department to adopt rules, and more specifically Texas Government Code Annotated §2306.092, which authorizes the Department to promulgate rules regarding its programs, and Texas Government Code §2306.066(a) - (c), which requires the Department to have a policy to handle complaints. The amendment affects no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 25, 2014.

TRD-201401303

Timothy K. Irvine

Executive Director

Texas Department of Housing and Community Affairs

Effective date: April 14, 2014

Proposal publication date: December 27, 2013

For further information, please call: (512) 475-3959



TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 7. GAS SERVICES DIVISION

SUBCHAPTER B. SPECIAL PROCEDURAL RULES

16 TAC §7.230

The Railroad Commission of Texas (Commission) adopts amendments to §7.230, relating to Contents of Notice, without changes to the proposed text as published in the January 3, 2014, issue of the *Texas Register* (39 TexReg 18). The amendments implement authority delegated to the Commission under Texas Utilities Code, §104.103, pursuant to Senate Bill (SB) 885, 83rd Legislature (Regular Session, 2013). The amendments allow a gas utility to provide notice of its intent to increase rates by e-mail to each directly affected customer.

The Commission received no comments on the proposal.

The Commission adopts a minor clarification to the mailing address provided in subsection (b)(5) and adopts new subsections (c), (d), and (e) to address the statutory changes made by SB 885. New subsection (c) allows a gas utility to provide notice of rate increases by electronic transmission (e-mail) to each directly affected customer if the customer has given written consent (which may be withdrawn) for the utility to do so, and if a valid e-mail address is available to the utility for that purpose. New subsection (d) requires the utility, in the event that it becomes aware that notice by e-mail has failed, to provide notice to the affected customer by mail within 30 days of the date notice of the proposed increase is issued. New subsection (e) requires the subject heading of the e-mail providing notice of a proposed rate increase to include the words "Notice of Proposed Rate Increase" and requires that the notice be the only information included in the body of that e-mail. The Commission redesignates current subsection (c) as subsection (f).

The Commission adopts the amendments pursuant to Texas Utilities Code, §104.001, which authorizes the Commission to adopt rules to ensure compliance with the obligations of gas utilities; and §104.103, which requires a gas utility to provide notice of a proposed increase to affected persons as required by Commission rules.

Texas Utilities Code, §104.001 and §104.103, are affected by the adopted amendments.

Statutory authority: Texas Utilities Code, §104.001 and §104.103.

Cross-reference to statute: Texas Utilities Code, §104.001 and §104.103.

Issued in Austin, Texas, on March 25, 2014.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 25, 2014.

TRD-201401306

Cristina Martinez Self

Rules Attorney, Office of General Counsel

Railroad Commission of Texas

Effective date: April 14, 2014

Proposal publication date: January 3, 2014

For further information, please call: (512) 475-1295



SUBCHAPTER D. CUSTOMER SERVICE AND PROTECTION

16 TAC §7.475

The Railroad Commission of Texas (Commission) adopts new §7.475, relating to Municipality Contact Information for Notice of Disconnection for Non-Payment for Non-submetered Master Metered Multifamily Properties, without changes to the proposed text as published in the January 3, 2014, issue of the *Texas Register* (39 TexReg 20). The Commission adopts the new rule to implement authority delegated to the Commission in Texas Utilities Code, §104.353, pursuant to House Bill (HB) 1772, 83rd Legislature (2013, Regular Session).

The Commission received one comment on the proposal from the Atmos Cities Steering Committee ("ACSC"). ACSC supported the rule, but suggested that subsection (c) be revised to read: "The Commission shall make the municipalities' contact information available to the public *by publishing it on the Commission's website.*" The Commission agrees with ACSC's comment that HB 1772 does not prescribe the method by which the Commission must provide this information to the public, but disagrees with the suggested wording change. Publishing the information on the Commission's website is only one method the Commission may use. The Commission makes no change to the rule.

New §7.475(a) states that a municipality may provide the Commission with the contact information for its authorized representative designated to receive the notice described in Texas Utilities Code, §104.352. New subsection (b) states that a municipality shall provide its authorized representative's contact information by mail to Director, Gas Services Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967, or through any other method as indicated on the Commission's website. New subsection (c) states that the Commission shall make the municipalities' contact information available to the public.

The Commission adopts new §7.475 pursuant to Texas Utilities Code, §104.353, which requires the Commission by rule to develop a mechanism by which a municipality may provide the Commission with the contact information of the municipality's authorized representative to whom the notice required under Texas Utilities Code, §104.352, must be sent.

Texas Utilities Code, §§104.351 - 104.353, are affected by the adopted new rule.

Statutory authority: Texas Utilities Code, §§104.351 - 104.353.

Cross-reference to statute: Texas Utilities Code, §§104.351 - 104.353.

Issued in Austin, Texas, on March 25, 2014.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TRD-201401307

Cristina Martinez Self

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Railroad Commission of Texas

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Proposal publication date: January 3, 2014

For further information, please call: (512) 475-1295



PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS SUBCHAPTER C. INFRASTRUCTURE AND RELIABILITY

16 TAC §25.54

The Public Utility Commission of Texas (commission) adopts new §25.54, relating to Cease and Desist Orders, with changes to the proposed text as published in the October 18, 2013, issue of the *Texas Register* (38 TexReg 7228). The rule implements statutory provisions granting the commission the authority to issue cease and desist orders to electric market participants in certain circumstances. This new section is adopted under Project Number 41659.

No party requested that a public hearing be held.

The commission received comments on the proposed new section from CPS Energy, Luminant, NRG Energy, Inc. (NRG), the Retail Electric Provider Coalition (REP Coalition), Southwestern Public Service Company (SPS), and Texas Competitive Power Advocates (TCPA).

Responses to Questions Included in Proposal for Publication

(1) Should the commission further delineate the following terms in proposed §25.54(b)(1) - (4)?

- a. "A threat to continuous and adequate electric service,"
- b. "Hazardous,"
- c. "Immediate danger to the public safety," and
- d. "An immediate injury to a customer of electric services" that is "incapable of being repaired or rectified by monetary compensation."

For example, is a definition needed for the term "incapable of being repaired or rectified by monetary compensation" to clarify whether a Retail Electric Provider (REP) that is going out of business, commingling customer deposit funds, and depleting the remaining deposits would satisfy the conditions required to issue a cease and desist order? Alternatively, would the approaching expiration of a REP's letter of credit meet any of the conditions?

In response to the hypothetical situations posed by the commission in the proposal for publication, NRG, Luminant, and the REP Coalition asserted that neither example posed by the commission would satisfy the requirements to issue a cease and desist order. NRG posited that neither hypothetical satisfies the statutory criteria in the proposed subsections because neither situation relates to customer safety or system reliability, and in both hypotheticals any injury would be capable of being rectified through monetary compensation. Similarly, Luminant argued that the hypothetical regarding a REP commingling funds would not satisfy the conditions required to issue a cease and desist order because the injury could be rectified by monetary compensation. Luminant did suggest that a REP incorrectly using a move-out protocol to disconnect a customer for non-payment during an extreme weather emergency would be more likely to satisfy the conditions required to issue a cease and desist.

The REP Coalition reasoned that in the first hypothetical a monetary remedy is available and in the second hypothetical there is no violation of PURA or commission substantive rules (a condition precedent which was not required by the proposal but is

recommended by the REP Coalition). Alternatively, the REP Coalition suggested two hypotheticals where they assert a REP may be subject to a cease and desist order. The REP Coalition suggested that a REP who attempts to circumvent the extreme weather disconnect rules, during an extreme weather event, by coding customers as "move outs" rather than disconnects for non-payment may be subject to a cease and desist order. The REP Coalition also suggested that a REP who is selling retail electric products to end-use customers without a REP certificate may be subject to a cease and desist order.

Luminant recommended including guidelines for the commission to follow when exercising its authority to issue a cease and desist order. NRG did not recommend that the terms listed in subsection (b)(1) - (4) be further defined because the terms closely mirror the language adopted by the Legislature in HB 1600 which granted the commission cease and desist authority and authorized this rulemaking. The REP Coalition advocated that the "threat to continuous and adequate electric service" condition should be clarified in the preamble.

Commission response

The commission agrees that the hypothetical situations in which a REP is commingling funds and going out of business or has an expiring letter of credit would not in isolation meet the requirements for the commission to issue a cease and desist order against the REP because the harm from the REP's actions would be repairable with monetary compensation. The commission further agrees that the example situations described by the REP Coalition may be appropriate for issuance of a cease and desist order. The commission declines to include guidelines, as recommended by Luminant, for the commission to follow when exercising its authority to issue a cease and desist order because the commission agrees with NRG that the terms closely mirror the language adopted by the Legislature in HB 1600. Additionally, the commission declines to give further clarification to the "threat to continuous and adequate electric service" condition because the term mirrors the statutory language, which provides market participants with reasonable expectation of when a cease and desist order might be issued.

(2) If the commission should further define the terms listed above, please provide suggestions.

Luminant's recommended guidelines for issuance of a cease and desist order included requiring the commission to apply threshold standards used for issuance of temporary restraining orders, to find a facial violation of PURA or commission rules, and to determine whether an acute emergency situation presents the risk of imminent and irreparable actual harm to a particular person or property that is impossible to rectify with monetary compensation.

While NRG did not recommend that the terms listed in subsection (b)(1) - (4) be further defined, NRG instead requested that further guidance be provided in the preamble and recommended that basic qualifications should be added to subsection (b) in order to underline the severity and harm warranting the commission to issue a cease and desist notice. NRG recommended that any action meriting a cease and desist order must be a clear violation of PURA or the commission's substantive rules, continuing in nature, and irresolvable through the commission's current oversight authority.

The REP Coalition suggested that the "threat to continuous and adequate electric service" condition, which it argues is similar to NERC and ERCOT "adequacy standards," should apply to

conduct that threatens electric reliability and would generally not apply to REP's conduct in relation to customers. The REP Coalition also asked the commission to provide guidance in the preamble as to whether there is a clear distinction between subsection (b)(2) and (3) or if there is no effective distinction and the terms are considered together in the manner in which they are used in §25.8(b)(3)(B). The REP Coalition advocated that these terms are more likely applicable to larger scale or systemic issues (*i.e.*, grid instability). The REP Coalition noted the similarity between the condition in subsection (b)(4) and the threshold standard applied by courts when determining whether a temporary injunction will prevent irreparable harm. The REP Coalition recommended that the commission apply the standard developed in temporary injunction cases, in which injuries are irreparable only when they "cannot be undone through monetary remedies." Finally, the REP Coalition argued that delineating the standard in the preamble for this condition will provide regulatory consistency for consumers and market participants.

Commission response

The commission declines to adopt Luminant's suggested guidelines for issuance of a cease and desist order. However, the commission agrees with NRG's recommendation to provide further guidance to the scope of the commission's cease and desist authority in the preamble while relying on the rule definitions which mirror the statutory language. The commission finds that issuance of a cease and desist order is an extraordinary remedy and that all remedies, including assessment of administrative penalties and disgorgement of excess revenues, should be considered in the determination of whether issuing a cease and desist order is the most appropriate remedy. The commission also recommends that whether the conduct is continuing in nature, or is likely to recur, should be a factor for consideration when a cease and desist order is issued. However, the commission disagrees with NRG that any action meriting a cease and desist order should not be able to be rectified through an administrative penalty or disgorgement proceeding. PURA grants the commission authority to seek a variety of remedies to ensure compliance with PURA and commission rules, as well as to ensure that electric utility service is safe, adequate, and reliable. The remedies are not inherently mutually exclusive and the commission should retain the ability to select the best available remedy. Additionally, PURA §15.103 provides that the commission may issue a cease and desist order solely under Subchapter D or in conjunction with other applicable law.

The commission recognizes that there may be similarities between the "threat to continuous and adequate electric service" condition and the NERC and ERCOT "adequacy standards." The commission agrees with the REP Coalition that there is no effective distinction between the terms "hazardous" conduct and that which "creates an immediate danger to the public safety," and that the terms are to be considered in the manner in which they are used in §25.8(b)(3)(B). The commission also finds no effective distinction between the terms "incapable of being repaired or rectified by monetary compensation" and the standard suggested by the REP coalition, which inquires whether an injury "cannot be undone through monetary remedies." The terms in subsection (b)(4) mirror the statutory language and provide market participants with reasonable expectation of when a cease and desist order might be issued.

(3) If a cease and desist order is issued by the executive director, should the executive director be required to immediately notify each Commissioner of the order to provide them an opportunity

to arrange to discuss the order as soon as possible, whether at a regularly scheduled open meeting or an emergency open meeting?

The REP Coalition argued that the rule should not universally delegate authority to the executive director to issue a cease and desist order. The REP Coalition asserted that a blanket delegation is unnecessary as an emergency meeting may be called in as little as two hours. Additionally, recent changes in open meetings statutes allow the commission to conduct an open meeting by teleconference, thus eliminating logistical problems with scheduling an emergency open meeting. If the commission wishes to delegate cease and desist authority, the REP Coalition argued the commission should limit the delegation to a specific type of harm or conduct. The REP Coalition suggested language that would allow the commission to delegate the authority to issue cease and desist orders to the executive director in relation to conduct specified by the commission and for a time period of no more than 180 days.

Furthermore, the REP Coalition argued that the authority to issue a cease and desist order should not be delegated to the executive director without the delegation publicly occurring within the context of an open meeting. The REP Coalition argued that transparency in delegation is critical and that the Government Code requires that the commission can only take action at a properly noticed open meeting. Additionally, the REP Coalition asserted that PURA §15.104(b) indicates that a delegation of authority to issue a cease and desist order would publicly occur within the context of an open meeting. Thus, the REP Coalition recommended the commission amend the rule to reflect that a delegation of the authority to issue a cease and desist order would be decided at an open meeting. The REP Coalition argued that if the authority to issue a cease and desist order is delegated, the rule should require the executive director to immediately notify each Commissioner of the order and notice it for the next scheduled open meeting or, if the circumstances dictate, at an emergency open meeting. The REP Coalition argued that transparency in the exercise of the delegated authority by the executive director is equally as important as transparency in the agency's action to delegate the authority.

NRG commented that it is appropriate for the executive director to issue a cease and desist order on behalf of the commission. However, each Commissioner should be notified prior to such issuance, if possible. Luminant preferred that the commission retain the exclusive authority to issue cease and desist orders. If this authority is delegated to the executive director, Luminant suggested the executive director immediately call an emergency open meeting, at which the commission would review the order.

TCPA advocated that the executive director should be required to notify each Commissioner as soon as possible after issuing the cease and desist order to give Commissioners the opportunity to discuss the order, whether at a regularly scheduled open meeting or emergency open meeting. TCPA argued that notifying the Commissioners would provide a safeguard against issuing a cease and desist order in error due to the haste in which it was issued, assist in swift clarification and consistent implementation of commission policies, and allow the commission to determine whether to convene an emergency open meeting to evaluate the order or conduct it proscribes and whether to adopt any other measures.

Commission response

The commission disagrees with Luminant that the Commissioners should retain the exclusive authority to issue a cease and desist order. The delegation of authority to the executive director allows the commission to act in an expedient manner if necessary to prevent the occurrence of hazardous or potentially hazardous conduct. The commission agrees with the REP Coalition that the option to delegate the authority to issue a cease and desist order to the executive director should be renewed on a periodic basis at a commission open meeting. However, the commission finds that a time period of up to two years is more practicable than the 180 day term suggested by the REP Coalition. The commission further agrees with the REP Coalition and NRG that when a cease and desist order is issued by the executive director, each Commissioner should be notified prior to the issuance when possible and, if not possible, immediately afterwards. While the commission agrees that an emergency open meeting may be needed after a cease and desist order is issued, the commission declines to require that the cease and desist order be noticed for an open meeting because public discussion of the order may not be necessary and because the procedures for placing an item on the open meeting agenda as an emergency item are thoroughly covered by the APA and the commission's procedural rules.

Section 25.54(b)

TCPA argued that "practicable" should be defined in order to give "greater precision" to the rule and that the definition of "practicable" should be defined in such a way to limit ex parte orders to only exigent circumstances. TCPA compares a cease and desist order to a temporary restraining order (TRO) in support of the argument that notice and opportunity for a hearing is "practicable" if there is no undue burden or unreasonable risk that illegal and harmful conduct will continue. CPS Energy suggested that the rule should provide further guidance on the meaning of "practicable" by defining the term or including examples of situations when notice and opportunity for a hearing are not practicable.

The REP Coalition requested that the commission modify the rule to require that a violation of PURA or commission substantive rule must occur for the commission to issue a cease and desist order. The REP Coalition pointed to the Sunset Advisory Commission's citation of TDI as another agency that possessed cease and desist power to support their argument that Sunset intended the commission to reflect the requirement in TDI's rule that a cease and desist order be issued only when there is a violation. The REP Coalition recommended adding this condition precedent to subsection (b). TCPA advocated adding a required finding of a violation of PURA or the commission's substantive rules as a threshold criterion in subsection (b). TCPA argued that it is implied in the statute but expressly including the requirement in the rule would provide clarification.

Commission response

The commission finds that subsection (b) uses the term "practicable" in its plain meaning and including a dictionary definition of the term is unnecessary as statutory construction calls for terms to be defined in their plain meaning. While the TRO standard as suggested by TCPA may provide guidance to the commission in identifying extraordinary circumstances that warrant use of the cease and desist authority, the commission does not find it necessary to include specific guidelines in the rule.

The commission agrees that a cease and desist order must identify a violation of a statute or rule as reasonably believed by commission staff. The commission finds that the Legislature in-

tended that the cease and desist authority be an extraordinary remedy. This authority should be exercised with great prudence. The commission believes that requiring an alleged violation to be identified in the cease and desist order honors the legislative intent of the statute and modifies the rule accordingly.

Section 25.54(c)

TCPA requested that the proposed order identify which law or rule the company is violating to afford the company full notice. TCPA suggested the rule language be modified to include this requirement. TCPA requested that the commission revise subsection (c) to more closely resemble the statute to clarify that "practicable" modifies both notice and hearing.

Commission response

The commission agrees with TCPA that the proposed order should identify the statute or rule that commission staff reasonably believes the market participant is violating. The commission finds that the rule adequately conveys that both notice and opportunity for a hearing must be provided if practicable and thus declines to modify the rule language.

Section 25.54(c)(1)

CPS Energy expressed concern about the notice procedures when notice and opportunity for a hearing is not practicable. CPS Energy suggested using the term "proposed cease and desist order" to clarify that a cease and desist order is not effective until after the market participant has received notice and an opportunity for a hearing. Luminant also recommended additional language to clarify the notice procedures when notice and opportunity for a hearing is not practicable. Similarly, NRG expressed concern that subsection (c)(1) could be read to require that a cease and desist order could be issued immediately, without allowing a market participant the opportunity to request a hearing. NRG recommended the subsection describing the content of the order be amended to clarify that the order is that which is issued after a hearing or in the instance that the market participant does not request a hearing.

TCPA commented that subsection (c)(1) fails to indicate how a market participant may exercise its opportunity for a hearing and confuses the sequence in which notice would relate to a request for hearing. TCPA advocated revising the subsection to make it consistent with statutory language.

Commission response

The commission clarifies that when notice and opportunity for hearing is practicable, notice of the cease and desist order must be provided according to contested case provisions in Chapter 2001, Texas Government Code, and the order will be issued after the requisite notice and opportunity for hearing have been provided. To further address the concerns of market participants regarding the issuance of a cease and desist order when notice and opportunity for hearing is practicable, the commission adopts a requirement that the notice shall include a description of the market participant's violations, as reasonably believed by commission staff, of PURA, commission rules. The notice shall also include a proposed order that contains a statement of the charges. The commission clarifies that a proposed order issued when notice and opportunity for a hearing is practicable does not require the market participant to immediately cease and desist the conduct at issue.

Section 25.54(c)(1)(B)

Luminant recommended that the rule clarify who within the commission has the authority to provide telephonic or other means of actual notice to the market participant subject to a cease and desist order. Luminant suggested the rule require notice to be communicated by the commission's executive director or oversight and enforcement director to the market participant's authorized representative, chief executive officer, chief financial officer, or general counsel. TCPA also recommended that the rule be revised to require "telephonic notice" to be in the form of a live conversation with an authorized representative of the market participant. Luminant further recommended that actual notice must include all of the information required to be in the proposed order and TCPA suggested that the rule be revised to require the entire body of the mailed notice to be relayed in the conversation. NRG recommended that the option to serve the notice through telephonic means should be removed.

Commission response

The commission agrees with NRG's recommendation to remove the telephonic notice requirement. The commission acknowledges that telephonic notice may create questions of fact as to whether actual notice was received. If the commission only has the ability to contact the market participant by phone, then the commission can request that the market participant provide an address or fax number to provide written notice. In the case of a cease and desist order, the speed in which the order may be implemented will likely be important. Notice is sufficient when the market participant is directly and personally made aware of the existence of the particular fact in question. The commission's intent is to ensure that a cease and desist order will be effective as soon as the market participant receives a written order.

Section 25.54(c)(2)

NRG recommended, in the event notice and opportunity for a hearing is not practicable, the order contain a proposed hearing date that is within ten days of the date the market participant receives the order. Conversely, NRG recommended that if the date of a hearing is not stated in the order, and the market participant subject to the order requested a hearing within ten days, the cease and desist order should be set aside ten days after notice of the cease and desist order was received.

The REP Coalition argued that subsection (c)(2) fails to establish a timeline for the commission to issue a ruling on the hearing reviewing the ex parte cease and desist order. The REP Coalition contended that because a cease and desist order is not automatically stayed upon requesting a hearing, the cease and desist order could remain in effect for an indefinite and uncertain period of time. Thus, the REP Coalition recommended the commission revise subsection (c)(2) to require an order or proposal for decision be issued within seven days of the hearing.

Additionally, the REP Coalition recommended that a cease and desist order issued without notice and opportunity for a hearing include a statement describing why notice and opportunity for a hearing was not practicable.

Commission response

The commission disagrees that a cease and desist order issued without notice and opportunity for a hearing should include a proposed hearing date. PURA requires that a hearing reviewing a cease and desist order shall be governed by Chapter 2001, Texas Government Code, which includes procedures and deadlines for issuance of a proposal for decision. Furthermore, determining a hearing date before the order is issued may be pro-

cedurally impractical because the commission is likely to refer a contested case hearing to the State Office of Administrative Hearings (SOAH). In this instance a hearing date may not be set at SOAH without the proceeding first being referred to and accepted by SOAH. The commission also disagrees that the cease and desist order should be automatically set aside if a hearing cannot be scheduled within ten days. The deadline places an arbitrary expiration on the order that may hinder the commission's ability to prevent a market participant from engaging in hazardous conduct. The commission agrees with the REP Coalition that a cease and desist order issued without notice and opportunity for a hearing should state the specific reasons why notice and an opportunity for a hearing was not practicable.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2013) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically PURA §15.102, which requires the commission to adopt rules to implement the commission's cease and desist authority.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, and 15.101 - 15.107.

§25.54. *Cease And Desist Orders.*

(a) *Application.* This section is applicable to electric utilities, transmission and distribution utilities, power generation companies, retail electric providers, municipally owned utilities, electric cooperatives, the independent system operator, and any other person regulated under the Public Utility Regulatory Act (PURA) Subtitle B, collectively referred to as "market participants," and shall refer to the definitions provided in PURA §11.003 and §31.002.

(b) *Authority to issue order.* The commission or the executive director, who has been authorized pursuant to subsection (c) of this section, may issue a cease and desist order if the commission or executive director determines that the alleged conduct of a market participant meets one or more of the following conditions:

- (1) The conduct poses a threat to continuous and adequate electric service;
- (2) The conduct is hazardous;
- (3) The conduct creates an immediate danger to the public safety; or
- (4) The conduct is causing or can be reasonably expected to cause an immediate injury to a customer of electric services and that the injury is incapable of being repaired or rectified by monetary compensation.

(c) *Delegation of authority.* The commission may delegate the authority to issue a cease and desist order to the executive director. The authority to issue a cease and desist order shall be delegated at an open meeting and may remain in effect for up to two years.

(d) *Procedure.* The commission must provide notice and opportunity for a hearing before issuing a cease and desist order if such notice is practicable. If such notice is not practicable, the commission may issue a cease and desist order without providing notice and opportunity for a hearing.

(1) If notice and opportunity for a hearing is practicable. If notice and opportunity for a hearing is practicable, the commission shall follow these procedures:

(A) *Notice and Opportunity for Hearing.* The commission shall provide notice and opportunity for hearing pursuant to Chapter 2001, Texas Government Code. The notice shall include a description of the violation(s) of PURA or this chapter that the market participant's conduct is alleged to violate and specific facts that support each allegation as reasonably believed by commission staff and a proposed order that contains a statement of the charges. Notice of a proposed order shall be given not later than the 10th day before the date set for a hearing.

(B) *Hearing.* A hearing on a cease and desist order is a contested case under Chapter 2001, Texas Government Code. The commission may hold a hearing on a cease and desist order or may refer the case to be heard by the State Office of Administrative Hearings.

(C) *Service of Cease and Desist Order.* If, after notice and opportunity for a hearing, the commission issues a cease and desist order, then the commission shall serve the cease and desist order by registered or certified mail, return receipt requested, to the market participant's last known address. A cease and desist order is effective upon the earlier of receipt of actual notice or three days after the order is mailed.

(D) *Content of Cease and Desist Order.* A cease and desist order shall be served upon the market participant affected by that order and shall:

(i) Contain a statement of the charges and a description of the alleged violation(s) of PURA or this chapter that the market participant's conduct has been found to have violated and specific facts that support each violation; and

(ii) Require the market participant immediately to cease and desist from the acts, methods, or practices stated in the order.

(2) *Notice and opportunity for a hearing not practicable.* If notice and opportunity for a hearing is not practicable, the commission shall follow these procedures:

(A) *Contents of order.* A cease and desist order shall be served upon the market participant affected by that order and shall:

(i) Contain a statement of the charges and a description of the alleged violation(s) of PURA or this chapter that the market participant's conduct has been found to have violated and specific facts that support each violation as reasonably believed by commission staff;

(ii) Require the market participant immediately to cease and desist from the acts, methods, or practices stated in the order;

(iii) Notify the market participant that a request for a hearing to affirm, modify, or set aside the order must be submitted not later than the 30th day after the date the market participant receives the order; and

(iv) Contain a statement indicating that notice and an opportunity for a hearing was not practicable and state the specific reasons why notice and an opportunity for a hearing was not practicable.

(B) *Service.* Chapter 2001, Texas Government Code, does not apply to the issuance of a cease and desist order issued by the commission when notice and an opportunity for a hearing is not practicable.

(i) The commission shall serve the cease and desist order by registered or certified mail, return receipt requested, to the market participant's last known address.

(ii) A cease and desist order is effective upon the earlier of receipt of actual notice or three days after the order is mailed.

(C) Hearing Requested. The market participant affected by the cease and desist order may request a hearing to affirm, modify, or set aside the order. A request must be submitted not later than the 30th day after the date the market participant receives the order.

(i) If the market participant affected by a cease and desist order requests a hearing, the commission shall set the hearing date not later than the 10th day after the date the commission receives a request for a hearing or agreed to by the market participant and the commission.

(I) A hearing conducted after the issuance of a cease and desist order is a contested case under Chapter 2001, Texas Government Code. The commission may hold a hearing on a cease and desist order or may refer the case to be heard by the State Office of Administrative Hearings.

(II) Pending a hearing on a cease and desist order, the cease and desist order continues in effect unless stayed by the commission.

(III) At or following the hearing, the commission shall wholly or partly affirm, modify, or set aside the cease and desist order.

(ii) If the market participant affected by a cease and desist order does not request a hearing and the commission does not hold a hearing on the order, the order is affirmed without further action by the commission.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 28, 2014.

TRD-201401412

Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

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Proposal publication date: October 18, 2013

For further information, please call: (512) 936-7223



PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 33. LICENSING

SUBCHAPTER C. LICENSE AND PERMIT ACTION

16 TAC §33.31

The Texas Alcoholic Beverage Commission (commission) adopts amendments to §33.31, relating to Administrative Inactivation, Reinstatement and Renewal of a License or Permit, without changes to the text as proposed in the February 14, 2014, issue of the *Texas Register* (39 TexReg 853).

The amendments conform the section to the requirements of Alcoholic Beverage Code §11.44 as amended by Senate Bill 409, 83rd Legislature, Regular Session, and clarify procedures related to involuntary inactivation involving either voluntary or involuntary suspensions. Senate Bill 409 amended Alcoholic Beverage Code §11.44 to create an exception to the general prohibition against the commission issuing a license or permit for a location when an action to suspend or cancel the current license or permit at that location is pending. The exception applies when the current licensee or permittee at that location has been finally evicted from the premises under a final, nonappealable court judgment.

Section 33.31 was also reviewed under Government Code §2001.039 and is being readopted as amended: to address procedures related to and consequences of both voluntary and involuntary administrative inactivation; and to reflect the prohibition in Alcoholic Beverage Code §102.32 on voluntary suspensions and cancellations where the license or permit holder is delinquent in the payment of an account for liquor under that code section.

No comments were received on the proposal.

The section is amended pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 26, 2014.

TRD-201401325

Martin Wilson

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Texas Alcoholic Beverage Commission

Effective date: April 15, 2014

Proposal publication date: February 14, 2014

For further information, please call: (512) 206-3489



TITLE 22. EXAMINING BOARDS

PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 505. THE BOARD

22 TAC §505.10

The Texas State Board of Public Accountancy adopts an amendment to §505.10, concerning Board Committees, without changes to the proposed text as published in the February 7, 2014, issue of the *Texas Register* (39 TexReg 574). The section will not be republished.

The amendment will make it clearer that the behavioral enforcement and technical standards review committees, rather than the licensing committee, considers applications for reinstatements.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the

agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

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

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 27, 2014.

TRD-201401341

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Effective date: April 16, 2014

Proposal publication date: February 7, 2014

For further information, please call: (512) 305-7842



CHAPTER 511. ELIGIBILITY

SUBCHAPTER B. CERTIFICATION BY EXAMINATION

22 TAC §511.22

The Texas State Board of Public Accountancy adopts an amendment to §511.22, concerning Initial Filing of the Application of Intent, without changes to the proposed text as published in the February 7, 2014, issue of the *Texas Register* (39 TexReg 577). The section will not be republished.

The amendment adopts language from the Homeland Security standards so that international students here legally would be permitted to take the exam in Texas.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt, and repeal rules deemed necessary or advisable to effectuate the Act.

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

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TRD-201401342

J. Randel (Jerry) Hill

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Texas State Board of Public Accountancy

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 97. COMMUNICABLE DISEASES

SUBCHAPTER A. CONTROL OF COMMUNICABLE DISEASES

25 TAC §§97.1, 97.3, 97.4, 97.7

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts amendments to §§97.1, 97.3, 97.4, and 97.7, concerning the control of communicable diseases, without changes to the proposed text as published in the December 6, 2013, issue of the *Texas Register* (38 TexReg 8766) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The amendments comply with Health and Safety Code, Chapter 81. The amendments will enable the reporting sources to more clearly identify the conditions and diseases that must be reported, define the minimal reportable information on these conditions and diseases, and describe the procedures for reporting. The amendments adjust the list of reportable diseases to include diseases and conditions of concern to public health. The conditions being added are newly emerging infectious conditions that have received international attention. Texas is complying with guidance from the Centers for Disease Control and Prevention regarding surveillance for these conditions. These amendments will allow the department to conduct more relevant and efficient disease surveillance.

SECTION-BY-SECTION SUMMARY

The amendments to §§97.1, 97.3, and 97.4 add the reporting of Carbapenem resistant *Enterobacteriaceae* (CRE) and the reporting of Multi-drug Resistant (MDR) *Acinetobacter* as defined in the Centers for Disease Control and Prevention, National Healthcare Safety Network (NHSN) Manual, Patient Safety Component, Protocol for Multidrug-Resistant Organism and *Clostridium difficile* Infection (MDRO/CDI) Module, or its successor.

The amendments to §97.3 and §97.4 remove references to severe acute respiratory syndrome (SARS) and replace with the reporting of novel coronavirus causing severe acute respiratory disease because it is a broader category/definition that includes SARS. The disease novel influenza is placed in correct alphabetical order in §97.3.

In §97.1 and §97.7, the references to the legacy agency are updated.

The amendment to §97.7 updates exclusion criteria from a school for a student who has or is suspected of having a communicable condition, so that meningitis, bacterial and Meningococcal Infections (meningitis and bacteremia) are handled in a similar fashion.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendments are authorized by Health and Safety Code, §81.004, which authorizes rules necessary for the effective administration of the Communicable Disease Prevention and Control Act; §81.042, which requires a rule on the exclusion of children from schools; §81.050, which requires a rule to prescribe criteria that constitute exposure to reportable diseases; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 31, 2014.

TRD-201401425

Lisa Hernandez

General Counsel

Department of State Health Services

Effective date: April 20, 2014

Proposal publication date: December 6, 2013

For further information, please call: (512) 776-6972



TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 39. PUBLIC NOTICE

SUBCHAPTER H. APPLICABILITY AND GENERAL PROVISIONS

30 TAC §§39.411, 39.412, 39.419, 39.420

The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts amendments to §§39.411, 39.419, and 39.420; and new §39.412.

Section 39.411 is adopted *with changes* to the proposed text as published in the November 8, 2013, issue of the *Texas Register* (38 TexReg 7845). Sections 39.412, 39.419, and 39.420 are adopted *without changes* to the proposed text and will not be republished.

The commission will submit §§39.411(e)(11), (15) and (16), (f)(4) and (8), 39.412(a) - (d), 39.419(e)(1), and 39.420(e)(4) to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

In *Massachusetts v. EPA* (549 U.S. 497 (2007)), the Supreme Court of the United States ruled that greenhouse gases (GHGs) fit within the Federal Clean Air Act (FCAA or Act) definition of air pollutant. This ruling gave EPA the authority to regulate GHGs from new motor vehicles and engines if EPA made a finding under FCAA, §202(a) that six key GHGs taken in combination endanger both public health and welfare, and that

combined emissions of GHGs from new motor vehicles and engines contribute to pollution that endangers public health and welfare. EPA issued its "Endangerment Finding" for GHGs on December 15, 2009, (Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, as published in the December 15, 2009, issue of the *Federal Register* (74 FR 66496)). Based on the Endangerment Finding, EPA subsequently adopted new emissions standards for motor vehicles (the "Tailpipe Rule" as published in the May 7, 2010, issue of the *Federal Register* (75 FR 25324)). The rule established standards for light-duty motor vehicles to improve fuel economy thereby reducing emissions of GHGs. The standards were effective January 2, 2011. EPA also reconsidered its interpretation of the timing of applicability of Prevention of Significant Deterioration (PSD) under the FCAA (the "Timing Rule" as published in the April 2, 2010, issue of the *Federal Register* (75 FR 17004)). EPA's interpretation of the FCAA is that PSD requirements for stationary sources of GHGs take effect when the first national rule subjects GHGs to regulation under the Act. EPA determined that once GHGs were actually being controlled under any part of the Act they were subject to regulation under the PSD program. Specifically, EPA took the position that beginning on January 2, 2011, GHG control requirements would be required under the PSD and Title V permitting programs because national standards for GHGs under the Tailpipe Rule were effective on January 2, 2011.

EPA's regulation of GHGs under the FCAA presented substantial difficulties for the EPA and states, particularly with regard to the PSD program. For instance, the most common of the GHGs, carbon dioxide (CO₂), is emitted in quantities that dwarf the Act's major source thresholds for program applicability. As a result, under EPA's Timing Rule, PSD requirements could have expanded from approximately 500 issued permits annually to more than 81,000 nationwide, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514, 31537 and 31538). To avoid this result, EPA excluded much of this new construction activity from the PSD program by altering the Act's statutory emission rate applicability thresholds for GHGs. This "Tailoring Rule," as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514) newly defined the statutory term "subject to regulation" and established higher GHGs emission thresholds for applicability of PSD and Title V permitting than specified in the FCAA. The Tailoring Rule also phased in permitting requirements in a multi-stepped process.

Before the *Massachusetts* decision in 2007, EPA took the position that GHGs are not regulated under the FCAA, and GHGs unquestionably were not regulated when EPA approved Texas' SIP in 1992. Texas has had an approved SIP since 1972, as published in the May 31, 1972, issue of the *Federal Register* (37 FR 10842). In 1983, Texas was delegated authority to implement the PSD program, as published in the February 9, 1983, issue of the *Federal Register* (48 FR 6023). Following this delegation, Texas submitted several SIP revisions to enable it to administer the PSD program (collectively the "PSD SIP submission"). EPA approved Texas' PSD SIP in 1992, granting the state full authority to implement the PSD program, as published in the June 24, 1992, issue of the *Federal Register* (57 FR 28093).

The Texas PSD SIP submission and approval proceedings produced a well-developed record on how Texas would address the applicability of newly-regulated pollutants under the PSD program. During the SIP submission process, Texas consistently explained to EPA that the PSD provisions in the SIP are not

prospective rulemaking, and do not incorporate future EPA interpretations of the Act or its regulations.

EPA's GHGs regulations created practical difficulties about how EPA could apply its Tailoring Rule in states with approved SIPs. In August 2010, Texas advised EPA that it could not retroactively reinterpret its SIP to cover GHGs, which were not regulated at the time Texas' SIP was approved in 1992 and were, in fact, a composite pollutant defined for the first time in the Tailoring Rule. Texas also explained that the PSD program only encompassed National Ambient Air Quality Standard (NAAQS) pollutants, but confirmed as a regulatory matter that the approved PSD program encompasses all federally regulated new source review (NSR) pollutants, including any pollutant that otherwise is subject to regulation under the FCAA, as stated in 30 TAC §116.12(14)(D).

Following promulgation of the Tailoring Rule, EPA issued a proposed "Finding of Substantial Inadequacy and SIP Call," as published in the September 2, 2010, issue of the *Federal Register* (75 FR 53892). This action proposed finding the SIPs of 13 states, including Texas', "substantially inadequate" because these SIPs did not apply PSD requirements to GHGs-emitting sources. EPA proposed to require these states (through their SIP-approved PSD programs) to regulate GHGs as defined in the Tailoring Rule. EPA also proposed a Federal Implementation Plan (FIP) that would apply specifically to states that did not or could not agree to reinterpret their SIPs to impose the Tailoring Rule and did not meet SIP submission deadlines. EPA finalized its GHG SIP Call in the December 12, 2010, issue of the *Federal Register* (75 FR 77698) and required Texas to submit revisions to its SIP by December 1, 2011.

EPA published an interim final rule partially disapproving Texas' SIP; imposing the GHGs FIP effective as of its date of publication, as published in the December 30, 2010, issue of the *Federal Register* (75 FR 82430). EPA stated that FCAA, §110(k)(6) authorized it to change its previous approval of Texas' PSD SIP into a partial approval and partial disapproval. EPA's basis was that it had erroneously approved Texas' PSD SIP submission because the SIP did not appropriately address the applicability of newly-regulated pollutants to the PSD program in the future. EPA further stated that its action was independent of the GHG SIP Call because that action was aimed at a narrower issue of applicability to GHGs, whereas its decision retroactively disapproving Texas' PSD SIP submission was addressed to Texas' purported failure to address, or assure the legal authority for, application of PSD to all pollutants newly subject to regulation. EPA published the final rule retroactively disapproving Texas' PSD SIP in part and promulgating the FIP as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178).

The effect of EPA's FIP is that major source preconstruction permitting authority is divided between two authorities - EPA for GHGs and the state of Texas for all other pollutants. Currently, major construction projects and expansions in Texas that require PSD permits must file applications with both EPA Region 6 (for GHGs) and TCEQ (for all non-GHG pollutants).

House Bill (HB) 788, 83rd Legislature, 2013, added Texas Health and Safety Code (THSC), §382.05102. This section grants TCEQ authority to authorize emissions of GHGs consistent with THSC, §382.051, to the extent required under federal law. THSC, §382.05102 directs the commission to adopt implementing rules, including a procedure to transition GHG PSD applications currently under EPA review to the TCEQ. Upon adoption, the rules must be submitted to EPA for review

and approval into the Texas SIP. THSC, §382.05102 excludes permitting processes for GHGs from the contested case hearing procedures in THSC, Chapter 382; Texas Water Code, Chapter 5; and Texas Government Code, Chapter 2001. THSC, §382.05102 also requires that the commission repeal the rules adopted under this authority and submit a SIP revision to EPA, if (at a future date) emissions of GHGs are no longer required to be authorized under federal law.

The commission initiated this rulemaking to fulfill the directive from the legislature. The legislature found that "in the interest of the continued vitality and economic prosperity of the state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred authority for emissions of {GHGs}."

Texas has challenged in federal court EPA's GHG regulations as well as EPA's SIP Call and FIP. Implementation of HB 788 through this rulemaking is not adverse to Texas' claims in its ongoing challenges to EPA's actions regarding GHGs generally or relating to the SIP. The commission's action to conduct rulemaking for submittal and approval by EPA is consistent with Texas' position that state law does not give EPA the authority to automatically change state regulations.

The United States Supreme Court is currently considering Texas' challenge to EPA's authority to regulate stationary sources of GHGs under the FCAA. If the court issues a ruling that invalidates or renders unenforceable all or some of EPA's regulations of GHGs after adoption and submittal of these rules to EPA, the commission intends to follow the direction in THSC, §382.05102 to promptly repeal or amend the rules as necessary based on the court's order, and submit the changes or repeal to EPA to remove the provisions from the SIP.

Concurrently with this rulemaking, the commission is adopting new and amended rules to 30 TAC Chapters 55 (Requests for Reconsideration and Contested Case Hearings; Public Comment), 101 (General Air Quality Rules), 106 (Permits by Rule), 116 (Control of Air Pollution by Permits for New Construction or Modification), and 122 (Federal Operating Permits Program) to implement HB 788. Except where specifically noted, all adopted changes to Chapters 39, 55, 101, 106, 116, and 122 are necessary to achieve the goal of implementation of HB 788, obtaining SIP approval of certain rules, and rescission of the FIP.

Specific Changes to Chapters 39 and 55

The commission adopts changes to two chapters regarding public participation. The adopted amendments in Chapters 39 and 55 make two changes to the commission's rules that are distinguishable from current public participation rules and the Texas SIP. First, GHG PSD permit applications are not be subject to an opportunity to request a contested case hearing or reconsideration of the executive director's decision. Second, based on EPA interpretation of its PSD rules, there may be no requirement for the commission to prepare an air quality analysis for proposed emissions of GHGs, and, if so, there will be no such analysis available for public comment.

HB 788 specifically excludes GHG PSD permit applications from the requirements relating to a contested case hearing. Requests for reconsideration were added by HB 801 (76th Legislature, 1999) as an alternative to the opportunity to request a contested case hearing. However, this remedy is not independent of the right to request a contested case hearing. Absent a right to request a contested case hearing, there is no independent right to

request reconsideration of the executive director's decision. The commission interprets HB 788 to require that all other HB 801 requirements, discussed later in this preamble, apply to GHG PSD permit applications.

The majority of the existing public participation and notice requirements in Chapters 39 and 55, which implement both federal and state law, will apply to the GHG PSD applications. Many of these requirements were clarified in or added by HB 801. The Chapter 39 amendments will be submitted as revisions to the SIP, but the Chapter 55 amendment is not required for the SIP. The public participation and notice requirements include newspaper publication of Notice of Receipt of Application and Intent to Obtain Permit (NORI) and Notice of Application and Preliminary Decision (NAPD), each with particular language; sign posting; alternate language newspaper publication and sign posting (where applicable); placement of a copy of the application, the executive director's preliminary decision (draft permit), preliminary determination summary in a public place for review and copying; providing opportunity for and mandatory attendance at a public meeting (which is mandatory when requested by a member of the public for any PSD permit application or by a legislator who represents the general area where the facility is or is proposed to be located); and notice to certain affected agencies and representatives, including EPA Region 6, local air pollution control agencies with jurisdiction, the chief executives of the city and county where the source would be located, and any State or Federal Land Manager, and Indian Governing Body. In addition, the executive director's draft permit and preliminary decision and preliminary determination summary are available electronically on the commission's Web site at the time of publication of the NAPD. Finally, the executive director is required to respond to comments submitted by preparing a Response to Comments (RTC), which is mailed to commenters and posted on the commission's Web site, with the executive director's decision. Some of these requirements and procedures were changed in rulemaking and described in the preamble adopted June 2, 2010. Background information regarding the commission's public participation rules for PSD permits can be found in the preamble adopting new and amended rules as published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198 - 5255, 5274 - 5277, and 5344 - 5348).

Further, based on EPA's interpretation of its rules that no air quality analysis is required for a GHG PSD permit application, there will be no such analysis available for comment for these applications reviewed by the TCEQ. Even if the air quality analysis is a requirement under FCAA, §110, the exclusion of this analysis does not affect attainment and maintenance of the NAAQS. This is because the permit application review must include an evaluation that the proposed emissions will comply with the NAAQS, and there are no NAAQS established for GHGs. Therefore, the rule amendments will provide that an air quality analysis will be available for public comment, if applicable.

Although the proposal preamble stated that, at that time, the commission expects to issue two separate notices, for both NORI and NAPD, for applications filed requesting both a GHG PSD permit and a new permit or a permit amendment for air contaminants that are not GHGs. However, the executive director is still in the process of implementation activities, including preparing a guidance document and updating notice forms, and as part of that activity is considering whether providing notice of an application for a GHG PSD permit may be consolidated and published with notice for other case-by-case NSR permit

applications, including those mentioned by the commenter. As discussed elsewhere in this preamble, the commission's rules limit combining NORI and NAPD.

In addition to the changes discussed earlier, the commission is adopting new §39.412. As discussed earlier, major construction projects and expansions in Texas that require PSD permits must currently file applications with both EPA Region 6 (for GHGs) and TCEQ (for all contaminants that are not GHGs). After jurisdiction for issuance of GHG PSD permits is transferred to Texas, applicants who have already filed an application with EPA for a GHG PSD only permit and for which notice of draft permit was published as required by EPA, may wish to have EPA transfer that application or file an application with TCEQ for initial issuance of a GHG PSD permit. Transfer of an application from EPA will be considered filing an application with the commission. In those circumstances, which are expected to be limited in number, applicants may choose an alternative notice option that is adopted in new §39.412.

As is the case with the commission's existing SIP-approved rules for notice of PSD permits, this new section also complies with the federal notice requirements. First, 40 Code of Federal Regulations (CFR) §51.161 concerns the public availability of information for review and commenting for permits generally, including: 1) a 30-day public comment period; 2) notice by prominent advertisement in at least one location in the area affected by the source or proposed source; 3) placement of a copy of the application in a location in the area affected and a copy of the TCEQ's air quality analysis; and 4) submittal of a copy of the notice to the EPA Regional Administrator and any other affected agency. These requirements are met in §39.412(b)(2)(B)(vi) and (C), (3)(A), and (5), respectively.

Second, 40 CFR §51.166(q) adds additional notice requirements for PSD permit applications. 40 CFR §51.166(q)(1) provides that the TCEQ is required to notify applicants with regard to completeness (or deficiency) of applications; this requirement is met by §116.114(a)(1), which was not amended in this rulemaking.

Eight additional requirements are enumerated in 40 CFR §51.166(q)(2)(i) - (viii), some of which overlap with 40 CFR §51.161. The commission's rules meet these requirements as follows. For 40 CFR §51.166(q)(2)(i), §116.114(a)(2), which was not amended in this rulemaking, satisfies the requirement for the TCEQ to make a preliminary determination on the application. For 40 CFR §51.166(q)(2)(ii), §39.412(b)(3) satisfies the requirement for a copy of the application and the preliminary determination to be made available in a public place.

For 40 CFR §51.166(q)(2)(iii), §39.412(b)(2), particularly §39.412(b)(2)(B)(iii) - (v), satisfies the requirement for notice by prominent advertisement in a newspaper of general circulation in the area affected by the source or proposed source of the location of the source or proposed source that the application and preliminary decision are available for review and comment, as well as the opportunity to request a public meeting or a notice and comment hearing and to submit written public comment. The discussion regarding the addition of §39.411(f)(3) in 2010, which requires the public place to have internet access, also applies to the commission's basis for including that requirement in §39.412; that discussion can be found in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198). 40 CFR §51.166(q)(2)(iii) also requires the notice to include degree of increment consumption, which is not included in §39.412 because there is no increment established for GHGs.

For 40 CFR §51.166(q)(2)(iv), §39.412(b)(5), which references §39.605, meets the requirement to notify EPA and other affected agencies. Additional discussion of the commission's adoption of §39.605 can be found in the preamble for the rule amendments adopted in June 2010 (See the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198).)

For 40 CFR §51.166(q)(2)(v), §39.412(b)(2)(B)(v), as well as §39.411(g) and §55.154(c)(3), which were not amended in this rulemaking, meet the requirement for the executive director to hold a public meeting or notice and comment hearing in response to a request from an interested person regarding a PSD application.

For 40 CFR §51.166(q)(2)(vi), §55.156(b) and (g), which were not amended in this rulemaking, satisfy the requirement regarding the executive director's response to timely submitted written comments and at any public hearing. The use of the term "public hearing" in 40 CFR §51.166(q)(2)(vi) is understood to be EPA's notice and comment style hearing, not a contested case hearing which is available for certain applications under the Texas Clean Air Act (TCAA). The FCAA and EPA's implementing regulations do not provide for a bench trial-type proceeding, which is what a contested case hearing is analogous to. A public meeting is conducted by TCEQ in the same way that a notice and comment hearing is conducted, and is an equivalent opportunity for the public to participate in the permitting process for air quality permit applications. These explanations were provided in the preambles to Chapters 39 and 55, respectively, in the June 2010 rulemaking that amended the public participation requirements for air quality permit applications (See the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198).) Finally, §55.156(g) and §116.114(c), which were not amended in this rulemaking, satisfy the requirement that the commission make all comments available for public inspection.

For 40 CFR §51.166(q)(2)(vii), §55.156(g) satisfies the requirement that the executive director or commission make a final determination on the application.

Finally, for 40 CFR §51.166(q)(2)(viii), §55.156(g) and §116.114(c), which were not amended in this rulemaking, satisfy the requirement that the applicant be notified in writing of the final permit application determination and to make that information and the executive director's RTC publicly available. In addition, compliance with 40 CFR §51.166(q)(2)(vi) and (viii) is addressed in §39.420(c), which was not amended in this rulemaking; §39.420(c) requires the commission to make available comments and the final determination on the application for public inspection in the same locations where the preconstruction information was made available. As stated in the June 2010 preamble for public participation rule amendments, the commission interprets this as a requirement that the executive director's RTC, which is a summary of the comments submitted on an application and the agency's response to those comments, and the issued permit, be made available in the local area. The commission adopted §39.420(c)(2) which makes available all RTCs on its Web site, and also requires the draft permit preliminary determination summary, and air quality analysis, where available, be electronically available for PSD permit applications. The posting of RTCs was established by the commission in January 2010. This rule change was in addition to the commission's long-standing practices of maintaining a copy of the final permit at the commission's headquarters in Austin and at the appropriate regional offices, and, as required by rule, by mailing a copy of the RTC to all commenters, as well

as any other interested persons who have asked to be included on a mailing list for a particular application. This rule change not only satisfied but exceeded the federal rule, and thus is at least as stringent. The commission concurrently adopted similar rule amendments regarding RTCs in §55.156(g).

Federal Clean Air Act, §110(l) Analysis

Removal or reduction of a SIP requirement must be analyzed under FCAA, §110(l). This rulemaking is not backsliding under the Texas SIP. Although the SIP has long contained the Texas statutory requirement for a contested case hearing for PSD permit applications, no such counterpart exists in EPA's regulations, and the exemption from the requirement for a contested case hearing for GHG PSD permits does not remove any federal public participation requirements that are in the commission's rules. Further, the exclusion of a contested case hearing opportunity does not affect attainment and maintenance of the NAAQS. Public participation through opportunity to comment on the draft permit (as well as the application) and seek judicial review remains. In summary, the amendments to §§39.411, 39.419, and 39.420, and new §39.412 meet the public participation requirements in federal rule and the Texas SIP.

Any GHG PSD permit issued by the executive director will be subject to the Motion to Overturn Process in §50.139, or, if issued by the commission, will be subject to a Motion for Rehearing. Both of these administrative remedies are subject to appeal to Texas District Court for persons who participated in the steps of the administrative process by submitting comments and filing the appropriate challenge with the commission. As discussed in the preamble for the most recent rule amendments regarding public participation for air quality permit applications, as published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198), access to judicial review for air quality permits is governed by THSC, §382.032. Generally, a person must comply with the requirement to exhaust the available administrative remedies prior to filing suit in district court. In addition, EPA has approved the Texas Title V Operating Permit Program, which required the submission of a Texas Attorney General opinion regarding sufficient access to courts, in compliance with Article III of the United States Constitution. The Attorney General Opinion specifically states that "{a}ny provisions of State law that limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirement of Article III of the United States Constitution." The state statutory authority cited in support of the Texas Title V Operating Permit Program includes THSC, §382.032, which is the underlying authority for the appeal of Texas' air quality permit actions, including the PSD permitting program. Therefore, the Texas Attorney General statement regarding equivalence of judicial review based on THSC, §382.032 in accordance with Article III of the United States Constitution is also applicable for every action of the commission subject to the TCAA, including PSD permit decisions.

Therefore, there will be no backsliding from any FCAA requirements resulting from the adopted amendments to Chapter 39 and approval of the amendments as part of the Texas SIP.

Section by Section Discussion

§39.411, Text of Public Notice

Adopted subsection (e)(15) provides that notice for an application for an air quality permit under Chapter 116, Subchapter B, Division 6 that would authorize only emissions of GHGs, as defined in the adopted amendment to §101.1, must include a statement that any person is entitled to request a public meeting or

a notice and comment hearing, as applicable from the commission. The pollutant GHGs are defined as CO₂, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. To accommodate this additional type of permit, subsection (e)(11) is amended to add a reference to subsection (e)(15), and existing subsection (e)(15) is renumbered as subsection (e)(16). The commission adopts changes in response to comment, including revising the phrase "any person" to "any interested person," to ensure that adopted subsection (e)(15) is consistent with other commission rules and for clarity.

The adopted amendment to §39.411(f)(4) adds the phrase "if applicable" to indicate that certain items may not be available for public comment. At this time, EPA has indicated that no air quality analysis is required for GHG PSD permits. In "PSD and Title V Permitting Guidance for Greenhouse Gases," (dated March 2011) prepared by EPA's Office of Air Quality Planning and Standards, EPA stated that monitoring for GHGs is not required because EPA regulations provide an exemption in 40 CFR §52.21(i)(5)(iii) and §51.166(i)(5)(iii) for pollutants that are not listed in the appropriate section of the regulations, and GHGs are not currently included in that list. However, 40 CFR §52.21(m)(1)(ii) and §51.166(m)(1)(ii) of EPA's regulations apply to pollutants for which no NAAQS exists. These provisions call for collection of air quality monitoring data "as the Administrator determines is necessary to assess ambient air quality for that pollutant in any (or the) area that the emissions of that pollutant would affect." In the case of GHGs, the exemption in 40 CFR §52.21(i)(5)(iii) and §51.166(i)(5)(iii) is controlling since GHGs are not currently listed in the relevant paragraph. Nevertheless, EPA does not consider it necessary for applicants to gather monitoring data to assess ambient air quality for GHGs under 40 CFR §52.21(m)(1)(ii) and §51.166(m)(1)(ii), or similar provisions that may be contained in state rules based on EPA's rules. GHGs do not affect "ambient air quality" in the sense that EPA intended when these parts of EPA's rules were initially drafted. Considering the nature of GHGs emissions and their global impacts, EPA stated that it is not "practical or appropriate to expect permitting authorities to collect monitoring data for the purpose of assessing ambient air impacts of GHGs." The "PSD and Title V Permitting Guidance for Greenhouse Gases," (dated March 2011) guidance is available on the EPA's Web site: <http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf>.

Furthermore, consistent with EPA's statement in the Tailoring Rule, EPA stated, "...it is not necessary for applicants or permitting authorities to assess impacts from GHGs in the context of the additional impacts analysis or Class I area provisions of the PSD regulations for the following policy reasons. Although it is EPA's position that GHG emissions contribute to global warming and other climate changes that result in impacts on the environment, including impacts on Class I areas and soils and vegetation due to the global scope of the problem, climate change modeling and evaluations of risks and impacts of GHG emissions is typically conducted for changes in emissions orders of magnitude larger than the emissions from individual projects that might be analyzed in PSD permit reviews. Quantifying the exact impacts attributable to a specific GHG source obtaining a permit in specific places and points would not be possible with current climate change modeling. Given these considerations, GHG emissions would serve as the more appropriate and credible proxy for assessing the impact of a given facility. Thus, EPA believes that the most practical way to address the considerations reflected in the Class I area and additional impacts analysis is to focus on reducing GHG emissions to the maximum extent.

In light of these analytical challenges, EPA has stated that compliance with the best available control technology analysis is the best technique that can be employed at present to satisfy the additional impacts analysis and Class I area requirements of the rules related to GHGs." TCEQ intends to implement GHG PSD permitting requirements consistent with EPA's recognition of the unique nature of GHG emissions.

Because both 40 CFR §52.21(i) and (m) are part of the Texas SIP, the commission is adopting implementation of the exemption for preparation of an air quality analysis for GHGs by excluding it as a requirement in its internal permit application review and permit issuance procedures. In addition, the commission is indicating in its procedural rules that the air quality analysis will be prepared and made available for review and comment, where applicable. This requirement will continue to be applicable for PSD permit application reviews for contaminants other than GHGs. Among the existing rules regarding availability of an air quality analysis for review and comment, only §39.411(f)(4) and §39.419(e)(1) do not include the "if applicable text" and thus both are amended.

Finally, the commission is correcting typographical errors including clarifying the title of a referenced chapter in subsection (b), the spelling of the word "commission's" in subsection (b)(4)(B), and clarifying the title of referenced divisions in subsection (f)(8). In addition, cross references in subsections (g)(1) and (h)(1) are adopted to account for adopted subsection (e)(15).

§39.412, Combined Notice for Certain Greenhouse Gases Permit Applications

Adopted new §39.412 provides the option to publish NORI combined with the NAPD, instead of publishing these separately as required by §39.418 and §39.419. Subsection (a) provides that this option will apply only to permit applications transferred from EPA or filed with the commission for initial issuance of a PSD permit to authorize only GHGs which, prior to receipt of the application with the commission, was filed with EPA and for which notice of draft permit was published as required by EPA.

Adopted subsection (b) lists the specific requirements for the combined notice when this option is chosen. Subsection (b)(1) lists the portions of the general notice requirements in §39.405 that apply.

The specific publication requirements are in subsection (b)(2). Subsection (b)(2)(A) specifies that the Combined Notice must meet certain requirements in §39.411(e) for the text of the notice. Subsection (b)(2)(B) includes eight specific notice content requirements. Subsection (b)(2)(B)(i) requires the notice to include a list of the individual GHGs proposed to be emitted. Subsection (b)(2)(B)(ii) requires the notice to include a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit, and a statement that the executive director's draft permit and preliminary decision, preliminary determination summary, and air quality analysis, if applicable, are available electronically on the commission's Web site. Subsection (b)(2)(B)(iii) - (vi) requires the combined notice to include other information that is currently required and will continue to apply to all PSD applications, including that the executive director's documents are available electronically on the commission's Web site; the location of the public place at which a copy of the complete application and other documents are available for review and copying; a brief description of the public comment procedures, printed in a font style or size that clearly provides emphasis and distinguishes it from the remain-

der of the Combined Notice; and that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located, there is substantial public interest in the proposed activity, or at the request of any interested person. In addition, subsection (b)(2)(B)(vi) - (viii) requires the notice state that the comment period will be for at least 30 days following the last publication of the combined notice, together with the deadline to file comments or request a public meeting; any comments submitted to EPA regarding the application will not be included in the executive director's RTC unless the comments are timely submitted to the commission; and, if the executive director prepares an RTC as required by §55.156, the chief clerk will make the executive director's RTC available on the commission's Web site.

Adopted subsection (b)(2)(C) requires the combined notice meet the requirements of newspaper publication in §39.603(c) and (d) and that publication must be within 33 days after the chief clerk has mailed the preliminary decision concurrently with the notice to the applicant.

Adopted subsection (b)(3)(A) and (B) requires the applicant to make a copy of the application and certain other documents, as applicable, available for review and copying at a public place with internet access in the county in which the facility is located or proposed to be located and that the copy of the application must be updated as changes are made, if any, to the application so that the entire application must be available for review and copying.

Adopted subsection (b)(3)(C) requires the applicant make available on the first day of newspaper publication of the combined notice required by this section a copy of the executive director's preliminary decision, draft permit, preliminary determination summary and air quality analysis, if applicable. These must remain available until the commission has taken action on the application. Finally, subsection (b)(3)(D) provides that if the application is submitted with confidential information the applicant must indicate in the public file that there is additional information in a confidential file marked as confidential by the applicant.

Adopted subsection (b)(4) requires the applicant to comply with the sign posting requirements of §39.604(a) and (c) - (e), except that the sign or signs must be in place on the first day of publication of the combined notice. The signs must remain in place and legible throughout the public comment period. The applicant is required to provide verification that the sign posting was conducted according to §39.604.

Adopted subsection (b)(5) requires the applicant to comply with §39.605 regarding providing notice to certain other governmental agencies.

Adopted subsection (c) provides that the chief clerk shall be responsible for mailing the combined notice as required by §39.602, and for transmitting the executive director's RTC as provided for in §39.420(c)(1)(A) and (B), (2), and (d).

Adopted subsection (d) provides that the public comment period shall automatically be extended to the close of any public meeting or notice and comment hearing.

Adopted subsection (e) provides that final action on an application may be taken under Chapter 50 after the deadline for submitting public comment. This subsection will not be submitted to EPA as a SIP revision because it is not a requirement of the FCAA.

§39.419, Notice of Application and Preliminary Decision

The adopted amendment to §39.419(e)(1) adds the phrase "if applicable" to indicate that certain items may not be available for public comment, for the same reasons as the changes discussed earlier regarding the amendment to §39.411(f)(4).

§39.420, Transmittal of the Executive Director's Response to Comments and Decision

Adopted §39.420(e)(4) provides that, after the close of the comment period and when required by and subject to §55.156, the chief clerk will not include instructions for requesting that the commission reconsider the executive director's decision and for requesting a contested case hearing for applications for a PSD permit that would authorize only GHGs as defined in the adopted amendment to §101.1.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis (RIA) requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a RIA.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the rulemaking is to make the necessary procedural rule amendments necessary to implement HB 788 in Chapter 116 which is concurrently amended to add six GHGs to the pollutants subject to the commission's PSD permitting program, consistent with federal law, as well establish the emissions thresholds for applicability of the program consistent with federal requirements in the GHG Tailoring Rule.

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a RIA for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted rules implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. This rulemaking will amend rules for public participation for GHG PSD permit applications such that those applications are not subject to requests for reconsideration or contested case hearing to implement HB 788 and to ensure that the rules can be a federally approved part of the Texas SIP.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633, 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "...based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the adopted rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and thus allow EPA to lift its federal permitting program on GHG sources in Texas. In fact, the rules create no additional impacts because owners and operators of major GHG sources in Texas must currently obtain a PSD permit from EPA and the rules merely supplant EPA as the authority for GHG PSD permitting in Texas. For these reasons, the rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ.*) Cf. *Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative

Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The adopted rules do not exceed an express requirement in federal or state law. This rulemaking implements relevant provisions of THSC, §382.05102, as added by HB 788 83rd Legislature, 2013. The rules implement requirements of the FCAA, specifically to adopt and implement SIPs, including a requirement to adopt and implement permit programs. The specific intent of the rulemaking is to amend rules for public participation for GHG PSD permit applications such that those applications are not subject to requests for reconsideration or contested case hearing to implement HB 788 and to ensure that the rules can be a federally approved part of the Texas SIP. The rules do not exceed a requirement of a delegation agreement or any contract between the state and a federal agency, because there is no agreement applicable to this rulemaking. The rules were not developed solely under the general powers of the agency, but are authorized by specific sections of THSC, Chapter 382 (also known as the TCAA), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the draft RIA determination during the public comment period. No comments were received on the RIA determination.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution §17 or §19, Article I; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the adopted rulemaking under Texas Government Code, §2007.043. The primary purpose of this rulemaking, as discussed elsewhere in this preamble, is to amend rules for public participation for GHG PSD permit applications such that those applications are not subject to requests for reconsideration or contested case hearing to implement HB 788 and to ensure that the rules can be federally approved as part of the Texas SIP.

The adopted rules will not create any additional burden on private real property. The rules will not affect private real property in a manner that would require compensation to private real prop-

erty owners under the United States Constitution or the Texas Constitution. The rulemaking will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The adopted rules update procedural rules that govern the submittal of air quality GHG PSD permit applications. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Effect on Sites Subject to the Federal Operating Permits Program

The adopted rules will not require any revisions to federal operating permits.

Public Comment

The commission held a public hearing on December 5, 2013. The public comment period ended on December 9, 2013. The commission received comments from Air Alliance Houston (AAH); Association of Electric Companies of Texas, Inc (AECT); C3 Petrochemicals (C3P); Calpine Corporation (Calpine); Environment Texas; Gas Processors Association (GPA); Golden Pass Products LLC (Golden Pass); Golden Spread Electric Cooperative, Inc. (GSEC); House Bill 788 Working Group (HB788WG); Jackson Walker L.L.P.; Lone Star Chapter of the Sierra Club (Sierra Club); Natgasoline, LLC; Occidental Chemical Corporation (OCC); OCI Beaumont, LLC; Pioneer Natural Resources (Pioneer); Public Citizen; State Representative Lon Burnam; Sustainable Energy and Economic Development Coalition (SEED); Texas Chemical Council (TCC); Texas Combined Heat and Power Initiative (TXCHPI); Texas Industry Project (TIP); Texas Oil and Gas Association (TXOGA); Texas Pipeline Association (TPA); Texas Solid Waste Association of North America (TxSWANA); Weaver Boos Consultants, LLC (Weaver); Zephyr Environmental Corporation (Zephyr). This

comprehensive list includes all of the commenters for all of the chapters of this concurrent rulemaking project. The individual comments are addressed in the Response to Comment section of the appropriate chapter. Eighteen of the commenters supported the rulemaking or portions of the rulemaking, six of the commenters opposed portions of the rulemaking, and 18 of the commenters suggested changes.

Response to Comments

Comment

TIP commented that the proposal preamble suggests that "the SIP has long contained the Texas statutory requirement for a contested case hearing for PSD permit applications" (See the October 25, 2013, issue of the *Texas Register* (38 TexReg 7849)). TIP commented that such references to the SIP status of contested case hearings are unnecessary and potentially confusing, and should be omitted from the final rule preamble, because contested case hearings are not federally enforceable through the SIP.

Response

No changes were made to the preamble in response to this comment. The commission respectfully disagrees with the commenter's assertion that contested case hearings are not federally enforceable through the SIP. When the State of Texas was approved to administer the PSD permitting program in 1992, the state's rules specifically provided for the opportunity for a contested case hearing for applications for case-by-case NSR permit applications. Most recently, EPA approved the commission's amendments to the commission's public participation rules in the January 6, 2014, issue of the *Federal Register* (79 FR 551). These amendments include the opportunity for a contested case hearing for PSD permit applications. Therefore, although this particular component of public participation is not required by the FCAA or EPA's regulations for PSD permits, the approved Texas SIP includes the contested case hearing opportunity for PSD applications. Because the legislature elected to eliminate this particular requirement regarding public participation for GHG PSD applications, and not for other applications, discussion about how these applications are different was necessary for the commission's analysis under FCAA, §110(l), which is necessary for approval of the GHG PSD permitting program. This analysis is required when the commission is eliminating a SIP-approved requirement, even if the requirement is not specifically found in federal law. In addition, the discussion may also be helpful for the public to understand how and why public participation for GHG PSD applications is both similar to and different from other PSD applications.

Comment

Zephyr commented that the rule and preamble were not clear on whether public notices for GHG PSD permits can be combined with public notices for NSR permits, PSD for non-GHG emissions, or nonattainment NSR applications. Zephyr requested that TCEQ allow for combined public notice publications, because the potential for a single project to trigger multiple public notices under NSR, GHG PSD, and Title V permit actions would raise the cost and complexity of the permitting process.

Response

The commission's rule regarding combined notice, §39.405(d), has been used to allow combined notice in limited circumstances. It is the exception from common practice to combine NORI and NAPD.

The executive director is still in the process of implementation activities, including preparing a guidance document and updating notice forms, and as part of that activity is considering whether providing notice of an application for a GHG PSD permit may be consolidated and published with notice for other associated case-by-case NSR permit applications, including those mentioned by the commenter.

However, notice of these case-by-case NSR permit applications will not be combined with notice of an application for a Title V permit because those applications are for authorization under different parts of the FCAA and as such are subject to different procedural, timing and review requirements. Several years ago, the commission attempted combining notice of NSR and Title V applications and it was not successful. In addition to the basic differences between the NSR and Title V permitting programs, no efficiency is gained by combining notices for these permit applications and the combination can lead to confusion by the public. No change has been made to the rule in response to this comment.

Comment

TCC commented that it remains neutral and defers to TCEQ with regard to the proposal to require two separate notices for applications filed requesting both a GHG PSD permit and a new non-GHG permit or a non-GHG permit amendment. However, TCC is concerned about the potential for increased time to process applications and encourages the TCEQ to consider this when adopting the GHG permitting rules.

Response

The commission appreciates the support and understands the commenter's concern for timely permit application review. The preamble for the proposed rules stated that the commission expected to issue two separate notices, for both NORI and NAPD, for applications filed requesting both a GHG PSD permit and a new permit or a permit amendment for air contaminants that are not GHGs. An applicant may choose to publish the separate notices (for NORI or NAPD) concurrently. However, no final decisions have been made, and there is no need to include any such decisions in rule. The executive director is still in the process of implementation activities, including preparing a guidance document and updating notice forms, and as part of that activity is considering whether providing notice of an application for a GHG PSD permit may be consolidated and published with notice for other associated case-by-case NSR permit applications. No change has been made to the rules in response to this comment.

Comment

AECT commented that proposed language in §39.411(e)(15) should include a phrase that clearly informs the people who read public notices regarding GHG PSD permit applications that there is no right to a contested case hearing. Zephyr commented that the combined public notice language would need to specify that the GHG PSD permit is not subject to contested case hearings.

Response

No change has been made to the rule in response to these comments. Section 39.411(e)(11) excludes the GHG applications described in paragraph (15) from the notice requirements regarding contested case hearings. The commission's notices of GHG permit applications will include language that explicitly

states that there is no right to a contested case hearing for these applications.

Comment

GPA and TPA commented that the proposed language in §39.411(e)(15) should be revised to limit the ability to request a public meeting to "interested persons." They commented that current language in §39.411(e)(5), (f)(8)(D) and (9)(B) and §55.154(c)(3) reference "interested persons" and it is inconsistent for new language in §39.411(e)(15) to reference "any person." TPA commented that the change is needed to maintain consistency and to prevent persons located in areas geographically distant from the project at issue from being granted a public meeting, based on the claim that GHG emissions may have a global impact. GPA commented that the proposed language to allow "any person" goes beyond the federal requirements in 40 CFR §51.166(q).

Response

Although the commission does not find that the exclusion of the word "interested" results in a rule that exceeds federal requirements, the commission agrees that the rule as proposed be amended to provide that interested persons may request a public meeting and adopts this change to ensure consistency with existing rule language. However, persons located in areas geographically distant from the project at issue can request a public meeting for GHG PSD applications. Specifically, the commission's rule regarding public meetings, §55.154, which is not currently open for public comment, provides that a meeting will be held regarding PSD applications if requested by any interested person, and that rule is part of the Texas SIP. Section 55.154(c)(1) provides that a meeting will be held if the executive director determines that there is a substantial or significant degree of public interest in a permit application; however, subsection (c)(3), which specifically concerns PSD applications, does not include the discretionary provisions found in subsection (c)(1).

As stated in the adoption preamble (See the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198)), the addition of §55.154(c)(3) was in response to EPA's concerns that for a new or modified source subject to PSD or nonattainment requirements. The rules do not require the TCEQ to provide an opportunity for any interested person to give oral comments on PSD and nonattainment air quality draft permits. The provision in §55.154 that provides the executive director with discretion to hold a public meeting if the executive director determines that there is a substantial or significant degree of public interest in an application is not consistent with the federal requirements for PSD applications. Under the Texas rule, for non-PSD applications the decision to grant a public meeting is within the executive director's discretion and must be based upon substantial or significant public interest. In contrast, the rules adopted by EPA for PSD applications provide for the opportunity of interested persons to request a public hearing and public notice of that opportunity. The TCEQ's public meetings are the same type of proceeding as EPA's public hearings.

Comment

TIP commented that the beginning of proposed §39.411(e)(15) should be rephrased to read "(15) if notice is for an application for an air quality permit under Chapter 116, Subchapter B, Division 6 of this title...." TIP also commented that as the current §39.411(e)(15) is being renumbered as subsection (e)(16), cross

references to §39.411(e)(15) in existing §39.411(g)(1) and (h)(1) should be amended to refer to §39.411(e)(16).

Response

The commission agrees with the proposed grammatical and cross-reference changes and the adopted rule has been revised accordingly.

Comment

AECT requested revisions to §39.411(f)(6) to update the existing language to include a new condition that there must be "...a right to a contested case hearing for the application" in order for a timely request for a contested case hearing to prevent final approval of the permit by the executive director.

Response

No change has been made in response to this comment. Section §39.411(f)(4) currently requires the chief clerk to provide information regarding the applicable public comment and participation procedures when mailing the NAPD. This information includes the right to request a contested case hearing when there is a legal opportunity to do so. The information required by §39.411(f)(6) is not inconsistent because the language limiting the executive director's ability to issue a permit when there is a timely filed request for contested case hearing or request for reconsideration only applies if such requests are legally applicable to that type of application. In addition, the executive director's authority to issue permits is contained in Chapter 50, which is not open as part of this rulemaking. The rule, in §50.133(a)(5)(E), authorizes the executive director to issue a permit as an uncontested matter if a contested case hearing has been filed but no opportunity for contested case hearing is provided by law.

Comment

GPA, OCC, TCC, and TPA support the combined notice procedures in §39.412.

Response

The commission appreciates the support.

Comment

Jackson Walker L.L.P. commented that new §39.412 would be improved if consolidated notice options were not limited to those applications that have already gone to notice at EPA. Jackson Walker L.L.P. commented that the commission's existing rules provide flexibility regarding combined notice. Jackson Walker L.L.P. encouraged the commission to revise proposed §39.412(a) to preserve the discretion of the executive director to allow consolidated notice where the circumstances warrant such an approach.

Response

No change has been made to the rule in response to this comment. The TCAA specifically requires notice of the filing of an application (i.e., NORI) and the availability for public review of that application and a later, separate notice and opportunity for viewing the commission's draft permit (i.e., NAPD), as well as the continuing opportunity to view the application.

The commission's rule regarding combined notice, §39.405(d), has been used to allow combined notice in limited circumstances. It is the exception from common practice to combine NORI and NAPD.

As discussed in the Background and Summary of the Factual Basis for the Adopted rules section in this preamble, the basis for determining that applications for which EPA has published notice satisfies the requirement to publish notice that an application is available for review in the local area, and therefore the commission has determined that a combined NORI and NAPD is appropriate for these applications.

The executive director is still in the process of implementation activities, including preparing a guidance document and updating notice forms, and as part of that is considering whether providing notice of an application for a GHG PSD permit may be consolidated and published with notice for other associated case-by-case NSR permit applications.

Comment

Golden Pass commented that a single combined notice would meet the notice requirements otherwise required for EPA-issued GHG permits, and would satisfy EPA's PSD public notice requirements for SIP-approved states. Therefore, TCEQ should expand the availability of new §39.412 to include applications that have been deemed complete by EPA and transferred to TCEQ. In support of this, Golden Pass states that EPA places a copy of the application on its Web site upon receipt; EPA is required to thoroughly evaluate the application to determine it contains all the information needed for EPA to determine whether to issue or deny permits; and a GHG permit application does not require the same amount of modeling or impacts review as a non-GHG permit application and therefore EPA's completeness determination review will cover the key permit elements without the need to coordinate with a modeling permit expert. In addition, Golden Pass states that a single notice meets federal rule requirements and that EPA has approved a single notice for GHG permit applications in other states, such as New Mexico.

Response

No change has been made to the rule in response to this comment. With regard to EPA's procedures, its completeness determinations for permit applications are technical completeness determinations that accompany draft permits. The completeness determinations consist of more than just determining that sufficient information is submitted, regardless of the lack of a requirement to submit air dispersion modeling as part of the application.

The TCAA and commission rules specifically require that an applicant place a copy of the application for public review in the municipality or nearest municipality to the location, or the proposed location, of the facilities to be authorized, and also to publish notice of the filing of an application (i.e., NORI) after the commission determines the application is administratively complete. These are distinct state law requirements, which are part of the Texas SIP, that are not satisfied by EPA's posting of a filed application on its Web site. New Mexico law does not require publication of a notice of receipt of application for a PSD permit, and therefore only notice of a draft PSD permit is required in New Mexico.

Texas law requires a later, separate notice and opportunity for viewing the commission's draft permit (i.e., NAPD). The NAPD mirrors the federal requirement.

The commission's rule regarding combined notice, §39.405(d), has been used to allow combined notice in limited circumstances. It is the exception from common practice to combine NORI and NAPD.

Applicants whose applications in the narrowly defined circumstances contained in §39.412 may elect to publish notice under §39.412. As discussed in the Background and Summary of the Factual Basis for the Adopted Rules section of this preamble, the basis for determining that applications for which EPA has provided a copy of the application and published notice satisfies the requirement to publish notice that an application is available for review in the local area, and therefore the commission has determined that a combined NORI and NAPD is appropriate for these applications.

The executive director is still in the process of implementation activities, including preparing a guidance document and updating notice forms, and as part of that activity is considering whether providing notice of an application for a GHG PSD permit may be consolidated and published as one notice with other associated case-by-case NSR permit applications.

Comment

HB788WG commented that TCEQ should expand the availability of new §39.412 Combined Notice for Certain GHG PSD Permit Applications. HB788WG commented that the provisions of new §39.412 should be available for any applicant that has a pending GHG PSD application transferred from EPA to TCEQ and has already gone to the first public notice (i.e., NORI) though TCEQ for an air permit application for non-GHG emissions for the same project. HB788WG commented that the requested change would expand the availability of combined notice under §39.412 for GHG PSD applications, while limiting that expansion to a readily identifiable group of applicants for which combined notice serves an equitable purpose.

Response

No change has been made to the rule in response to this comment. As discussed elsewhere in this preamble, the TCAA specifically requires notice of the filing of an application (i.e., NORI) and the availability for public review of that application and a later, separate notice and opportunity for viewing the commission's draft permit (i.e., NAPD), as well as the continuing opportunity to view the application.

The commission's rule regarding combined notice, §39.405(d), has been used to allow combined notice in limited circumstances. It is the exception from common practice to combine NORI and NAPD.

If the applications submitted to EPA have been subject to published notice by EPA but are transferred to TCEQ, then applicants can elect to publish notice under §39.412. The basis for allowing this option in this narrow circumstance is that the EPA's notice actions satisfies the requirement to publish notice that an application is available for review in the local area and that a draft permit has been made available for review and comment. EPA provides a copy of the application to be placed in the local area.

In the circumstance described by the commenter, the commission understands that the GHG PSD application has not been subject to notice published by EPA. Therefore, the TCAA requirement for publication of availability of the application for review (the NORI) and the procedure for submitting comment to the commission would have not been met. If the applicant wants to include such information in the NORI for the non-GHG application, the commission has the flexibility to issue one NORI for more than one application, and no rule change is necessary to implement that option. The executive director is still in the

process of implementation activities, including preparing a guidance document and updating notice forms, and as part of that activity is considering whether providing notice of an application for a GHG PSD permit may be consolidated and published with notice for other associated case-by-case NSR permit applications.

Comment

TPA commented that language in proposed §39.412(b)(2)(B)(v) seemed to create an internal inconsistency. TPA commented that the provision that there be "substantial public interest" is subsumed by the alternative that the request for a meeting be made at the request of any "interested person." TPA suggested alternative language for the clause, "...general area where the facility is to be located, or at the request of any interested person and there is substantial public interest in the proposed activity."

Response

No change has been made in response to this comment. The commission does not agree that this rule is internally inconsistent. Rather, it provides three circumstances for when a public meeting will be held for this limited group of GHG PSD applications. The text of the rule is consistent with §39.411(e)(5) and (f)(8)(D) and §55.154 and the accompanying preamble discussions for the amendments to those rules adopted in 2010. These rules provide that text of notices and the requirements for holding public meetings regarding PSD applications are not subject to a finding of substantial interest if a meeting is requested by any interested person. These rules are part of the Texas SIP.

As discussed elsewhere in this preamble, the addition of this specific provision was in response to EPA's concerns that for a new or modified source subject to PSD or nonattainment requirements, the rules do not require the TCEQ to provide an opportunity for any interested person to give oral comments on PSD and nonattainment air quality draft permits.

Finally, the location of a public meeting for a GHG PSD application is governed by existing §55.154, which is not open as part of this rulemaking.

Comment

Sierra Club suggested revised rule language to §39.412(b)(3)(C) to require that the file available for public review during the combined public notice period would "include a full analysis of Best Available Control Technology."

Response

No change has been made to the rule in response to this comment. The applicant's proposed best available control technology (BACT) is included in the filed application. In addition, the commission's rule for notice of the draft permit for a PSD application, §39.419(e)(1), provides that after technical review is complete for PSD applications, the executive director shall file the executive director's draft permit and preliminary decision, as well as the preliminary determination summary, with the chief clerk and the chief clerk shall post these on the commission's Web site. This also applies to GHG PSD applications. In addition, applicants are required to publish NAPD which includes the statement that these items are subject to public review and comment. The draft permit contains the executive director's proposed BACT; BACT is also discussed in the preliminary determination summary.

Comment

TCC and TIP commented in general support of the proposed revisions in Chapters 39 and 55. However, TCC encouraged TCEQ to clarify by rule or preamble language that testimony and evidence produced for a contested case hearing on a PSD non-GHG permit application associated with the project requiring a GHG-PSD permit are limited to non-GHGs and shall not include consideration of GHGs. TCC and TIP requested that it be further clarified that a contested case hearing on a non-GHG application should not be used as a vehicle to litigate such GHG authorizations.

TXOGA suggested adding clarifying language to the preamble for Chapter 39 to limit collateral presentation of GHGs at contested case hearings. TXOGA requested TCEQ clarify that testimony and evidence presented in PSD non-GHG permit applications subject to a contested case hearing are limited to non-GHG pollutants and shall not include consideration of GHG.

Response

The commission appreciates the support, and agrees that testimony and evidence produced for a contested case hearing regarding applications for permits other than for a GHG PSD permit, but which concern the same project requiring a GHG PSD permit, are limited to non-GHGs and shall not include consideration of the GHG application or any GHG draft permit. In addition, a contested case hearing on a non-GHG application shall not be used as a vehicle to litigate the GHG application or to allow a collateral attack on the GHG draft permit.

Comment

TPA commented that the general provision regarding the location of a public meeting in §55.154(b) should apply to GHG PSD applications. TPA commented that §55.154(b) provides that public meetings may be held in the county where the facility is located or proposed to be located, but the proposed new or amended sections in Chapter 39 do not contain any specific provision about the location of public meetings for GHG PSD applications. TPA commented that the project's home county is the most logical place to hold public meetings and neither the public nor the applicant should have any objection to holding the meeting in the county where the project is contemplated. TPA requests that the agency clarify its intent regarding locations of public meetings for GHG PSD applications.

Response

No change has been made to the rules in Chapter 39 or Chapter 55 as part of this rulemaking in response to this comment. The location of a public meeting for all PSD applications, including GHG PSD applications, is governed by existing §55.154(b), which is not open as part of this rulemaking.

Comment

TPA commented in support of proposed language in §39.411 that an air quality analysis would only be available for public review "where applicable." TPA agreed with TCEQ that, given the unique nature of GHG emissions, air quality analysis is not required for GHG PSD permits. TPA commented that this approach is consistent with EPA's approach.

Response

The commission appreciates the support.

Statutory Authority

The amendments and new section are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which

provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments and new section are also adopted under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.05102, which relates to the permitting authority of the commission for greenhouse gas emissions; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0517, concerning Determination of Administrative Completion of Application, which specifies when the commission shall determine applications are administratively complete; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which requires an applicant for a permit issued under THSC, §382.0518 to publish notice of intent to obtain a permit. Additional relevant sections are Texas Government Code, §2001.004, concerning Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt procedural rules; and Texas Government Code, §2001.006, concerning Actions Preparatory to Implementation of Statute or Rule, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendments and new section are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The adopted amendments and new section implement House Bill 788 (82nd Legislature, 2013), THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05102, 382.0515, 382.0517, 382.0518, and 382.056; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq.*

§39.411. Text of Public Notice.

(a) Applicants shall use notice text provided and approved by the agency. The executive director may approve changes to notice text before notice being given.

(b) When Notice of Receipt of Application and Intent to Obtain Permit by publication or by mail is required by Subchapters H and K of this chapter (relating to Applicability and General Provisions and Public Notice of Air Quality Permit Applications) for air quality permit applications, those applications are subject to subsections (e) - (h) of this section. When notice of receipt of application and intent to obtain

permit by publication or by mail is required by Subchapters H - J and L of this chapter (relating to Applicability and General Provisions, Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications and Water Quality Management Plans, and Public Notice of Injection Well and Other Specific Applications), Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits), or for Subchapter M of this chapter (relating to Public Notice for Radioactive Material Licenses), the text of the notice must include the following information:

(1) the name and address of the agency and the telephone number of an agency contact from whom interested persons may obtain further information;

(2) the name, address, and telephone number of the applicant and a description of the manner in which a person may contact the applicant for further information;

(3) a brief description of the location and nature of the proposed activity;

(4) a brief description of public comment procedures, including:

(A) a statement that the executive director will respond to comments raising issues that are relevant and material or otherwise significant; and

(B) a statement in the notice for any permit application for which there is an opportunity for a contested case hearing, that only disputed factual issues that are relevant and material to the commission's decision that are raised during the comment period can be considered if a contested case hearing is granted;

(5) a brief description of procedures by which the public may participate in the final permit decision and, if applicable, how to request a public meeting, contested case hearing, reconsideration of the executive director's decision, a notice and comment hearing, or a statement that later notice will describe procedures for public participation, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice. The notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or there is substantial public interest in the proposed activity;

(6) the application or permit number;

(7) if applicable, a statement that the application or requested action is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies;

(8) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the application is available for review and copying;

(9) a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application;

(10) for notices of municipal solid waste applications, a statement that a person who may be affected by the facility or proposed facility is entitled to request a contested case hearing from the commission. This statement must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice; and

(11) any additional information required by the executive director or needed to satisfy public notice requirements of any federally authorized program; or

(12) for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules), if applicable, a statement that a written environmental analysis on the application has been prepared by the executive director, is available to the public for review, and that written comments may be submitted; and

(13) for Class 3 modifications of hazardous industrial solid waste permits, the statement "The permittee's compliance history during the life of the permit being modified is available from the agency contact person."

(c) Unless mailed notice is otherwise provided for under this section, the chief clerk shall mail Notice of Application and Preliminary Decision to those listed in §39.413 of this title (relating to Mailed Notice). When notice of application and preliminary decision by publication or by mail is required by Subchapters G - J and L of this chapter, the text of the notice must include the following information:

(1) the information required by subsection (b)(1) - (11) of this section;

(2) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted, or a statement in the notice for any permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted. The public comment procedures must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;

(3) if the application is subject to final approval by the executive director under Chapter 50 of this title (relating to Action on Applications and Other Authorizations), a statement that the executive director may issue final approval of the application unless a timely contested case hearing request or a timely request for reconsideration (if applicable) is filed with the chief clerk after transmittal of the executive director's decision and response to public comment;

(4) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit;

(5) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the complete application and the executive director's preliminary decision are available for review and copying;

(6) the deadline to file comments or request a public meeting. The notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or there is substantial public interest in the proposed activity; and

(7) for radioactive material licenses under Chapter 336 of this title, if applicable, a statement that a written environmental analysis on the application has been prepared by the executive director, is available to the public for review, and that written comments may be submitted.

(d) When notice of a public meeting or notice of a hearing by publication or by mail is required by Subchapters G - J and L of this chapter, the text of the notice must include the following information:

(1) the information required by subsection (b)(1) - (3), (6) - (8), and (11) of this section;

(2) the date, time, and place of the meeting or hearing, and a brief description of the nature and purpose of the meeting or hearing, including the applicable rules and procedures; and

(3) for notices of public meetings only, a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted and a statement in the notice for any permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted.

(e) When Notice of Receipt of Application and Intent to Obtain Permit by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications, the text of the notice must include the information in this subsection.

(1) the name and address of the agency and the telephone number of an agency contact from whom interested persons may obtain further information;

(2) the name, address, and telephone number of the applicant and a description of the manner in which a person may contact the applicant for further information;

(3) a brief description of the location and nature of the proposed activity;

(4) a brief description of public comment procedures, including:

(A) a statement that the executive director will respond to:

(i) all comments regarding applications for Prevention of Significant Deterioration and Nonattainment permits under Chapter 116, Subchapter B of this title (relating to New Source Review Permits) and Plant-wide Applicability Limit permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) filed on or after the effective date of this section;

(ii) all comments regarding applications subject to the requirements of Chapter 116, Subchapter E of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), whether for construction or reconstruction, filed on or after the effective date of this section; and

(iii) for all other air quality permit applications, comments raising issues that are relevant and material or otherwise significant; and

(B) a statement in the notice for any air quality permit application for which there is an opportunity for a contested case hearing, that only disputed factual issues that are relevant and material to the commission's decision that are raised during the comment period can be considered if a contested case hearing is granted;

(5) a brief description of procedures by which the public may participate in the final permit decision and, if applicable, how to request a public meeting, contested case hearing, reconsideration of the executive director's decision, a notice and comment hearing, or a statement that later notice will describe procedures for public participation, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice. Where applicable, the notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located if there is substantial public interest in the proposed activity when requested by any interested person for the following applications that are filed on or after the effective date of this section:

(A) air quality permit applications subject to the requirements for Prevention of Significant Deterioration and Nonattainment in Chapter 116, Subchapter B of this title;

(B) applications for the establishment or renewal of, or an increase in, a plant-wide applicability limit subject to Chapter 116 of this title; and

(C) applications subject to the requirements of Chapter 116, Subchapter E of this title, whether for construction or reconstruction;

(6) the application or permit number;

(7) if applicable, a statement that the application or requested action is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies;

(8) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the application is available for review and copying;

(9) a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application;

(10) at a minimum, a listing of criteria pollutants for which authorization is sought in the application which are regulated under national ambient air quality standards (NAAQS) or under state standards in Chapters 111, 112, 113, 115, and 117 of this title (relating to Control of Air Pollution from Visible Emissions and Particulate Matter, Control of Air Pollution from Sulfur Compounds, Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants, Control of Air Pollution from Volatile Organic Compounds, and Control of Air Pollution from Nitrogen Compounds);

(11) If notice is for any air quality permit application except those listed in paragraphs (12) and (15) of this subsection, the following information must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice:

(A) a statement that a person who may be affected by emissions of air contaminants from the facility or proposed facility is entitled to request a contested case hearing from the commission within the following specified time periods;

(i) for air quality permit applications subject to the requirements for Prevention of Significant Deterioration and Nonattainment permits in Chapter 116, Subchapter B of this title a statement that a request for a contested case hearing must be received by the commission by the end of the comment period or within 30 days after the mailing of the executive director's response to comments;

(ii) for air quality permit applications subject to the requirements of Chapter 116, Subchapter E of this title, whether for construction or reconstruction, a statement that a request for a contested case hearing must be received by the commission by the end of the comment period or within 30 days after the mailing of the executive director's response to comments;

(iii) for renewals of air quality permits that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted and the application does not involve a facility for which the applicant's compliance history is in the lowest classification under Texas Water Code, §5.753 and §5.754 and the commission's rules in Chapter 60 of this title (relating to Compliance History), a statement that a request for a contested case hearing must be received by the commission before the close of

the 15-day comment period provided in response to the last publication of Notice of Receipt of Application and Intent to Obtain Permit; or

(iv) for all air quality permit applications other than those in clauses (i) - (iii) of this subparagraph, a statement that a request for a contested case hearing must be received by the commission before the close of the 30-day comment period provided in response to the last publication of Notice of Receipt of Application and Intent to Obtain Permit. If no hearing requests are received by the end of the 30-day comment period following the last publication of Notice of Receipt of Application and Intent to Obtain Permit, there is no further opportunity to request a contested case hearing. If any hearing requests are received before the close of the 30-day comment period following the last publication of Notice of Receipt of Application and Intent to Obtain Permit, the opportunity to file a request for a contested case hearing is extended to 30 days after the mailing of the executive director's response to comments;

(B) a statement that a request for a contested case hearing must be received by the commission;

(C) a statement that a contested case hearing request must include the requester's location relative to the proposed facility or activity;

(D) a statement that a contested case hearing request should include a description of how the requestor will be adversely affected by the proposed facility or activity in a manner not common to the general public, including a description of the requestor's uses of property which may be impacted by the proposed facility or activity;

(E) a statement that only relevant and material issues raised during the comment period can be considered if a contested case hearing request is granted; and

(F) if notice is for air quality permit applications described in subparagraph (A)(iv) of this paragraph, a statement that when no hearing requests are timely received the applicant shall publish a Notice of Application and Preliminary Decision that provides an opportunity for public comment and to request a public meeting.

(12) if notice is for air quality applications for a permit under Chapter 116, Subchapter L of this title (relating to Permits for Specific Designated Facilities), filed on or before January 1, 2018, a Multiple Plant Permit under Chapter 116, Subchapter J of this title (relating to Multiple Plant Permits), or for a Plant-wide Applicability Limit under Chapter 116 of this title, a statement that any person is entitled to request a public meeting or a notice and comment hearing, as applicable from the commission;

(13) notification that a person residing within 440 yards of a concrete batch plant without enhanced controls under a standard permit adopted by the commission under Chapter 116, Subchapter F of this title (relating to Standard Permits) is an affected person who is entitled to request a contested case hearing;

(14) the statement: "The facility's compliance file, if any exists, is available for public review in the regional office of the Texas Commission on Environmental Quality;"

(15) if notice is for an application for an air quality permit under Chapter 116, Subchapter B, Division 6 of this title (relating to Prevention of Significant Deterioration Review) that would authorize only emissions of greenhouse gases as defined in §101.1 of this title (relating to Definitions), a statement that any interested person is entitled to request a public meeting or a notice and comment hearing, as applicable, from the commission; and

(16) any additional information required by the executive director or needed to satisfy federal public notice requirements.

(f) The chief clerk shall mail Notice of Application and Preliminary Decision to those listed in §39.602 of this title (relating to Mailed Notice). When notice of application and preliminary decision by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications, the text of the notice must include the information in this subsection:

(1) the information required by subsection (e) of this section;

(2) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit;

(3) the location, at a public place in the county with internet access in which the facility is located or proposed to be located, at which a copy of the complete application and the executive director's draft permit and preliminary decision are available for review and copying;

(4) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's draft permit and, where applicable, preliminary decision, preliminary determination summary, and air quality analysis may be submitted, or a statement in the notice for any air quality permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted. The public comment procedures must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;

(5) the deadline to file comments or request a public meeting. The notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or there is substantial public interest in the proposed activity. The notice must include a statement that the comment period will be for at least thirty days following publication of the Notice of Application and Preliminary Decision;

(6) if the application is subject to final approval by the executive director under Chapter 50 of this title, a statement that the executive director may issue final approval of the application unless a timely contested case hearing request or a timely request for reconsideration (if applicable) is filed with the chief clerk after transmittal of the executive director's decision and response to public comment;

(7) If the executive director prepares a Response to Comments as required by §55.156 of this title (relating to Public Comment Processing), the chief clerk will make the executive director's response to public comments available on the commission's Web site;

(8) in addition to the requirements in paragraphs (1) - (7) of this subsection, for air quality permit applications filed on or after the effective date of this section for permits under Chapter 116, Subchapter B, Divisions 5 of this title (relating to Nonattainment Review Permits) and 6 of this title:

(A) as applicable, the degree of increment consumption that is expected from the source or modification;

(B) a statement that the state's air quality analysis is available for comment;

(C) the deadline to request a public meeting;

(D) a statement that the executive director will hold a public meeting at the request of any interested person; and

(E) a statement that the executive director's draft permit and preliminary decision, preliminary determination summary, and air

quality analysis are available electronically on the commission's Web site at the time of publication of the Notice of Application and Preliminary Decision; and

(9) in addition to the requirements in paragraphs (1) - (7) of this subsection, for air quality permit applications filed on or after the effective date of this section for permits under Chapter 116, Subchapter E of this title:

(A) the deadline to request a public meeting;

(B) a statement that the executive director will hold a public meeting at the request of any interested person; and

(C) a statement that the executive director's draft permit and preliminary decision are available electronically on the commission's Web site at the time of publication of the Notice of Application and Preliminary Decision.

(g) When notice of a public meeting by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications filed on or after the effective date of this section, the text of the notice must include the information in this subparagraph. Air quality permit applications filed before the effective date of this section are governed by the rules in Subchapters H and K of this chapter as they existed immediately before the effective date of this section, and those rules are continued in effect for that purpose.

(1) the information required by subsection (e)(1) - (3), (4)(A), (6), (8), (9), and (16) of this section;

(2) the date, time, and place of the public meeting, and a brief description of the nature and purpose of the meeting, including the applicable rules and procedures; and

(3) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's draft permit and preliminary decision, and, as applicable, preliminary determination summary, and air quality analysis may be submitted and a statement in the notice for any air quality permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted.

(h) When notice of a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications, the text of the notice must include the following information:

(1) the information required by subsection (e)(1) - (3), (6), (9) and (16) of this section; and

(2) the date, time, and place of the hearing, and a brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 28, 2014.

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Texas Commission on Environmental Quality

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For further information, please call: (512) 239-6087

◆ ◆ ◆
CHAPTER 55. REQUESTS FOR
RECONSIDERATION AND CONTESTED
CASE HEARINGS; PUBLIC COMMENT
SUBCHAPTER F. REQUESTS FOR
RECONSIDERATION OR CONTESTED CASE
HEARING

30 TAC §55.201

The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts the amendment to §55.201 *without change* to the proposed text as published in the November 8, 2013, issue of the *Texas Register* (38 TexReg 7860). The text will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

In *Massachusetts v. EPA* (549 U.S. 497 (2007)) the Supreme Court of the United States ruled that greenhouse gases (GHGs) fit within the Federal Clean Air Act (FCAA or Act) definition of air pollutant. This ruling gave United States Environmental Protection Agency (EPA) the authority to regulate GHGs from new motor vehicles and engines if EPA made a finding under FCAA, §202(a) that six key GHGs taken in combination endanger both public health and welfare, and that combined emissions of GHGs from new motor vehicles and engines contribute to pollution that endangers public health and welfare. EPA issued its "Endangerment Finding" for GHGs on December 15, 2009 (Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, as published in the December 15, 2009, issue of the *Federal Register* (74 FR 66496)). Based on the Endangerment Finding, EPA subsequently adopted new emissions standards for motor vehicles (the "Tailpipe Rule" as published in the May 7, 2010, issue of the *Federal Register* (75 FR 25324)). The rule established standards for light-duty motor vehicles to improve fuel economy thereby reducing emissions of GHGs. The standards were effective January 2, 2011. EPA also reconsidered its interpretation of the timing of applicability of Prevention of Significant Deterioration (PSD) under the FCAA (the "Timing Rule" as published in the April 2, 2010, issue of the *Federal Register* (75 FR 17004)). EPA's interpretation of the FCAA is that PSD requirements for stationary sources of GHGs take effect when the first national rule subjects GHGs to regulation under the Act. EPA determined that once GHGs were actually being controlled under any part of the Act they were subject to regulation under the PSD program. Specifically, EPA took the position that beginning on January 2, 2011, GHG control requirements would be required under the PSD and Title V permitting programs because national standards for GHGs under the Tailpipe Rule were effective on January 2, 2011.

EPA's regulation of GHGs under the FCAA presented substantial difficulties for the EPA and states, particularly with regard to the PSD program. For instance, the most common of the GHGs, carbon dioxide (CO₂), is emitted in quantities that dwarf the Act's major source thresholds for program applicability. As a result, under EPA's Timing Rule, PSD requirements could have expanded from approximately 500 issued permits annually to more than 81,000 nationwide, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514, 31537 and 31538). To avoid this

result, EPA excluded much of this new construction activity from the PSD program by altering the Act's statutory emission rate applicability thresholds for GHGs. This "Tailoring Rule," as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514) newly defined the statutory term "subject to regulation" and established higher GHGs emission thresholds for applicability of PSD and Title V permitting than specified in the FCAA. The Tailoring Rule also phased in permitting requirements in a multi-stepped process.

Before the *Massachusetts* decision in 2007, EPA took the position that GHGs are not regulated under the FCAA, and GHGs unquestionably were not regulated when EPA approved Texas' State Implementation Plan (SIP) in 1992. Texas has had an approved SIP since 1972, as published in the May 31, 1972, issue of the *Federal Register* (37 FR 10842). In 1983, Texas was delegated authority to implement the PSD program, as published in the February 9, 1983, issue of the *Federal Register* (48 FR 6023). Following this delegation, Texas submitted several SIP revisions to enable it to administer the PSD program (collectively the "PSD SIP submission"). EPA approved Texas' PSD SIP in 1992, granting the state full authority to implement the PSD program, as published in the June 24, 1992, issue of the *Federal Register* (57 FR 28093).

The Texas PSD SIP submission and approval proceedings produced a well-developed record on how Texas would address the applicability of newly-regulated pollutants under the PSD program. During the SIP submission process, Texas consistently explained to EPA that the PSD provisions in the SIP are not prospective rulemaking, and do not incorporate future EPA interpretations of the Act or its regulations.

EPA's GHGs regulations created practical difficulties about how EPA could apply its Tailoring Rule in states with approved SIPs. In August 2010, Texas advised EPA that it could not retroactively reinterpret its SIP to cover GHGs, which were not regulated at the time Texas' SIP was approved in 1992 and were, in fact, a composite pollutant defined for the first time in the Tailoring Rule. Texas also explained that the PSD program only encompassed National Ambient Air Quality Standard (NAAQS) pollutants, but confirmed as a regulatory matter that the approved PSD program encompasses all federally regulated new source review (NSR) pollutants, including any pollutant that otherwise is subject to regulation under the FCAA, as stated in 30 TAC §116.12(14)(D).

Following promulgation of the Tailoring Rule, EPA issued a proposed "Finding of Substantial Inadequacy and SIP Call," as published in the September 2, 2010, issue of the *Federal Register* (75 FR 53892). This action proposed finding the SIPs of 13 states, including Texas', "substantially inadequate" because these SIPs did not apply PSD requirements to GHGs-emitting sources. EPA proposed to require these states (through their SIP-approved PSD programs) to regulate GHGs as defined in the Tailoring Rule. EPA also proposed a Federal Implementation Plan (FIP) that would apply specifically to states that did not or could not agree to reinterpret their SIPs to impose the Tailoring Rule and did not meet SIP submission deadlines. EPA finalized its GHG SIP Call in the December 12, 2010, issue of the *Federal Register* (75 FR 77698) and required Texas to submit revisions to its SIP by December 1, 2011.

EPA published an interim final rule partially disapproving Texas' SIP; imposing the GHGs FIP effective as of its date of publication, as published in the December 30, 2010, issue of the *Federal Register* (75 FR 82430). EPA stated that FCAA, §110(k)(6)

authorized it to change its previous approval of Texas' PSD SIP into a partial approval and partial disapproval. EPA's basis was that it had erroneously approved Texas' PSD SIP submission because the SIP did not appropriately address the applicability of newly-regulated pollutants to the PSD program in the future. EPA further stated that its action was independent of the GHG SIP Call because that action was aimed at a narrower issue of applicability to GHGs, whereas its decision retroactively disapproving Texas' PSD SIP submission was addressed to Texas' purported failure to address, or assure the legal authority for, application of PSD to all pollutants newly subject to regulation. EPA published the final rule retroactively disapproving Texas' PSD SIP in part and promulgating the FIP as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178).

The effect of EPA's FIP is that major source preconstruction permitting authority is divided between two authorities - EPA for GHGs and the state of Texas for all other pollutants. Currently, major construction projects and expansions in Texas that require PSD permits must file applications with both EPA Region 6 (for GHGs) and TCEQ (for all non-GHG pollutants).

House Bill (HB) 788, 83rd Legislature, 2013, added new Texas Health and Safety Code (THSC), §382.05102. This new section grants TCEQ authority to authorize emissions of GHGs consistent with THSC, §382.051, to the extent required under federal law. THSC, §382.05102 directs the commission to adopt implementing rules, including a procedure to transition GHG PSD applications currently under EPA review to the TCEQ. Upon adoption, the rules must be submitted to EPA for review and approval into the Texas SIP. THSC, §382.05102 excludes permitting processes for GHGs from the contested case hearing procedures in THSC, Chapter 382; Texas Water Code, Chapter 5; and Texas Government Code, Chapter 2001. THSC, §382.05102 also requires that the commission repeal the rules adopted under this authority and submit a SIP revision to EPA, if (at a future date) emissions of GHGs are no longer required to be authorized under federal law.

The commission initiated this rulemaking to fulfill the directive from the legislature. The legislature found that "in the interest of the continued vitality and economic prosperity of the state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred authority for emissions of {GHGs}."

Texas has challenged in federal court EPA's GHG regulations as well as EPA's SIP Call and FIP. Implementation of HB 788 through this rulemaking is not adverse to Texas' claims in its ongoing challenges to EPA's actions regarding GHGs generally or relating to the SIP. The commission's action to conduct rulemaking for submittal and approval by EPA is consistent with Texas' position that state law does not give EPA the authority to automatically change state regulations.

Concurrently with this rulemaking, the commission is adopting new and amended rules to 30 TAC Chapters 39 (Public Notice), 101 (General Air Quality Rules), 106 (Permits by Rule), 116 (Control of Air Pollution by Permits for New Construction or Modification), and 122 (Federal Operating Permits Program) to implement HB 788. Except where specifically noted, all adopted changes to Chapters 39, 55, 101, 106, 116, and 122 are necessary to achieve the goal of implementation of HB 788, obtaining SIP approval of certain rules, and rescission of the FIP.

Specific Changes to Chapters 39 and 55

The commission adopts changes to two chapters regarding public participation. The adopted amendments to Chapters 39 and 55 are distinguishable from current public participation rules and the Texas SIP. First, GHG PSD permit applications are not subject to an opportunity to request a contested case hearing or reconsideration of the executive director's decision. Second, based on EPA's current interpretation of its PSD rules, no air quality analysis is required for GHG permits. Therefore, when no such analysis is required, none will be prepared by the commission and available for public comment.

HB 788 specifically excludes GHG PSD permit applications from the requirements relating to a contested case hearing. Requests for reconsideration were added by HB 801 (76th Legislature, 1999) as an alternative to the opportunity to request a contested case hearing. However, this remedy is not independent of the right to request a contested case hearing. Absent a right to request a contested case hearing, there is no independent right to request reconsideration of the executive director's decision. The commission interprets HB 788 to require that all other HB 801 requirements, discussed later in this preamble, apply to GHG PSD permit applications.

In addition, although HB 788 does not specify that GHG PSD permit applications are exempt from requests for the commission to reconsider the executive director's preliminary decision, the legislative history of the bill provides that the intent of HB 788 is to shorten the time to obtain a permit by simplifying the permit process. Requests for reconsideration and contested case hearing are interim administrative remedies which add time to the process, and are not part of EPA's procedural mechanisms.

The majority of the existing public participation and notice requirements in Chapters 39 and 55, which implement both federal and state law, will apply to the GHG PSD applications. Many of these requirements were clarified in or added by HB 801. The Chapter 39 amendments will be submitted as revisions to the SIP, but the Chapter 55 amendment is not required for the SIP. The public participation and notice requirements include newspaper publication of Notice of Receipt of Application and Intent to Obtain Permit (NORI) and Notice of Application and Preliminary Decision (NAPD), each with particular language; sign posting; alternate language newspaper publication and sign posting (where applicable); placement of a copy of the application, the executive director's preliminary decision (draft permit), and preliminary determination summary in a public place for review and copying; providing opportunity for and mandatory attendance at a public meeting (which is mandatory when requested by a member of the public for any PSD permit application or by a legislator who represents the general area where the facility is or is proposed to be located); and notice to certain affected agencies and representatives, including EPA Region 6, local air pollution control agencies with jurisdiction, the chief executives of the city and county where the source is or would be located, and any State or Federal Land Manager, and Indian Governing Body. In addition, the executive director's draft permit and preliminary decision, and preliminary determination summary are available electronically on the commission's Web site at the time of publication of the NAPD. Finally, the executive director is required to respond to comments submitted by preparing a Response to Comments, which is mailed to commenters and posted on the commission's Web site, with the executive director's decision. Some of these requirements and procedures were changed in rulemaking and described in the preamble adopted June 2, 2010. Background information regarding the commission's public participation rules for PSD permits can be found in the preamble adopting new and

amended rules as published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198 - 5255, 5274 - 5277, and 5344 - 5348).

Any GHG PSD permit issued by the executive director will be subject to the Motion to Overturn Process in §50.139, or, if issued by the commission, will be subject to a Motion for Rehearing. Both of these administrative remedies are subject to appeal to Texas District Court for persons who participated in the steps of the administrative process by submitting comments and filing the appropriate challenge with the commission. As discussed in the preamble for the most recent rule amendments regarding public participation for air quality permit applications, as published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198), access to judicial review for air quality permits is governed by THSC, §382.032. Generally, a person must comply with the requirement to exhaust the available administrative remedies prior to filing suit in district court. In addition, EPA has approved the Texas Title V Operating Permit Program, which required the submission of a Texas Attorney General opinion regarding sufficient access to courts, in compliance with Article III of the United States Constitution. The Attorney General Opinion specifically states that "{a}ny provisions of State law that limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirement of Article III of the United States Constitution." The state statutory authority cited in support of the Texas Title V Operating Permit Program includes THSC, §382.032, which is the underlying authority for the appeal of Texas' air quality permit actions, including the PSD permitting program. Therefore, the Texas Attorney General statement regarding equivalence of judicial review based on THSC, §382.032 in accordance with Article III of the United States Constitution is also applicable for every action of the commission subject to the Texas Clean Air Act (TCAA), including PSD permit decisions.

Section Discussion

The adopted amendment to §55.201(i)(3)(C) provides that an application for an air quality permit under Chapter 116, Subchapter B, Division 6 that would authorize only emissions of GHGs (as defined in adopted amendments to 30 TAC §101.1) is a type of application that is not subject to contested case hearing. This amendment is consistent with HB 788 and the corresponding statute in THSC, §382.05102(d). Existing subparagraph (C) is re-lettered as subparagraph (D).

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of this rulemaking, as discussed elsewhere in this preamble, is to implement HB 788 by amending §55.201 to add an exemption from requests for contested case hearing for applications for GHG PSD permits.

Additionally, even if the rule met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted amendment was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382 (also known as the TCAA), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble, and is specifically required by state law. The specific intent of this rulemaking, as discussed elsewhere in this preamble, is to implement HB 788 by amending §55.201 to add an exemption from requests for contested case hearing for applications for GHG PSD permits. Further, the amendment does not exceed a standard set by federal law or exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the regulatory impact analysis determination.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution §17 or §19, Article I; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the adopted rulemaking under Texas Government Code, §2007.043. The primary purpose of this rulemaking, as discussed elsewhere in this preamble, is to implement HB 788 by amending the rule to add an exemption from requests for contested case hearing for applications for GHG PSD permits.

The adopted rule will not create any additional burden on private real property. The rule will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The rulemaking will not affect private real property in

a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §33.201 *et seq.*) and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The adopted rule updates a procedural requirement that governs the submittal of air quality GHG PSD permit applications. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR) to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Effect on Sites Subject to the Federal Operating Permits Program

The adopted rule will not require any changes to outstanding federal operating permits.

Public Comment

The commission held a public hearing on December 5, 2013. The public comment period ended on December 9, 2013. The commission received comments from Air Alliance Houston (AAH); Association of Electric Companies of Texas, Inc (AECT); C3 Petrochemicals (C3P); Calpine Corporation (Calpine); Environment Texas; Gas Processors Association (GPA); Golden Pass Products LLC (Golden Pass); Golden Spread Electric Cooperative, Inc. (GSEC); House Bill 788 Working Group (HB788WG); Jackson Walker L.L.P.; Lone Star Chapter of the Sierra Club (Sierra Club); Natgasoline, LLC; Occidental Chemical Corporation (OCC); OCI Beaumont, LLC; Pioneer Natural Resources (Pioneer); Public Citizen; State Representative Lon Burnam; Sustainable Energy and Economic Development Coalition (SEED); Texas Chemical Council (TCC); Texas Combined Heat and Power Initiative (TXCHPI); Texas Industry Project (TIP); Texas Oil and Gas Association (TXOGA); Texas Pipeline Association (TPA); Texas Solid Waste Association of North America (TxSWANA); Weaver Boos Consultants, LLC (Weaver); and Zephyr Environmental Corporation (Zephyr).

This comprehensive list includes all of the commenters for all of the chapters of this concurrent rulemaking project. The individual comments are addressed in the Response to Comment section of the appropriate chapter. Eighteen of the commenters supported the rulemaking or portions of the rulemaking, six commenters opposed portions of the rulemaking, and 18 commenters suggested changes.

Response to Comments

Comment

GPA and TPA commented in support of §55.201(i)(3)(C), which provides there is no right to a contested case hearing on a GHG PSD application. GPA commented that it is concerned that a request for a contested case hearing could delay the issuance of a permit. GPA and TPA urged the TCEQ to make clear in the rules that the executive director may issue a GHG PSD permit even if a request for a contested case hearing was filed. TPA suggested that a request for a contested case hearing be considered a comment on the application, and the executive director could state in his response to comments that a contested case hearing is not provided for under the law.

Response

HB 788, codified as THSC, §382.05102, states that the GHG PSD processes are not subject to the requirements related to a contested case hearing, which are otherwise applicable to PSD permit applications. The commission agrees that the executive director may issue a GHG PSD permit even if a request for contested case hearing is filed for that application. Generally, the executive director's response to comment for applications that are subject to a public comment process but without a statutory right for a hearing will include the request as a comment and provide the statutory citation as part of the response.

If an applicant files a request for a GHG PSD permit as part of an application that includes other case by case authorization requests and a hearing request is received on the consolidated application, the commission will be required to consider the hearing request for the non-GHG portion of the application and, if granted, the issues for the contested case. The consolidated permit document cannot be issued until the resolution of the remainder of the permits that would be included in the consolidated permit document, and construction cannot commence until all authorizations are issued.

The executive director is still in the process of implementation activities, including preparing a guidance document and updating notice forms, and as part of that activity is considering whether applicants may file consolidated applications. The executive director is also considering whether providing notice of an application for a GHG PSD permit may be consolidated and published with notice for other associated case-by-case NSR permit requests included in the same application. No change has been made to the rule in response to these comments.

Comment

TPA commented that the general provision regarding the location of a public meeting in §55.154(b) should apply to GHG PSD applications. TPA commented that §55.154(b) provides that public meetings may be held in the county where the facility is located or proposed to be located, but the proposed new or amended sections in Chapter 39 do not contain any specific provision about the location of public meetings for GHG PSD applications. TPA commented that the project's home county is the most logical place to hold public meetings and neither the

public nor the applicant should have any objection to holding the meeting in the county where the project is contemplated. TPA requests that the agency clarify its intent regarding locations of public meetings for GHG PSD applications.

Response

No change has been made to the rules in Chapter 39 or Chapter 55 as part of this rulemaking in response to this comment. The location of a public meeting for all PSD applications, including GHG PSD applications, is governed by existing §55.154(b), which is not open as part of this rulemaking.

Comment

TPA requested clarification on the applicability of §55.154(c)(1) to GHG PSD applications regarding when a public meeting will be granted. TPA commented that §55.154(c)(1) requires that a public meeting be held if (among other things) the executive director determines that there is a substantial or significant degree of public interest in a permit application, which is consistent with EPA's practice. TPA also commented that in addition to EPA, Oklahoma and Arkansas retain regulatory discretion regarding when a public meeting will be held, based on level of public interest. TPA suggested that TCEQ clarify that it retains some discretion in determining whether or not to grant a request for a public meeting.

Response

TCEQ rules, including §55.154, provide that a public meeting on a PSD application will be held if requested by any interested person. Although §55.154(c)(1) provides that a meeting will be held if the executive director determines that there is a substantial or significant degree of public interest in a permit application, §55.154(c)(3), which specifically concerns PSD applications, does not include the discretionary provisions found in §55.154(c)(1).

EPA's authority regarding holding public hearings and the public participation rules for the permits it issues are found in 40 CFR Part 124; these rules are not applicable to SIP-approved states such as Texas. Further, the Arkansas rules cited in the comment do not apply to PSD permits and as such are not part of the Arkansas SIP. No change has been made to the rule in response to this comment.

Comment

GPA and TPA commented that the proposed language in §39.411(e)(15) should be revised to limit the ability to request a public meeting to "interested persons." They commented that current language in §39.411(e)(5), (f)(8)(D) and (f)(9)(B) and §55.154(c)(3) reference "interested persons" and it is inconsistent for new language in §39.411(e)(15) to reference "any person." TPA commented that the change is needed to maintain consistency and to prevent persons located in areas geographically distant from the project at issue from being granted a public meeting, based on the claim that GHG emissions may have a global impact. GPA commented that the proposed language to allow "any person" goes beyond the federal requirements in 40 CFR §51.166(q).

Response

Although the commission does not find that the exclusion of the word "interested" results in a rule that exceeds federal requirements, the commission agrees that the rule as proposed be amended to provide that interested persons may request a public meeting and adopts this change to ensure consistency

with existing rule language. However, persons located in areas geographically distant from the project at issue can request a public meeting for GHG PSD applications. Specifically, the commission's rule regarding public meetings, §55.154, which is not currently open for public comment, provides that a meeting will be held regarding PSD applications if requested by any interested person, and that rule is part of the Texas SIP. Section 55.154(c)(1) provides that a meeting will be held if the executive director determines that there is a substantial or significant degree of public interest in a permit application; however, §55.154(c)(3), which specifically concerns PSD applications, does not include the discretionary provisions found in §55.154(c)(1).

As stated in the adoption preamble in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198), the addition of §55.154(c)(3) was in response to EPA's concerns that for a new or modified source subject to PSD or nonattainment requirements, the rules do not require the TCEQ to provide an opportunity for any interested person to give oral comments on PSD and nonattainment air quality draft permits. The provision in §55.154 that provides the executive director with discretion to hold a public meeting if the executive director determines that there is a substantial or significant degree of public interest in an application is not consistent with the federal requirements for PSD applications. Under the Texas rule, for non-PSD applications the decision to grant a public meeting is within the executive director's discretion and must be based upon substantial or significant public interest. In contrast, the rules adopted by EPA for PSD applications provide for the opportunity of interested persons to request a public hearing and public notice of that opportunity. The TCEQ's public meetings are the same type of proceeding as EPA's public hearings.

Comment

Sierra Club commented that HB 788 does not allow a contested case hearing on GHG PSD permit applications, and hoped TCEQ would take seriously its commitment to assess GHG PSD applications, especially the Best Available Control Technology (BACT) portion, and allow public input on the application.

Response

Except for the opportunity to request a contested case hearing, the public participation components of GHG PSD permitting are the same as other PSD permit applications, and thus there are opportunities for the public to provide comment on both the application and the executive director's draft permit. The executive director is required by §55.152 to respond to all relevant and material, or otherwise significant public comment in a formal Response to Comment document, which includes responding to comments regarding BACT. No change has been made to the rule in response to this comment.

Comment

TCC and TIP commented in general support of the proposed revisions in Chapters 39 and 55. However, TCC encouraged TCEQ to clarify by rule or preamble language that testimony and evidence produced for a contested case hearing on a PSD non-GHG permit application associated with the project requiring a GHG-PSD permit are limited to non-GHGs and shall not include consideration of GHGs. TCC and TIP requested that it be further clarified that a contested case hearing on a non-GHG application should not be used as a vehicle to litigate such GHG authorizations.

TXOGA suggested adding clarifying language to the preamble for Chapter 39 to limit collateral presentation of GHGs at contested case hearings. TXOGA requested TCEQ clarify that testimony and evidence presented in PSD non-GHG permit applications subject to a contested case hearing are limited to non-GHG pollutants and shall not include consideration of GHG.

Response

The commission appreciates the support, and agrees that testimony and evidence produced for a contested case hearing regarding applications for permits other than for a GHG PSD permit, but which concern the same project requiring a GHG PSD permit, are limited to non-GHGs and shall not include consideration of the GHG application or any GHG draft permit. In addition, a contested case hearing on a non-GHG application shall not be used as a vehicle to litigate the GHG application or to allow a collateral attack on the GHG draft permit. No change has been made to the rule in response to these comments.

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also adopted under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.05102, which relates to the permitting authority of the commission for greenhouse gas emissions THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which requires an applicant for a permit issued under THSC, §382.0518 to publish notice of intent to obtain a permit. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency. The amendment is also adopted under Federal Clean Air Act, 42 United States Code, §§7401 *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards

will be achieved and maintained within each air quality control region of the state.

The adopted amendment implements House Bill 788 (83rd Legislature, 2013), THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05102, 382.0515, 382.0518, and 382.056; and Texas Government Code, §2001.004 and §2001.006.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 101. GENERAL AIR QUALITY RULES

The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts the amendments to §§101.1, 101.10, 101.27, and 101.201.

Section 101.1 is adopted *with change* to the proposed text in the November 8, 2013, issue of the *Texas Register* (38 TexReg 7866). Sections 101.10, 101.27, and 101.201 are adopted *without changes* to the proposed text and will not be republished.

The commission will submit §§101.1, 101.10, and 101.201 to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

In *Massachusetts v. EPA* (549 U.S. 497 (2007)) the Supreme Court of the United States ruled that greenhouse gases (GHGs) fit within the Federal Clean Air Act (FCAA or Act) definition of air pollutant. This ruling gave EPA the authority to regulate GHGs from new motor vehicles and engines if EPA made a finding under FCAA, §202(a) that six key GHGs taken in combination endanger both public health and welfare, and that combined emissions of GHGs from new motor vehicles and engines contribute to pollution that endangers public health and welfare. EPA issued its "Endangerment Finding" for GHGs on December 15, 2009, (Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, as published in the December 15, 2009, issue of the *Federal Register* (74 FR 66496)). Based on the Endangerment Finding, EPA subsequently adopted new emissions standards for motor vehicles (the "Tailpipe Rule" as published in the May 7, 2010, issue of the *Federal Register* (75 FR 25324)). The rule established standards for light-duty motor vehicles to improve fuel economy thereby reducing emissions of GHGs. The standards were effective January 2, 2011. EPA also reconsidered its interpretation of the timing of applicability of Prevention of Significant Deterioration (PSD) under the FCAA (the "Timing Rule" as published in the April 2, 2010, issue of the *Federal Register* (75 FR 17004)). EPA's interpretation of the FCAA is that PSD requirements for stationary sources of

GHGs take effect when the first national rule subjects GHGs to regulation under the Act. EPA determined that once GHGs were actually being controlled under any part of the Act, they were subject to regulation under the PSD program. Specifically, EPA took the position that beginning on January 2, 2011, GHG control requirements would be required under the PSD and Title V permitting programs because national standards for GHGs under the Tailpipe Rule were effective on January 2, 2011.

EPA's regulation of GHGs under the FCAA presented substantial difficulties for the EPA and states, particularly with regard to the PSD program. For instance, the most common of the GHGs, carbon dioxide (CO₂), is emitted in quantities that dwarf the Act's major source thresholds for program applicability. As a result, under EPA's Timing Rule, PSD requirements could have expanded from approximately 500 issued permits annually to more than 81,000 nationwide, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514, 31537 and 31538). To avoid this result, EPA excluded much of this new construction activity from the PSD program by altering the Act's statutory emission rate applicability thresholds for GHGs. This "Tailoring Rule," as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514) newly defined the statutory term "subject to regulation" and established higher GHGs emission thresholds for applicability of PSD and Title V permitting than specified in the FCAA. The Tailoring Rule also phased in permitting requirements in a multi-stepped process.

Before the *Massachusetts* decision in 2007, EPA took the position that GHGs are not regulated under the FCAA, and GHGs unquestionably were not regulated when EPA approved Texas' SIP in 1992. Texas has had an approved SIP since 1972, as published in the May 31, 1972, issue of the *Federal Register* (37 FR 10842). In 1983, Texas was delegated authority to implement the PSD program, as published in the February 9, 1983, issue of the *Federal Register* (48 FR 6023). Following this delegation, Texas submitted several SIP revisions to enable it to administer the PSD program (collectively the "PSD SIP submission"). EPA approved Texas' PSD SIP in 1992, granting the state full authority to implement the PSD program, as published in the June 24, 1992, issue of the *Federal Register* (57 FR 28093).

The Texas PSD SIP submission and approval proceedings produced a well-developed record on how Texas would address the applicability of newly regulated pollutants under the PSD program. During the SIP submission process, Texas consistently explained to EPA that the PSD provisions in the SIP are not prospective rulemaking, and do not incorporate future EPA interpretations of the Act or its regulations.

EPA's GHGs regulations created practical difficulties about how EPA could apply its Tailoring Rule in states with approved SIPs. In August 2010, Texas advised EPA that it could not retroactively reinterpret its SIP to cover GHGs, which were not regulated at the time Texas' SIP was approved in 1992 and were, in fact, a composite pollutant defined for the first time in the Tailoring Rule. Texas also explained that the PSD program only encompassed National Ambient Air Quality Standard (NAAQS) pollutants, but confirmed as a regulatory matter that the approved PSD program encompasses all federally regulated new source review (NSR) pollutants, including any pollutant that otherwise is subject to regulation under the FCAA, as stated in 30 TAC §116.12(14)(D).

Following promulgation of the Tailoring Rule, EPA issued a proposed "Finding of Substantial Inadequacy and SIP Call," as published in the September 2, 2010, issue of the *Federal Register*.

ter (75 FR 53892). This action proposed finding the SIPs of 13 states, including Texas', "substantially inadequate" because these SIPs did not apply PSD requirements to GHGs-emitting sources. EPA proposed to require these states (through their SIP-approved PSD programs) to regulate GHGs as defined in the Tailoring Rule. EPA also proposed a Federal Implementation Plan (FIP) that would apply specifically to states that did not or could not agree to reinterpret their SIPs to impose the Tailoring Rule and did not meet SIP submission deadlines. EPA finalized its GHG SIP Call in the December 12, 2010, issue of the *Federal Register* (75 FR 77698) and required Texas to submit revisions to its SIP by December 1, 2011.

EPA published an interim final rule partially disapproving Texas' SIP; imposing the GHGs FIP effective as of its date of publication, as published in the December 30, 2010, issue of the *Federal Register* (75 FR 82430). EPA stated that FCAA, §110(k)(6) authorized it to change its previous approval of Texas' PSD SIP into a partial approval and partial disapproval. EPA's basis was that it had erroneously approved Texas' PSD SIP submission because the SIP did not appropriately address the applicability of newly-regulated pollutants to the PSD program in the future. EPA further stated that its action was independent of the GHG SIP Call because that action was aimed at a narrower issue of applicability to GHGs, whereas its decision retroactively disapproving Texas' PSD SIP submission was addressed to Texas' purported failure to address, or assure the legal authority for, application of PSD to all pollutants newly subject to regulation. EPA published the final rule retroactively disapproving Texas' PSD SIP in part and promulgating the FIP as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178).

The effect of EPA's FIP is that major source preconstruction permitting authority is divided between two authorities - EPA for GHGs and the state of Texas for all other pollutants. Currently, major construction projects and expansions in Texas that require PSD permits must file applications with both EPA Region 6 (for GHGs) and TCEQ (for all non-GHG pollutants).

Although Texas has an EPA-approved Title V operating permit program, it currently lacks the approval to permit sources that are major sources subject to Title V as a result of their emissions of GHGs. In EPA's "Action to Ensure Authority to Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule," as published in the December, 30, 2010, issue of the *Federal Register* (75 FR 82254), EPA stated in footnote 8 that in this situation, there is no obligation for these major GHG sources to apply for a Title V permit until such time as the state amends its rules to make the permit program applicable to them.

House Bill (HB) 788, 83rd Legislature, 2013, added new Texas Health and Safety Code (THSC), §382.05102. The new section grants TCEQ authority to authorize emissions of GHGs consistent with THSC, §382.051, to the extent required under federal law. THSC, §382.05102 directs the commission to adopt implementing rules, including a procedure to transition GHG PSD applications currently under EPA review to the TCEQ. Upon adoption, the rules must be submitted to EPA for review and approval into the Texas SIP. THSC, §382.05102 excludes permitting processes for GHGs from the contested case hearing procedures in THSC, Chapter 382; Texas Water Code (TWC), Chapter 5; and Texas Government Code, Chapter 2001. THSC, §382.05102 also requires that the commission repeal the rules adopted under this authority and submit a SIP revision to EPA, if (at a future date) emissions of GHGs are no longer required to be authorized under federal law.

The commission initiated this rulemaking to fulfill the directive from the legislature. The legislature found that "in the interest of the continued vitality and economic prosperity of the state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred authority for emissions of {GHGs}."

Texas has challenged in federal court EPA's GHG regulations as well as EPA's SIP Call and FIP. Implementation of HB 788 through this rulemaking is not adverse to Texas' claims in its ongoing challenges to EPA's actions regarding GHGs generally or relating to the SIP. The commission's action to conduct rulemaking for submittal and approval by EPA is consistent with Texas' position that state law does not give EPA the authority to automatically change state regulations.

The United States Supreme Court is currently considering Texas' challenge to EPA's authority to regulate stationary sources of GHGs under the FCAA. If the court issues a ruling that invalidates or renders unenforceable all or some of EPA's regulations of GHGs after adoption and submittal of these rules to EPA, the commission intends to follow the direction in THSC, §382.05102 to promptly repeal or amend the rules as necessary based on the court's order, and submit the changes or repeal to EPA to remove the provisions from the SIP.

Concurrently with this rulemaking, the commission is adopting new and amended rules to 30 TAC Chapters 39 (Public Notice), 55 (Requests for Reconsideration and Contested Case Hearings; Public Comment), 106 (Permits by Rule), 116 (Control of Air Pollution by Permits for New Construction or Modification), and 122 (Federal Operating Permits Program) to implement HB 788. Except where specifically noted, all adopted changes to Chapters 39, 55, 101, 106, 116, and 122 are necessary to achieve the goal of implementation of HB 788, obtaining SIP approval of certain rules, and the lifting of the FIP.

Implementation of HB 788

THSC, §382.0215 provides that the commission require the owner or operator of a regulated entity that experiences emissions events to maintain a record of all emissions events at the regulated entity in the manner and for the periods prescribed by commission rule. However, not all emissions events, consisting of emissions from upset events and unscheduled maintenance, startup, and shutdown (MSS) activities, are required to be reported under §101.201. THSC, §382.0215 also authorizes the commission to establish the reportable quantities (RQs) of air contaminants associated with emissions events and requires the owner or operator of a regulated entity to notify the commission for each emissions event that meets or exceeds an RQ. The reporting provides useful information to evaluate the event for protection of air quality. In 1997 and 1999, the commission adopted RQs and updated its rules to clarify when and how emissions must be recorded and reported, considering reporting requirements found in other state and federal regulations, enhancement of compliance, and utilization of TCEQ resources. The commission uses the reports to determine compliance with the rule and claims of affirmative defense, determine excessive emissions events, organize potential monitoring of long duration events, provide technical assistance to emergency personnel, and inform the public. The records are also used to evaluate trends and provide an enforcement perspective. More information can be found in the rulemaking that first adopted the RQs in the July 29, 1997, issue of the *Texas Register* (22 TexReg

7040), and also for amendments to the rule in the December 17, 1999, issue of the *Texas Register* (24 TexReg 11494).

The RQ establishes what should be reported as soon as practicable within the 24-hour timeframe provided in THSC, §382.0215. The RQs are not intended to represent a judgment as to the specific degree of hazard associated with certain releases, but rather function as a mechanism by which the regulated community will know when to notify the commission of unauthorized emissions. When the RQs were first established, the recordkeeping requirements replaced the requirement to report events that do not meet an RQ.

The commission adopts no RQ for CO₂, nitrous oxide (N₂O), methane (CH₄), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), or sulfur hexafluoride (SF₆), individually or collectively, except for the HFCs that are listed specifically in the definition of RQ. The adopted amendments also exempt reporting of these six air contaminant compounds as part of a mixture with other air contaminant compounds. Further, any emissions of CO₂, N₂O, CH₄, HFCs, PFCs, or SF₆, individually or collectively, are not required to be submitted as part of the final record described in §101.201(c), except for the HFCs that are listed specifically in the definition of RQ. With regard to GHGs, the commission has found no basis for receiving any reports of excess emissions due to emissions events and therefore exempts these from reporting under §101.201. A source which has emissions exceeding GHG PSD permit limits is subject to recordkeeping for the unauthorized emissions of GHGs and other pollutants. If an RQ was exceeded, reporting under §101.201 is required for pollutants other than GHGs (except the HFCs specifically listed). All unauthorized emissions are also considered Title V deviations and are required to be included in semi-annual reporting required in Chapter 122.

Unauthorized emissions are defined as exceeding a permit limit, rule, or order of the commission. A source that is not required to have a GHG PSD permit does not have a limit for which unauthorized emissions can be evaluated and therefore will not, by definition, have an emissions event of GHGs. Consequently, there is no recordkeeping requirement for unauthorized emissions of GHGs for a source that is not required to have a GHG PSD permit. However, recordkeeping of unauthorized emissions of other pollutants remains a requirement, and reporting under §101.201 may be required.

The commission is also adopting the removal of CO₂ and CH₄ from the definition of "Unauthorized emissions." By removing the terms, these two GHGs will no longer be exempted from the definition of unauthorized emissions. Because no GHGs will be listed in the exception, all GHGs would be considered as unauthorized emissions if they exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by Texas Clean Air Act (TCAA), THSC, §382.0518(g).

§101.10, Emissions Inventory Requirements

Implementation of HB 788 also necessitates the amendment of §101.10. Owners and operators of accounts that are currently required to submit an annual emissions inventory include any source that meets the definition of a major facility or major stationary source as defined in §116.12, or a source that emits or has the potential to emit 100 tons per year (tpy) of a contaminant. Under these requirements, a small source emitting 100 tpy of GHGs would be required to submit an annual emissions inventory. It is not the commission's intent to require these small-emitting sources to submit emissions inventories because this addi-

tional data would not contribute substantially to the inventory, and the commission could not administratively process the additional number of inventories received. Therefore, an exception to this 100 tpy reporting threshold is adopted in §101.10(a)(3) for emissions of GHGs. Only major sources required to obtain a PSD permit (at the thresholds adopted in new §116.164) are required to submit an inventory.

Under the adopted revisions, owners and operators of accounts that include sources that are required to obtain a PSD permit for GHGs are required to submit an initial emissions inventory and annual emissions inventory update required under §101.10(b). At this time, the commission does not require the reporting of emissions of GHGs from any source required to submit an emissions inventory per §101.10 unless otherwise required through future rulemaking or specifically requested under the authority of §101.10(b)(3), Special Inventories, as part of any future analysis to assess additional emissions fees to fund HB 788. Owners and operators that are required to submit an annual emissions inventory are required to report emissions of all pollutants listed in §101.10(b)(1). GHGs are not included in §101.10(b)(1).

§101.27, Emissions Fees

Implementation of HB 788 also necessitates the amendment of §101.27. Emissions fees are collected each fiscal year from regulated entities subject to federal operating permits under Chapter 122 (Federal Operating Permits Program, commonly referred to as Title V permitting). The fees are based on actual or authorized emissions of all regulated pollutants emitted from these sites including emissions of criteria pollutants, hazardous air pollutants, and other regulated emissions up to a cap of 4,000 tons per pollutant.

The emissions fee rule allows the rate to be adjusted annually in a range of \$25 to \$45 dollars per ton. This flexibility allows the agency to collect revenue necessary to fully fund the Title V program. The base rate is currently set at \$25 per ton which resulted in an adjusted rate of \$47.49 per ton for Fiscal Year 2014.

The adopted amendment to §101.27 excludes the GHGs defined in the adopted amendment to §101.1 from fee collection requirements. However, sources that are required to obtain a Title V permit because of emissions of GHGs are required to pay emissions fees on non-GHG pollutants. Owners or operators of these sources will pay fees on emissions of any pollutant subject to FCAA, §111; any pollutant listed as a hazardous air pollutant under FCAA, §112; each pollutant that a national primary ambient air quality standard has been promulgated (including carbon monoxide); and any other air pollutant subject to requirements under commission rules, regulations, permits, orders of the commission, or court orders. For purposes of §101.27 only, the term "regulated pollutant" does not include the individual GHGs as listed in the definition §101.1; thus excluding the GHGs from the emissions fee. The current and projected fees are anticipated to cover the cost of the program in the near term.

Adopted New Reportable Quantity for Fire Protection Fluid

In addition to the changes in Chapter 101 to implement HB 788, the commission adopts a new RQ for 3-Pentanone, 1,1,1,2,2,4,5,5,5-nonafluoro-4-(trifluoromethyl)-, CAS No. 756-13-8 (hereafter C6 fluoroketone) in §101.1. On May 22, 2013, the commission approved a rulemaking petition from 3M Company filed on April 1, 2013 (Project Number 2013-028-PET-NR), requesting that its fire protection fluid be listed in §101.1(88), to establish an RQ of 5,000 (lbs) pounds

instead of the default RQ of 100 lbs. The chemical is sold as 3M™ Novec™ 1230 Fire Protection Fluid. According to the petition, the fluid is "used to extinguish fires in high valued assets" that cannot be protected with water.

The adopted new RQ increases the reporting threshold for C6 fluoroketone. In considering RQs, the TCEQ considers toxicological effects, photochemical reactivity for producing ozone, and its intent of limiting emissions events reports to the most significant events. C6 fluoroketone is neither a criteria pollutant nor a precursor of ozone, and therefore the 100-pound default for nonattainment and maintenance areas should not apply.

No signs of acute toxicity were observed in rats exposed to 100,000 parts per million (ppm) C6 fluoroketone for up to four hours. The "no observed adverse effect" level for acute toxicity in rats was 100,000 ppm or 10%. Other toxicity studies have concluded that C6 fluoroketone is only minimally irritating to the eye, non-irritating to the skin, and does not cause sensitization. There have been no complaints of adverse health effects from human experience with exposures to C6 fluoroketone. C6 fluoroketone is safe to the public when discharged in the event of a fire. C6 fluoroketone was approved by the EPA in the December 20, 2002, issue of the *Federal Register* (67 FR 77931) as an acceptable substitute for ozone-depleting substances, such as halon 1301, for use in fire suppression.

Section by Section Discussion

§101.1, Definitions

The commission adopts the amendment to §101.1 to add the definition of GHGs, set an RQ for a compound in response to a rulemaking petition, provide that there is no RQ for GHGs (except for the specific individual air contaminant compounds found in the current RQ definition), amend the definition of unauthorized emissions to exclude CO₂ and CH₄, and make nonsubstantive revisions including renumbering and clarifying references.

The commission adopts §101.1(42) to add a definition of the pollutant GHGs and to appropriately renumber the paragraphs of §101.1. The definition establishes that the pollutant GHGs is an aggregate group of six GHGs including: CO₂, N₂O, CH₄, HFCs, PFCs, and SF₆. This definition is consistent with EPA's definition in 40 Code of Federal Regulations (CFR) §51.166(b)(48). HFCs are compounds containing only hydrogen, fluorine, and carbon atoms. PFCs are compounds containing only carbon and fluorine atoms. Other gases that are considered GHGs are not included in the definition of the pollutant GHGs.

The commission also adopts an RQ of 5,000 lbs in §101.1(89)(A)(i)(III)(-aaa-) for 3-Pentanone, 1,1,1,2,2,4,5,5,5-nonafluoro-4-(trifluoromethyl)-, CAS No. 756-13-8. The new RQ increases the reporting threshold for C6 fluoroketone. In considering RQs, the TCEQ considered toxicological effects, photochemical reactivity for producing ozone, and its intent of limiting emissions events reports to the most significant events. C6 fluoroketone is neither a criteria pollutant nor a precursor of ozone, and therefore the 100-pound default for nonattainment and maintenance areas should not apply.

No signs of acute toxicity were observed in rats exposed to 100,000 ppm C6 fluoroketone for up to four hours. The "no observed adverse effect" level for acute toxicity in rats was 100,000 ppm or 10%. Other toxicity studies have concluded that C6 fluoroketone is only minimally irritating to the eye, non-irritating to the skin, and does not cause sensitization. There

have been no complaints of adverse health effects from human experience with exposures to C6 fluoroketone. C6 fluoroketone is safe to the public when discharged in the event of a fire. C6 fluoroketone was approved by the EPA in the December 20, 2002, issue of the *Federal Register* (67 FR 77931) as an acceptable substitute for ozone-depleting substances, such as halon 1301, for use in fire suppression.

The commission adopts §101.1(89)(A)(iii) to provide that there will be no RQ for GHGs, except for the specific individual air contaminant compounds found in the current RQ definition. A source which has emissions exceeding GHG PSD permit limits is subject to recordkeeping for unauthorized emissions of GHGs and other pollutants. All unauthorized emissions are also considered Title V deviations and are required to be included in semi-annual reporting required in Chapter 122.

Unauthorized emissions are defined as exceeding a permit limit, rule, or order of the commission. A source that is not required to have a GHG PSD permit does not have a limit for which unauthorized emissions can be evaluated and therefore will not, by definition, have an emissions event of GHGs. Consequently, there is no recordkeeping requirement for unauthorized emissions of GHGs for a source that is not required to have a GHG PSD permit. However, recordkeeping of unauthorized emissions of other pollutants remains a requirement, and reporting under §101.201 may be required.

In adopted §101.1(108), the commission removes the words "carbon dioxide" and "methane" from the definition of "unauthorized emissions" because these will now be regulated as GHGs. By removing the terms, these two GHGs will no longer be exempted from the definition of unauthorized emissions. Because no GHGs will be listed in the exception, all GHGs would be considered as unauthorized emissions if they exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by TCAA, THSC, §382.0518(g).

In §101.1(25), the commission adopts nonsubstantive amendments to clarify the referenced rule is in the CFR. In §101.1(61), the commission adopts nonsubstantive revisions to the definition of "mobile emissions reduction credit." The added clarifying language provides the title of the referenced division, Emission Credit Banking and Trading. The commission adopts nonsubstantive amendments to the definition of "Particulate matter emissions," to clarify the chemical formula "NO_x" refers to nitrogen oxides in §101.1(77). The commission also adopt the amendment in §101.1(89) correcting CFR to CFC for four air contaminant compounds.

§101.10, Emissions Inventory Requirements

The commission adopts the amendment to §101.10(a)(3) by adding an exception for GHGs (as listed in the adopted amendment to §101.1) to the applicable criteria for which an owner or operator is required to submit emissions inventories. Specifically, the exception is added to the requirement for any account that emits or has the potential to emit 100 tpy or more of any contaminant.

The commission also adopts nonsubstantive revisions for this section. Subsection (a) is renumbered to reflect the subsection reorganization for clarity. Subsection (b) is updated to reflect the renumbering in subsection (a). The title of §116.12 is updated in subsection (a)(1) to "Nonattainment and Prevention of Significant Deterioration Review Definitions" to reflect the current title of the rule. In subsection (a)(4) the acronym for "Federal Clean Air Act" is expanded for clarification. In subsections (b)(3) and

(e) the word industrial is removed from the name of the "Emissions Assessment Section" to reflect its current name. Subsection (f) is updated to reflect the current enforcement authority for completing an emissions inventory. Enforcement by appropriate action includes TWC, §7.002 for administrative penalties, §7.101 for civil penalties, and §7.178 for criminal penalties.

§101.27, Emissions Fees

The commission adopts the amendment to §101.27(f)(3) to exempt GHGs as defined in §101.1 from the term "regulated pollutant" for the purposes of §101.27. This change is necessary to exempt GHGs from the list of pollutants subject to fees. GHGs are exempted because certain GHGs, like CO₂, are emitted in such large quantities that the resulting fee collection would be in excess of current near-term program funding requirements.

Existing sites in Texas will become subject to the Title V federal operating permits program on the effective date of EPA's final action approving the revisions to the Federal Operating Permits Program or approving revision of §122.122 into the SIP, whichever is later. For example, if the later of the two actions is effective on or before August 31, 2014 (the end of Fiscal Year 2014), existing sources which meet or exceed the Title V major source thresholds in adopted §122.122(14)(H) will become subject to emissions fees on that day. Since fees for Fiscal Year 2014 would have already been invoiced at that date, an emissions fee for Fiscal Year 2014 for these sources would be assessed as soon as practical and would be based on emissions of non-GHGs in calendar year 2012 (or other data allowed per §101.27). If the later of the two EPA actions is effective on or after September 1, 2014 (in Fiscal Year 2015), then these sources will become subject to emissions fees on that day. An emissions fee for Fiscal Year 2015 would typically be invoiced in fall of calendar year 2014 and would be based on emissions of non-GHGs in calendar year 2013 (or other data allowed per §101.27).

§101.201, Emissions Event Reporting and Recordkeeping Requirements

The commission adopts the amendment to §101.201(c) to provide that any emissions of CO₂, N₂O, CH₄, HFCs, PFCs, or SF₆, individually or collectively, are not required to be submitted as part of the final record under this subsection. This is consistent with the adopted change adding §101.1(89)(A)(iii) to provide that there is no RQ for GHGs, except for the specific individual air contaminant compounds found in the current RQ definition.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis (RIA) requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a RIA.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the rulemaking is to implement HB 788 by adding a definition of the pollutant GHGs as an aggregate group of six GHGs including: CO₂, N₂O, CH₄, HFCs, PFCs, and SF₆; and establishing an RQ for fire protection fluid, 3-Pentanone, 1,1,1,2,2,4,5,5,5-nonafluoro-4-(trifluoromethyl)-, CAS No. 756-13-8. Further, the rule-

making is intended to clarify how the regulation of GHGs is implemented in the emissions inventory and emissions fee requirements of the commission's rules.

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a RIA for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted rules would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. This rulemaking will implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of emissions of GHGs in Texas and to do so consistent with federal law. Specifically, the amendments to Chapter 101 would add a definition of the pollutant GHGs as an aggregate group of six GHGs including: CO₂, N₂O, CH₄, HFCs, PFCs, and SF₆. Further, the rulemaking is intended to clarify how the regulation of GHGs is implemented in the emissions inventory and emissions fee requirements of the commission's rules.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633, 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full RIA contemplated by SB 633. This conclusion is inconsistent with

the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the adopted rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA, and thus allow EPA to lift its federal permitting program on GHG sources in Texas. In fact, the rules create no additional impacts since major GHG sources in Texas must currently obtain a PSD permits from EPA and the adopted rules merely supplant EPA as the authority for GHG PSD permitting in Texas. For these reasons, the rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). Cf. *Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the RIA requirements is also supported by a change made to the Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The adopted rules do not exceed an express requirement in federal or state law. The rules implement requirements of the FCAA, specifically to adopt and implement SIPs, as well as specific requirements of the TCAA. The specific intent of the rulemaking is to implement HB 788 by adding a definition of the pollutant GHGs as an aggregate group of six GHGs including: CO₂, N₂O, CH₄, HFCs, PFCs, and SF₆. Further, the rulemaking is intended to clarify how the regulation of GHGs is implemented in the emissions inventory and emissions fee requirements of the commission's rules. The rulemaking also would add an RQ for fire protection fluid, 3-Pentanone, 1,1,1,2,2,4,5,5,5-nonafluoro-4-(trifluoromethyl)-, CAS No. 756-13-8. The rules do not exceed a requirement of a delegation agreement or any contract between the state and a federal agency, because there is no agreement applicable to this rulemaking. The rules were not developed solely under the general powers of the agency, but are authorized by specific sections of THSC, Chapter 382 (also known as

the TCAA), and the TWC, which are cited in the Statutory Authority section of this preamble. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the draft RIA determination during the public comment period. No comments were received on the regulatory impact analysis determination.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution §17 or §19, Article I; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the adopted rulemaking under the Texas Government Code, §2007.043. The primary purpose of this rulemaking, as discussed elsewhere in this preamble, is to implement HB 788 by adding a definition of the pollutant GHGs as an aggregate group of six GHGs including: CO₂, N₂O, CH₄, HFCs, PFCs, and SF₆. Further, the rulemaking is intended to clarify how the regulation of GHGs is implemented in the emissions inventory and emissions fee requirements of the commission's rules. The rulemaking also would add an RQ for fire protection fluid, 3-Pentanone, 1,1,1,2,2,4,5,5,5-nonafluoro-4-(trifluoromethyl)-, CAS No. 756-13-8.

The adopted rules will not create any additional burden on private real property. The rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The rulemaking will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal

to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The adopted rules update rules that govern the submittal of air quality PSD and Title V GHG permit applications and associated emissions of GHGs. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Effect on Sites Subject to the Federal Operating Permits Program

Sections 101.1 and 101.10 are applicable requirements in the Federal Operating Permits Program (Chapter 122). However the adopted rules will not require any revisions to federal operating permits.

Public Comment

The commission held a public hearing on December 5, 2013. The public comment period ended on December 9, 2013. The commission received comments from Air Alliance Houston (AAH); Association of Electric Companies of Texas, Inc (AECT); C3 Petrochemicals (C3P); Calpine Corporation (Calpine); Environment Texas; Gas Processors Association (GPA); Golden Pass Products LLC (Golden Pass); Golden Spread Electric Cooperative, Inc. (GSEC); House Bill 788 Working Group (HB788WG); Jackson Walker L.L.P.; Lone Star Chapter of the Sierra Club (Sierra Club); Natgasoline, LLC; Occidental Chemical Corporation (OCC); OCI Beaumont, LLC; Pioneer Natural Resources (Pioneer); Public Citizen; State Representative Lon Burnam; Sustainable Energy and Economic Development Coalition (SEED); Texas Chemical Council (TCC); Texas Combined Heat and Power Initiative (TXCHPI); Texas Industry Project (TIP); Texas Oil and Gas Association (TXOGA); Texas Pipeline Association (TPA); Texas Solid Waste Association of North America (TxSWANA); Weaver Boos Consultants, LLC (Weaver); and Zephyr Environmental Corporation (Zephyr). This comprehensive list includes all of the commenters for all of the chapters of this concurrent rulemaking project. The individual comments are addressed in the Response to Comment section of the appropriate chapter. Eighteen of the commenters supported the rulemaking or portions of the rulemaking, six commenters opposed portions of the rulemaking, and 18 commenters suggested changes.

Response to Comments

30 TAC §101.1 Comments

Comment

Zephyr commented that the definition of GHGs in §101.1(42) should include the acronym "GHGs."

Response

The commission has changed the rule in response to this comment, and included the acronym in the definition.

Comment

Pioneer, TCC, and TXOGA suggested edits to rule language in §101.1(89)(A)(ii) to ensure that there would be no RQ for GHGs. Clarification was requested because the exemption for GHGs was proposed as §101.1(89)(A)(iii) and the groups commented that the order of the requirements was potentially confusing.

Response

No changes were made to the rule in response to these comments. Compliance with a rule requires that all parts of the rule be considered when determining what action, if any, is required by the regulated entity. The 100-pound default amount applies to air contaminants that are not listed in §101.1(89)(A)(i) and logically follows in §101.1(89)(A)(ii). The complete exclusion of air contaminants is provided in §101.1(89)(A)(iii).

Comment

TCC commented that while no RQ is established for emissions of GHGs, the rules establish that a source is nonetheless subject to recordkeeping for emissions exceeding GHG PSD permit limits for unauthorized emissions of GHGs and other pollutants. TCC supported this provision, as long as it solely applies to point sources, and not to sources at a facility site that are not included within the permitted GHG facility.

Response

No changes were made to the rule in response to this comment. The commenter did not specify what types of sources are of concern that would not be included in a permit or other authorization for an account (such as a plant site). The commission's rules at §101.201 and §101.211 in Subchapter F require recording and reporting of certain unauthorized emissions (as defined in §101.1(107)). Specifically, these are unauthorized emissions from emissions events (as defined in §101.1(28)) or unplanned MSS activities associated with facilities (as defined in §101.1(108)). A facility is defined in THSC,§382.003(6) as "a discrete or identifiable structure device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility." RQs are used to determine whether those emissions are reportable.

Comment

Sierra Club commented that while most GHGs would not have an RQ for emissions events, CH₄ should have an RQ.

Response

No changes were made to the rule in response to this comment. The commenter did not provide a basis for requiring an RQ for CH₄ in the proposed rules. Prior to this rulemaking, CH₄ was not regulated under TCEQ rules and did not have an RQ, and was excluded from the RQ for natural gas.

Comment

Environment Texas commented on the proposed RQ for C6 fluoro-ketone. The commenter re-iterated the data provided in the proposal documents regarding EPA's finding of very low toxicity and no ozone-depletion potential. The commenter also reported the correction of the material's global warming potential in EPA's "Protection of Stratospheric Ozone: Notice 17 for Significant New Alternatives Policy Program; Correction." The commenter states that the 5,000 RQ seems high without specific data describing why this quantity is acceptable, and suggests a lower RQ based on the new, corrected EPA data he found.

Response

No changes were made to the rule in response to this comment. The commission is defining an RQ for C6 fluoroketone based on a rule petition, and the rulemaking from that petition was included with this rulemaking for HB 788: Greenhouse Gas Permitting. However, C6 fluoroketone is not a GHG by definition. The RQ is not based on a global warming potential. Rather, consistent with past commission actions, the RQ is based on an existing RQ of 5,000 lbs for compounds with similar characteristics (refrigerants and fire-extinguishing compounds listed elsewhere in the definition).

30 TAC §101.10 Comments

Comment

AAH, Sierra Club, Public Citizen, and SEED stated that companies should be required to report GHGs to the emissions inventory because many sources already report this data annually to the EPA. The Sierra Club stated that the public and TCEQ would be well served by having access to this information. Public Citizen and Sierra Club stated this data may be needed to track and potentially credit emissions reductions.

TPA, GSEC, and TCC supported exclusion of GHG reporting. The TPA and GSEC added that any reporting of GHGs by industry would duplicate the EPA's extensive GHG reporting program and would not provide any new information in the public domain. TPA supported not reporting GHGs in the emissions inventories because proposed §101.27 excludes a fee on GHG. GSEC added that the TCEQ would be required to undertake a new rulemaking proposal if it were to impose GHG reporting.

Response

The commission did not change the rule in response to these comments. The commission is not proposing to collect GHG emissions data in the emissions inventory at this time because this data does not provide necessary information for any current agency activities, including assessing Title V fees. The commission can, if needed, collect GHG data under the existing special inventory requirements in §101.10(b)(3) or it can propose a new rulemaking to annually collect the data in the future. The commission notes that the EPA already requires the reporting of GHG data annually to the EPA under regulations that include monitoring and estimation protocols. This site-level data are publicly available on the EPA's Web site at www.epa.gov/ghgreporting/ghgdata/index.html. The EPA estimates that the 41 source categories reporting account for 85% - 90% of the United States GHG emissions. Emissions trends can also be reviewed on this Web site.

Comment

Public Citizen and SEED suggested that each oil and gas production facility should report CH₄ releases from flares and vents in the aggregate.

Response

The commission has not changed the rule in response to this comment. The commission does not currently intend to collect GHG data because, as addressed elsewhere in this preamble, this data does not provide necessary information for any current agency activities, including assessing Title V fees. If the data becomes needed for agency activities, the TCEQ has the authority to collect it.

Comment

State Representative Lon Burnam recommended not exempting small sources emitting less than 100 tpy of GHGs from inventory requirements because the effects of GHGs are not localized and impacts from these sources still have effects. Environment Texas recommended that the TCEQ establish a more realistic threshold for reporting GHGs rather than stating that a 100-ton source is negligible.

Response

The commission has not changed the rule in response to these comments. These types of small-emitting sources are traditionally estimated in an area source category rather than as individual sources. An area source inventory includes, and is not limited to, gas stations, bakeries, and many types of agricultural sources. An area source inventory is developed with county or other appropriate activity data to estimate these emissions rather than requiring individual sources to provide that information. The commission is not proposing to develop a GHG area source inventory at this time. If data collection becomes necessary to support agency business requirements, the commission staff will review the permit authorizations and other appropriate data to determine appropriate reporting thresholds at that time.

30 TAC §101.27 Comments

Comment

TCC and TPA supported the proposed assessment of a Title V fee on non-GHG emissions at a site that is major only because of emissions of GHGs. AECT supported excluding GHGs from the list of pollutants that are subject to emissions fees. TIP suggested providing the same exclusion for aggregated GHGs that is provided for the individual gases by changing the last sentence in §101.27(f)(3) to read "{f}or purposes of this section, the term "regulated pollutant" does not include greenhouse gases or the individual gases listed in the definition of greenhouse gases."

Response

The commission has not changed the rule in response to these comments. The commission appreciates the support. The commission's intent is to not collect fees for aggregated or individual GHG emissions. The adopted exclusory language in §101.27(f)(3) is sufficiently clear to apply to GHGs individually and in the aggregate.

Comment

GPA and TPA suggested that the TCEQ should place a reasonable cap on Title V fees collected under the new rule to ensure that revenue did not exceed program obligations. These companies added that Oklahoma and Louisiana have provisions in their rules allowing the state to revisit their regulation for fee assessment based on program expenses and funding. TPA also suggested as an alternative that TCEQ conduct an annual review of its Title V program administrative costs compared to fees collected. TPA also requested clarification on what action the TCEQ would undertake if the Title V fee revenue far exceeded actual program costs. TXOGA supported the commission's approach of assessing the necessity of a Title V emissions fee after determining the cost of the program because the current cost impact is not completely known at this time.

Response

The commission did not change the rule in response to these comments. THSC, §382.0621(d) and federal Title V rule in 40 CFR §70.9 currently include a per pollutant cap of 4,000 tpy. The current Title V fee program administered under §101.27 allows

the agency to annually adjust the base rate on emissions fees to ensure sufficient revenue is collected. Annually, commission staff review Title V revenue and expenses. If necessary, the base fee rate is adjusted between \$25 and \$45 per ton to generate sufficient funds. Because this base rate can be raised or lowered as appropriate, the base rate can be lowered if the Title V fees collected would be more than necessary to administer the Texas Title V program. The commission does not have an annual cap on revenue collected, but has a goal to collect (including any surplus funds from previous years) approximately 100% - 105% of the annual Title V program expenses as addressed in the Fiscal Note section of the preamble for the proposed amendment to §101.27 as published in the August 11, 2011, issue of the *Texas Register* (36 TexReg 4964). As discussed elsewhere in this preamble, the commission will revisit the need to collect additional revenue at a later date after the potential program costs are estimated using actual data, and therefore declines to include any additional language regarding any limit or cap on Title V program fees.

Comment

Public Citizen, SEED, and Sierra Club stated not assessing a fee would violate HB 788 and THSC, §382.0621. Public Citizen and SEED added this would place an undue burden on Texas because unrecovered costs would need to be covered from budgetary allocations from general revenue. Sierra Club stated an adopted rule that prohibits emissions fees for GHGs will not allow for reasonable recovery of fees needed to fund the program and recommended a fee between \$0.00 and \$26 per ton on the first 4,000 tons of emissions of GHGs.

Response

The commission has not changed the rule in response to these comments. Currently, the commission expects to have sufficient revenue based on projected actual future criteria and other regulated (non-GHG) pollutant emissions to cover the additional expenses of administering the proposed GHG Title V program for the next biennium. Therefore, it is the commission's interpretation that the intent of HB 788 and the language in THSC, §382.0621 are not violated.

Sources that are subject to the Title V program due solely to emissions of GHGs will be subject to emissions fees on their non-GHG emissions. The commission annually reviews the revenue and the expenses for the Title V program and will continue to do so after GHG PSD permitting begins. As discussed previously and in the proposal preamble, §101.27 has the flexibility to allow the commission to raise or lower the emissions fee base rate and collect appropriate fees. If the commission determines it is necessary to assess a fee on emissions of GHGs, a separate rulemaking with public participation would need to be conducted. At that time, the amount of fee per ton (and any cap) will be proposed.

30 TAC §101.201 Comments

Comment

TIP commented that TCEQ should clarify that emissions associated with a non-PSD change at a source with a GHG PSD permit are not subject to Chapter 101, Subchapter F recordkeeping requirements.

Response

No changes were made to the rule in response to this comment. Minor sources and modifications of sources that do not meet the

thresholds for major modifications of GHG at a GHG PSD-permitted facility are not required to obtain authorization. Therefore, those emissions are not subject to Chapter 101, Subchapter F.

Comment

TIP requested that TCEQ clarify that emissions of GHGs are not required to be included in a final report of a scheduled MSS activity that must be submitted to the TCEQ under §101.211. TIP suggested amending §101.211 if necessary. TIP commented that the TCEQ has appropriately proposed to amend §101.201(c) to provide that GHGs are not required to be included in a final report of an emissions event under §101.201.

Response

No changes were made to the rule in response to this comment. The commenter is correct that the commission proposed and has adopted an amendment to §101.201(c), which provides that emissions of GHGs, whether individually or collectively, are not required to be submitted as part of a final report for emissions events, unless the emissions are a specific individual air contaminant compound listed in the definition of RQ. The commission did not propose to amend §101.211. The scheduled MSS activities are required to be reported only when the emissions from the activity are expected to meet or exceed the RQ, or for which a notification was not submitted prior to the activity (and thus the emissions are either upsets or unscheduled MSS activities, both of which are included in the definition of emissions event). The commission specifically proposed the amendment to §101.1(89)(A)(ii), which provides that there is no RQ for GHGs, except for specific individual air contaminant compounds listed in §101.1(89).

However, the requirement for compound quantities in a final report in §101.211 is similar to the requirement in §101.201 and both require a list of all air contaminants, even if some were not included in the initial report. The commission does not anticipate a significant amount of reporting of GHGs in the final report for a scheduled MSS activity based on these requirements.

SUBCHAPTER A. GENERAL RULES

30 TAC §§101.1, 101.10, 101.27

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.014, concerning Emission Inventory, which authorizes the commission to require submittal of information regarding emissions of air contaminants; THSC, §382.016, concerning Monitoring

Requirements; Examination of Records, which authorizes the commission to prescribe requirements for measuring, monitoring, and maintaining records of emissions of air contaminants; THSC, §382.0215, concerning Assessment of Emissions Due to Emissions Events, which authorizes the commission to collect and assess unauthorized emissions data due to emissions events; THSC, §382.0216, concerning Regulation of Emissions Events, which authorizes the commission to establish criteria for determining when emissions events are excessive and to require facilities to take action to reduce emissions from excessive emissions events; THSC, §382.05102, concerning Permitting Authority of Commission; Greenhouse Gas Emissions, which relates to the permitting authority of the commission for greenhouse gas emissions; THSC, §382.062, concerning Application, Permit and Inspection Fees, which authorizes the commission to charge these types of fees; and THSC, §382.085, concerning Unauthorized Emissions Prohibited, which prohibits emissions of air contaminants except as authorized by commission by rule or order. The amendments are also adopted under Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules; and Texas Government Code, §2001.006, concerning Actions Preparatory to Implementation of Statute or Rule, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendments are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The adopted amendments implement House Bill 788, 82nd Legislature, 2013, THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0215, 382.0216, 382.05102, and 382.062; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq.*

§101.1. Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following terms, when used in the air quality rules in this title, have the following meanings, unless the context clearly indicates otherwise.

(1) Account--For those sources required to be permitted under Chapter 122 of this title (relating to Federal Operating Permits Program), all sources that are aggregated as a site. For all other sources, any combination of sources under common ownership or control and located on one or more contiguous properties, or properties contiguous except for intervening roads, railroads, rights-of-way, waterways, or similar divisions.

(2) Acid gas flare--A flare used exclusively for the incineration of hydrogen sulfide and other acidic gases derived from natural gas sweetening processes.

(3) Agency established facility identification number--For the purposes of Subchapter F of this chapter (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities), a unique alphanumeric code required to be assigned by the owner or operator of a regulated entity that the emission inventory reporting requirements of §101.10 of this title (relating to Emissions Inventory Requirements) are applicable to each facility at that regulated entity.

(4) Ambient air--That portion of the atmosphere, external to buildings, to which the general public has access.

(5) Background--Background concentration, the level of air contaminants that cannot be reduced by controlling emissions from man-made sources. It is determined by measuring levels in non-urban areas.

(6) Boiler--Any combustion equipment fired with solid, liquid, and/or gaseous fuel used to produce steam or to heat water.

(7) Capture system--All equipment (including, but not limited to, hoods, ducts, fans, booths, ovens, dryers, etc.) that contains, collects, and transports an air pollutant to a control device.

(8) Captured facility--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(9) Carbon adsorber--An add-on control device that uses activated carbon to adsorb volatile organic compounds from a gas stream.

(10) Carbon adsorption system--A carbon adsorber with an inlet and outlet for exhaust gases and a system to regenerate the saturated adsorbent.

(11) Coating--A material applied onto or impregnated into a substrate for protective, decorative, or functional purposes. Such materials include, but are not limited to, paints, varnishes, sealants, adhesives, thinners, diluents, inks, maskants, and temporary protective coatings.

(12) Cold solvent cleaning--A batch process that uses liquid solvent to remove soils from the surfaces of parts or to dry the parts by spraying, brushing, flushing, and/or immersion while maintaining the solvent below its boiling point. Wipe cleaning (hand cleaning) is not included in this definition.

(13) Combustion unit--Any boiler plant, furnace, incinerator, flare, engine, or other device or system used to oxidize solid, liquid, or gaseous fuels, but excluding motors and engines used in propelling land, water, and air vehicles.

(14) Combustion turbine--Any gas turbine system that is gas and/or liquid fuel fired with or without power augmentation. This unit is either attached to a foundation or is portable equipment operated at a specific minor or major source for more than 90 days in any 12-month period. Two or more gas turbines powering one shaft will be treated as one unit.

(15) Commercial hazardous waste management facility--Any hazardous waste management facility that accepts hazardous waste or polychlorinated biphenyl compounds for a charge, except a captured facility that disposes only waste generated on-site or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(16) Commercial incinerator--An incinerator used to dispose of waste material from retail and wholesale trade establishments.

(17) Commercial medical waste incinerator--A facility that accepts for incineration medical waste generated outside the property boundaries of the facility.

(18) Component--A piece of equipment, including, but not limited to, pumps, valves, compressors, and pressure relief valves that has the potential to leak volatile organic compounds.

(19) Condensate--Liquids that result from the cooling and/or pressure changes of produced natural gas. Once these liquids are processed at gas plants or refineries or in any other manner, they are no longer considered condensates.

(20) Construction-demolition waste--Waste resulting from construction or demolition projects.

(21) Control system or control device--Any part, chemical, machine, equipment, contrivance, or combination of same, used to destroy, eliminate, reduce, or control the emission of air contaminants to the atmosphere.

(22) Conveyorized degreasing--A solvent cleaning process that uses an automated parts handling system, typically a conveyor, to automatically provide a continuous supply of parts to be cleaned or dried using either cold solvent or vaporized solvent. A conveyorized degreasing process is fully enclosed except for the conveyor inlet and exit portals.

(23) Criteria pollutant or standard--Any pollutant for which there is a national ambient air quality standard established under 40 Code of Federal Regulations Part 50.

(24) Custody transfer--The transfer of produced crude oil and/or condensate, after processing and/or treating in the producing operations, from storage tanks or automatic transfer facilities to pipelines or any other forms of transportation.

(25) De minimis impact--A change in ground level concentration of an air contaminant as a result of the operation of any new major stationary source or of the operation of any existing source that has undergone a major modification that does not exceed the significance levels as specified in 40 Code of Federal Regulations §51.165(b)(2).

(26) Domestic wastes--The garbage and rubbish normally resulting from the functions of life within a residence.

(27) Emissions banking--A system for recording emissions reduction credits so they may be used or transferred for future use.

(28) Emissions event--Any upset event or unscheduled maintenance, startup, or shutdown activity, from a common cause that results in unauthorized emissions of air contaminants from one or more emissions points at a regulated entity.

(29) Emissions reduction credit--Any stationary source emissions reduction that has been banked in accordance with Chapter 101, Subchapter H, Division 1 of this title (relating to Emission Credit Banking and Trading).

(30) Emissions reduction credit certificate--The certificate issued by the executive director that indicates the amount of qualified reduction available for use as offsets and the length of time the reduction is eligible for use.

(31) Emissions unit--Any part of a stationary source that emits, or would have the potential to emit, any pollutant subject to regulation under the Federal Clean Air Act.

(32) Excess opacity event--When an opacity reading is equal to or exceeds 15 additional percentage points above an applicable opacity limit, averaged over a six-minute period.

(33) Exempt solvent--Those carbon compounds or mixtures of carbon compounds used as solvents that have been excluded from the definition of volatile organic compound.

(34) External floating roof--A cover or roof in an open top tank that rests upon or is floated upon the liquid being contained and is equipped with a single or double seal to close the space between the roof edge and tank shell. A double seal consists of two complete

and separate closure seals, one above the other, containing an enclosed space between them.

(35) Federal motor vehicle regulation--Control of Air Pollution from Motor Vehicles and Motor Vehicle Engines, 40 Code of Federal Regulations Part 85.

(36) Federally enforceable--All limitations and conditions that are enforceable by the United States Environmental Protection Agency administrator, including those requirements developed under 40 Code of Federal Regulations (CFR) Parts 60 and 61; requirements within any applicable state implementation plan (SIP); and any permit requirements established under 40 CFR §52.21 or under regulations approved under 40 CFR Part 51, Subpart 1, including operating permits issued under the approved program that is incorporated into the SIP and that expressly requires adherence to any permit issued under such program.

(37) Flare--An open combustion unit (i.e., lacking an enclosed combustion chamber) whose combustion air is provided by uncontrolled ambient air around the flame, and that is used as a control device. A flare may be equipped with a radiant heat shield (with or without a refractory lining), but is not equipped with a flame air control damping system to control the air/fuel mixture. In addition, a flare may also use auxiliary fuel. The combustion flame may be elevated or at ground level. A vapor combustor, as defined in this section, is not considered a flare.

(38) Fuel oil--Any oil meeting the American Society for Testing and Materials (ASTM) specifications for fuel oil in ASTM D396-01, Standard Specifications for Fuel Oils, revised 2001. This includes fuel oil grades 1, 1 (Low Sulfur), 2, 2 (Low Sulfur), 4 (Light), 4, 5 (Light), 5 (Heavy), and 6.

(39) Fugitive emission--Any gaseous or particulate contaminant entering the atmosphere that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening designed to direct or control its flow.

(40) Garbage--Solid waste consisting of putrescible animal and vegetable waste materials resulting from the handling, preparation, cooking, and consumption of food, including waste materials from markets, storage facilities, and handling and sale of produce and other food products.

(41) Gasoline--Any petroleum distillate having a Reid vapor pressure of four pounds per square inch (27.6 kilopascals) or greater that is produced for use as a motor fuel, and is commonly called gasoline.

(42) Greenhouse gases (GHGs)--the aggregate group of six greenhouse gases: carbon dioxide (CO₂), nitrous oxide (N₂O), methane (CH₄), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆).

(43) Hazardous wastes--Any solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, 42 United States Code, §§6901 *et seq.*, as amended.

(44) Heatset (used in offset lithographic printing)--Any operation where heat is required to evaporate ink oil from the printing ink. Hot air dryers are used to deliver the heat.

(45) High-bake coatings--Coatings designed to cure at temperatures above 194 degrees Fahrenheit.

(46) High-volume low-pressure spray guns--Equipment used to apply coatings by means of a spray gun that operates between

0.1 and 10.0 pounds per square inch gauge air pressure measured at the air cap.

(47) Incinerator--An enclosed combustion apparatus and attachments that is used in the process of burning wastes for the primary purpose of reducing its volume and weight by removing the combustibles of the waste and is equipped with a flue for conducting products of combustion to the atmosphere. Any combustion device that burns 10% or more of solid waste on a total British thermal unit (Btu) heat input basis averaged over any one-hour period is considered to be an incinerator. A combustion device without instrumentation or methodology to determine hourly flow rates of solid waste and burning 1.0% or more of solid waste on a total Btu heat input basis averaged annually is also considered to be an incinerator. An open-trench type (with closed ends) combustion unit may be considered an incinerator when approved by the executive director. Devices burning untreated wood scraps, waste wood, or sludge from the treatment of wastewater from the process mills as a primary fuel for heat recovery are not included under this definition. Combustion devices permitted under this title as combustion devices other than incinerators will not be considered incinerators for application of any rule within this title provided they are installed and operated in compliance with the condition of all applicable permits.

(48) Industrial boiler--A boiler located on the site of a facility engaged in a manufacturing process where substances are transformed into new products, including the component parts of products, by mechanical or chemical processes.

(49) Industrial furnace--Cement kilns; lime kilns; aggregate kilns; phosphate kilns; coke ovens; blast furnaces; smelting, melting, or refining furnaces, including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machines, roasters, or foundry furnaces; titanium dioxide chloride process oxidation reactors; methane reforming furnaces; pulping recovery furnaces; combustion devices used in the recovery of sulfur values from spent sulfuric acid; and other devices the commission may list.

(50) Industrial solid waste--Solid waste resulting from, or incidental to, any process of industry or manufacturing, or mining or agricultural operations, classified as follows.

(A) Class 1 industrial solid waste or Class 1 waste is any industrial solid waste designated as Class 1 by the executive director as any industrial solid waste or mixture of industrial solid wastes that because of its concentration or physical or chemical characteristics is toxic, corrosive, flammable, a strong sensitizer or irritant, a generator of sudden pressure by decomposition, heat, or other means, and may pose a substantial present or potential danger to human health or the environment when improperly processed, stored, transported, or otherwise managed, including hazardous industrial waste, as defined in §335.1 and §335.505 of this title (relating to Definitions and Class 1 Waste Determination).

(B) Class 2 industrial solid waste is any individual solid waste or combination of industrial solid wastes that cannot be described as Class 1 or Class 3, as defined in §335.506 of this title (relating to Class 2 Waste Determination).

(C) Class 3 industrial solid waste is any inert and essentially insoluble industrial solid waste, including materials such as rock, brick, glass, dirt, and certain plastics and rubber, etc., that are not readily decomposable as defined in §335.507 of this title (relating to Class 3 Waste Determination).

(51) Internal floating cover--A cover or floating roof in a fixed roof tank that rests upon or is floated upon the liquid being con-

tained, and is equipped with a closure seal or seals to close the space between the cover edge and tank shell.

(52) Leak--A volatile organic compound concentration greater than 10,000 parts per million by volume or the amount specified by applicable rule, whichever is lower, or the dripping or exuding of process fluid based on sight, smell, or sound.

(53) Liquid fuel--A liquid combustible mixture, not derived from hazardous waste, with a heating value of at least 5,000 British thermal units per pound.

(54) Liquid-mounted seal--A primary seal mounted in continuous contact with the liquid between the tank wall and the floating roof around the circumference of the tank.

(55) Maintenance area--A geographic region of the state previously designated nonattainment under the Federal Clean Air Act Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under 42 United States Code, §7505a, as described in 40 Code of Federal Regulations Part 81 and in pertinent *Federal Register* notices.

(56) Maintenance plan--A revision to the applicable state implementation plan, meeting the requirements of 42 United States Code, §7505a.

(57) Marine vessel--Any watercraft used, or capable of being used, as a means of transportation on water, and that is constructed or adapted to carry, or that carries, oil, gasoline, or other volatile organic liquid in bulk as a cargo or cargo residue.

(58) Mechanical shoe seal--A metal sheet that is held vertically against the storage tank wall by springs or weighted levers and is connected by braces to the floating roof. A flexible coated fabric (envelope) spans the annular space between the metal sheet and the floating roof.

(59) Medical waste--Waste materials identified by the Department of State Health Services as "special waste from health care-related facilities" and those waste materials commingled and discarded with special waste from health care-related facilities.

(60) Metropolitan Planning Organization--That organization designated as being responsible, together with the state, for conducting the continuing, cooperative, and comprehensive planning process under 23 United States Code (USC), §134 and 49 USC, §1607.

(61) Mobile emissions reduction credit--The credit obtained from an enforceable, permanent, quantifiable, and surplus (to other federal and state rules) emissions reduction generated by a mobile source as set forth in Chapter 114, Subchapter F of this title (relating to Vehicle Retirement and Mobile Emission Reduction Credits), and that has been banked in accordance with Subchapter H, Division 1 of this chapter (relating to Emission Credit Banking and Trading).

(62) Motor vehicle--A self-propelled vehicle designed for transporting persons or property on a street or highway.

(63) Motor vehicle fuel dispensing facility--Any site where gasoline is dispensed to motor vehicle fuel tanks from stationary storage tanks.

(64) Municipal solid waste--Solid waste resulting from, or incidental to, municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste except industrial solid waste.

(65) Municipal solid waste facility--All contiguous land, structures, other appurtenances, and improvements on the land used for processing, storing, or disposing of solid waste. A facility may be publicly or privately owned and may consist of several processing, storage, or disposal operational units, e.g., one or more landfills, surface impoundments, or combinations of them.

(66) Municipal solid waste landfill--A discrete area of land or an excavation that receives household waste and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined under 40 Code of Federal Regulations §257.2. A municipal solid waste landfill (MSWLF) unit also may receive other types of Resource Conservation and Recovery Act Subtitle D wastes, such as commercial solid waste, nonhazardous sludge, conditionally exempt small-quantity generator waste, and industrial solid waste. Such a landfill may be publicly or privately owned. An MSWLF unit may be a new MSWLF unit, an existing MSWLF unit, or a lateral expansion.

(67) National ambient air quality standard--Those standards established under 42 United States Code, §7409, including standards for carbon monoxide, lead, nitrogen dioxide, ozone, inhalable particulate matter, and sulfur dioxide.

(68) Net ground-level concentration--The concentration of an air contaminant as measured at or beyond the property boundary minus the representative concentration flowing onto a property as measured at any point. Where there is no expected influence of the air contaminant flowing onto a property from other sources, the net ground level concentration may be determined by a measurement at or beyond the property boundary.

(69) New source--Any stationary source, the construction or modification of which was commenced after March 5, 1972.

(70) Nitrogen oxides (NO_x)-- The sum of the nitric oxide and nitrogen dioxide in the flue gas or emission point, collectively expressed as nitrogen dioxide.

(71) Nonattainment area--A defined region within the state that is designated by the United States Environmental Protection Agency (EPA) as failing to meet the national ambient air quality standard (NAAQS or standard) for a pollutant for which a standard exists. The EPA will designate the area as nonattainment under the provisions of 42 United States Code, §7407(d). For the official list and boundaries of nonattainment areas, see 40 Code of Federal Regulations (CFR) Part 81 and pertinent *Federal Register* notices. The designations and classifications for the one-hour ozone national ambient air quality standard in 40 CFR Part 81 were retained for the purpose of anti-backsliding and upon determination by the EPA that any requirement is no longer required for purposes of anti-backsliding, then that requirement no longer applies.

(72) Non-reportable emissions event--Any emissions event that in any 24-hour period does not result in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(73) Opacity--The degree to which an emission of air contaminants obstructs the transmission of light expressed as the percentage of light obstructed as measured by an optical instrument or trained observer.

(74) Open-top vapor degreasing--A batch solvent cleaning process that is open to the air and that uses boiling solvent to create solvent vapor used to clean or dry parts through condensation of the hot solvent vapors on the parts.

(75) Outdoor burning--Any fire or smoke-producing process that is not conducted in a combustion unit.

(76) Particulate matter--Any material, except uncombined water, that exists as a solid or liquid in the atmosphere or in a gas stream at standard conditions.

(A) Particulate matter with diameters less than 10 micrometers (PM₁₀)--Particulate matter with an aerodynamic diameter less than or equal to a nominal ten micrometers as measured by a reference method based on 40 Code of Federal Regulations (CFR) Part 50, Appendix J, and designated in accordance with 40 CFR Part 53, or by an equivalent method designated with that Part 53.

(B) Particulate matter with diameters less than 2.5 micrometers (PM_{2.5})--Particulate matter with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers as measured by a reference method based on 40 CFR Part 50, Appendix L, and designated in accordance with 40 CFR Part 53, or by an equivalent method designated with that Part 53.

(77) Particulate matter emissions--All finely-divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by United States Environmental Protection Agency Reference Method 5, as specified at 40 Code of Federal Regulations (CFR) Part 60, Appendix A, modified to include particulate caught by an impinger train; by an equivalent or alternative method, as specified at 40 CFR Part 51; or by a test method specified in an approved state implementation plan.

(A) Direct PM emissions--Solid particles emitted directly from an air emissions source or activity, or gaseous emissions or liquid droplets from an air emissions source or activity which condense to form particulate matter at ambient temperatures. Direct 2.5 micrometers (PM_{2.5}) emissions include elemental carbon, directly emitted organic carbon, directly emitted sulfate, directly emitted nitrate, and other inorganic particles (including but not limited to crustal materials, metals, and sea salt).

(B) Secondary PM emissions--Those air pollutants other than PM_{2.5} direct emissions that contribute to the formation of PM_{2.5}. PM_{2.5} precursors include sulfur dioxide (SO₂), nitrogen oxides (NO_x), volatile organic compounds, and ammonia.

(78) Petroleum refinery--Any facility engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through distillation of crude oil, or through the redistillation, cracking, extraction, reforming, or other processing of unfinished petroleum derivatives.

(79) PM_{2.5} emissions--Finely-divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers emitted to the ambient air as measured by an applicable reference method, or an equivalent or alternative method specified in 40 Code of Federal Regulations Part 51, or by a test method approved under a state implementation plan or under a United States Environmental Protection Agency delegation or approval.

(80) PM₁₀ emissions--Finely-divided solid or liquid material with an aerodynamic diameter less than or equal to a nominal ten micrometers emitted to the ambient air as measured by an applicable reference method, or an equivalent or alternative method specified in 40 Code of Federal Regulations Part 51, or by a test method specified in an approved state implementation plan.

(81) Polychlorinated biphenyl compound--A compound subject to 40 Code of Federal Regulations Part 761.

(82) Process or processes--Any action, operation, or treatment embracing chemical, commercial, industrial, or manufacturing

factors such as combustion units, kilns, stills, dryers, roasters, and equipment used in connection therewith, and all other methods or forms of manufacturing or processing that may emit smoke, particulate matter, gaseous matter, or visible emissions.

(83) Process weight per hour--"Process weight" is the total weight of all materials introduced or recirculated into any specific process that may cause any discharge of air contaminants into the atmosphere. Solid fuels charged into the process will be considered as part of the process weight, but liquid and gaseous fuels and combustion air will not. The "process weight per hour" will be derived by dividing the total process weight by the number of hours in one complete operation from the beginning of any given process to the completion thereof, excluding any time during that the equipment used to conduct the process is idle. For continuous operation, the "process weight per hour" will be derived by dividing the total process weight for a 24-hour period by 24.

(84) Property--All land under common control or ownership coupled with all improvements on such land, and all fixed or movable objects on such land, or any vessel on the waters of this state.

(85) Reasonable further progress--Annual incremental reductions in emissions of the applicable air contaminant that are sufficient to provide for attainment of the applicable national ambient air quality standard in the designated nonattainment areas by the date required in the state implementation plan.

(86) Regulated entity--All regulated units, facilities, equipment, structures, or sources at one street address or location that are owned or operated by the same person. The term includes any property under common ownership or control identified in a permit or used in conjunction with the regulated activity at the same street address or location. Owners or operators of pipelines, gathering lines, and flowlines under common ownership or control in a particular county may be treated as a single regulated entity for purposes of assessment and regulation of emissions events.

(87) Remote reservoir cold solvent cleaning--Any cold solvent cleaning operation in which liquid solvent is pumped to a sink-like work area that drains solvent back into an enclosed container while parts are being cleaned, allowing no solvent to pool in the work area.

(88) Reportable emissions event--Any emissions event that in any 24-hour period, results in an unauthorized emission from any emissions point equal to or in excess of the reportable quantity as defined in this section.

(89) Reportable quantity (RQ)--Is as follows:

(A) for individual air contaminant compounds and specifically listed mixtures by name or Chemical Abstracts Service (CAS) number, either:

(i) the lowest of the quantities:

(I) listed in 40 Code of Federal Regulations (CFR) Part 302, Table 302.4, the column "final RQ";

(II) listed in 40 CFR Part 355, Appendix A, the column "Reportable Quantity"; or

(III) listed as follows:

(-a-) acetaldehyde - 1,000 pounds, except in the Houston-Galveston-Brazoria (HGB) and Beaumont-Port Arthur (BPA) ozone nonattainment areas as defined in paragraph (70) of this section, where the RQ must be 100 pounds;

(-b-) butanes (any isomer) - 5,000 pounds;

(-c-) butenes (any isomer, except 1,3-butadiene) - 5,000 pounds, except in the HGB and BPA ozone nonattainment

areas as defined in paragraph (70) of this section, where the RQ must be 100 pounds;

(-d-) carbon monoxide - 5,000 pounds;

(-e-) 1-chloro-1,1-difluoroethane (HCFC-142b) - 5,000 pounds;

(-f-) chlorodifluoromethane (HCFC-22) - 5,000 pounds;

(-g-) 1-chloro-1-fluoroethane (HCFC-151a) - 5,000 pounds;

(-h-) chlorofluoromethane (HCFC-31) - 5,000 pounds;

(-i-) chloropentafluoroethane (CFC-115) - 5,000 pounds;

(-j-) 2-chloro-1,1,1,2-tetrafluoroethane (HCFC-124) - 5,000 pounds;

(-k-) 1-chloro-1,1,2,2 tetrafluoroethane (HCFC-124a) - 5,000 pounds;

(-l-) 1,1,1,2,3,4,4,5,5,5-decafluoropentane (HFC 43-10mee) - 5,000 pounds;

(-m-) decanes (any isomer) - 5,000 pounds;

(-n-) 1,1-dichloro-1-fluoroethane (HCFC-141b) - 5,000 pounds;

(-o-) 3,3-dichloro-1,1,2,2-pentafluoropropane (HCFC-225ca) - 5,000 pounds;

(-p-) 1,3-dichloro-1,1,2,2,3-pentafluoropropane (HCFC-225cb) - 5,000 pounds;

(-q-) 1,2-dichloro-1,1,2,2-tetrafluoroethane (CFC-114) - 5,000 pounds;

(-r-) 1,1-dichlorotetrafluoroethane (CFC-114a) - 5,000 pounds;

(-s-) 1,2-dichloro-1,1,2-trifluoroethane (HCFC-123a) - 5,000 pounds;

(-t-) 1,1-difluoroethane (HFC-152a) - 5,000 pounds;

(-u-) difluoromethane (HFC-32) - 5,000 pounds;

(-v-) ethanol - 5,000 pounds;

(-w-) ethylene - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70) of this section, where the RQ must be 100 pounds;

(-x-) ethylfluoride (HFC-161) - 5,000 pounds;

(-y-) 1,1,1,2,3,3,3-heptafluoropropane (HFC-227ea) - 5,000 pounds;

(-z-) 1,1,1,3,3,3-hexafluoropropane (HFC-236fa) - 5,000 pounds;

(-aa-) 1,1,1,2,3,3-hexafluoropropane (HFC-236ea) - 5,000 pounds;

(-bb-) hexanes (any isomer) - 5,000 pounds;

(-cc-) isopropyl alcohol - 5,000 pounds;

(-dd-) mineral spirits - 5,000 pounds;

(-ee-) octanes (any isomer) - 5,000 pounds;

(-ff-) oxides of nitrogen - 200 pounds in ozone nonattainment, ozone maintenance, early action compact areas, Nueces County, and San Patricio County, and 5,000 pounds in all other areas of the state, which should be used instead of the RQs for nitrogen oxide and nitrogen dioxide provided in 40 CFR Part 302, Table 302.4, the column "final RQ";

(-gg-) pentachlorofluoroethane (CFC-111) - 5,000 pounds;

(-hh-) 1,1,1,3,3-pentafluorobutane (HFC-365mfc) - 5,000 pounds;

(-ii-) pentafluoroethane (HFC-125) - 5,000 pounds;

(-jj-) 1,1,2,2,3-pentafluoropropane (HFC-245ca) - 5,000 pounds;

(-kk-) 1,1,2,3,3-pentafluoropropane (HFC-245ea) - 5,000 pounds;

(-ll-) 1,1,1,2,3-pentafluoropropane (HFC-245eb) - 5,000 pounds;

(-mm-) 1,1,1,3,3-pentafluoropropane (HFC-245fa) - 5,000 pounds;

(-nn-) pentanes (any isomer) - 5,000 pounds;

(-oo-) propane - 5,000 pounds;

(-pp-) propylene - 5,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70) of this section, where the RQ must be 100 pounds;

(-qq-) 1,1,2,2-tetrachlorodifluoroethane (CFC-112) - 5,000 pounds;

(-rr-) 1,1,1,2-tetrachlorodifluoroethane (CFC-112a) - 5,000 pounds;

(-ss-) 1,1,2,2-tetrafluoroethane (HFC-134) - 5,000 pounds;

(-tt-) 1,1,1,2-tetrafluoroethane (HFC-134a) - 5,000 pounds;

(-uu-) 1,1,2-trichloro-1,2,2-trifluoroethane (CFC-113) - 5,000 pounds;

(-vv-) 1,1,1-trichloro-2,2,2-trifluoroethane (CFC-113a) - 5,000 pounds;

(-ww-) 1,1,1-trifluoro-2,2-dichloroethane (HCFC-123) - 5,000 pounds;

(-xx-) 1,1,1-trifluoroethane (HFC-143a) - 5,000 pounds;

(-yy-) trifluoromethane (HFC-23) - 5,000 pounds;

(-zz-) toluene - 1,000 pounds, except in the HGB and BPA ozone nonattainment areas as defined in paragraph (70) of this section, where the RQ must be 100 pounds; or

(-aaa-) 3-Pentanone, 1,1,1,2,2,4,5,5,5-nonafluoro-4-(trifluoromethyl)-, CAS No. 756-13-8, or C6 fluoroketone - 5,000 pounds;

(ii) if not listed in clause (i) of this subparagraph, 100 pounds;

(iii) for greenhouse gases, individually or collectively, there is no reportable quantity, except for the specific individual air contaminant compounds listed in this paragraph;

(B) for mixtures of air contaminant compounds:

(i) where the relative amount of individual air contaminant compounds is known through common process knowledge or prior engineering analysis or testing, any amount of an individual air contaminant compound that equals or exceeds the amount specified in subparagraph (A) of this paragraph;

(ii) where the relative amount of individual air contaminant compounds in subparagraph (A)(i) of this paragraph is not known, any amount of the mixture that equals or exceeds the amount for any single air contaminant compound that is present in the mixture and listed in subparagraph (A)(i) of this paragraph;

(iii) where each of the individual air contaminant compounds listed in subparagraph (A)(i) of this paragraph are known to be less than 0.02% by weight of the mixture, and each of the other individual air contaminant compounds covered by subparagraph (A)(ii) of this paragraph are known to be less than 2.0% by weight of the mixture, any total amount of the mixture of air contaminant compounds greater than or equal to 5,000 pounds; or

(iv) where natural gas excluding carbon dioxide, water, nitrogen, methane, ethane, noble gases, hydrogen, and oxygen or air emissions from crude oil are known to be in an amount greater than or equal to 5,000 pounds or the associated hydrogen sulfide and mercaptans in a total amount greater than 100 pounds, whichever occurs first;

(C) for opacity from boilers and combustion turbines as defined in this section fueled by natural gas, coal, lignite, wood, fuel oil containing hazardous air pollutants at a concentration of less than 0.02% by weight, opacity that is equal to or exceeds 15 additional percentage points above the applicable limit, averaged over a six-minute period. Opacity is the only RQ applicable to boilers and combustion turbines described in this paragraph; or

(D) for facilities where air contaminant compounds are measured directly by a continuous emission monitoring system providing updated readings at a minimum 15-minute interval an amount, approved by the executive director based on any relevant conditions and a screening model, that would be reported prior to ground level concentrations reaching at any distance beyond the closest regulated entity property line:

(i) less than one-half of any applicable ambient air standards; and

(ii) less than two times the concentration of applicable air emission limitations.

(90) Rubbish--Nonputrescible solid waste, consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, yard trimmings, leaves, and similar materials. Noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, metal furniture, and like materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).

(91) Scheduled maintenance, startup, or shutdown activity--For activities with unauthorized emissions that are expected to exceed a reportable quantity (RQ), a scheduled maintenance, startup, or shutdown activity is an activity that the owner or operator of the regulated entity whether performing or otherwise affected by the activity, provides prior notice and a final report as required by §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements); the notice or final report includes the information required in §101.211 of this title; and the actual unauthorized emissions from the activity do not exceed the emissions estimates submitted in the initial notification by more than an RQ. For activities with unauthorized emissions that are not expected to, and do not, exceed an RQ, a scheduled maintenance, startup, or shutdown activity is one that is recorded as required by §101.211 of this title. Expected excess opacity events as described in §101.201(e) of this title (relating to Emissions Event Reporting and Recordkeeping Requirements) resulting from scheduled maintenance, startup, or shutdown activities are those that provide prior notice (if required), and are recorded and reported as required by §101.211 of this title.

(92) Sludge--Any solid or semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant; water supply treatment plant, exclusive of the treated effluent from a wastewater treatment plant; or air pollution control equipment.

(93) Smoke--Small gas-born particles resulting from incomplete combustion consisting predominately of carbon and other combustible material and present in sufficient quantity to be visible.

(94) Solid waste--Garbage, rubbish, refuse, sludge from a waste water treatment plant, water supply treatment plant, or air pollution control equipment, and other discarded material, including solid, liquid, semisolid, or containerized gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. The term does not include:

(A) solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued under the Texas Water Code, Chapter 26;

(B) soil, dirt, rock, sand, and other natural or man-made inert solid materials used to fill land, if the object of the fill is to make the land suitable for the construction of surface improvements; or

(C) waste materials that result from activities associated with the exploration, development, or production of oil or gas, or geothermal resources, and other substance or material regulated by the Railroad Commission of Texas under Natural Resources Code, §91.101, unless the waste, substance, or material results from activities associated with gasoline plants, natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants and is hazardous waste as defined by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act, as amended (42 United States Code, §§6901 *et seq.*).

(95) Sour crude--A crude oil that will emit a sour gas when in equilibrium at atmospheric pressure.

(96) Sour gas--Any natural gas containing more than 1.5 grains of hydrogen sulfide per 100 cubic feet, or more than 30 grains of total sulfur per 100 cubic feet.

(97) Source--A point of origin of air contaminants, whether privately or publicly owned or operated. Upon request of a source owner, the executive director shall determine whether multiple processes emitting air contaminants from a single point of emission will be treated as a single source or as multiple sources.

(98) Special waste from health care-related facilities--A solid waste that if improperly treated or handled, may serve to transmit infectious disease(s) and that is comprised of the following: animal waste, bulk blood and blood products, microbiological waste, pathological waste, and sharps.

(99) Standard conditions--A condition at a temperature of 68 degrees Fahrenheit (20 degrees Centigrade) and a pressure of 14.7 pounds per square inch absolute (101.3 kiloPascals).

(100) Standard metropolitan statistical area--An area consisting of a county or one or more contiguous counties that is officially so designated by the United States Bureau of the Budget.

(101) Submerged fill pipe--A fill pipe that extends from the top of a tank to have a maximum clearance of six inches (15.2 centimeters) from the bottom or, when applied to a tank that is loaded from the side, that has a discharge opening entirely submerged when the pipe used to withdraw liquid from the tank can no longer withdraw liquid in normal operation.

(102) Sulfur compounds--All inorganic or organic chemicals having an atom or atoms of sulfur in their chemical structure.

(103) Sulfuric acid mist/sulfuric acid--Emissions of sulfuric acid mist and sulfuric acid are considered to be the same air contaminant calculated as H₂SO₄ and must include sulfuric acid liquid mist,

sulfur trioxide, and sulfuric acid vapor as measured by Test Method 8 in 40 Code of Federal Regulations Part 60, Appendix A.

(104) Sweet crude oil and gas--Those crude petroleum hydrocarbons that are not "sour" as defined in this section.

(105) Total suspended particulate--Particulate matter as measured by the method described in 40 Code of Federal Regulations Part 50, Appendix B.

(106) Transfer efficiency--The amount of coating solids deposited onto the surface or a part of product divided by the total amount of coating solids delivered to the coating application system.

(107) True vapor pressure--The absolute aggregate partial vapor pressure, measured in pounds per square inch absolute, of all volatile organic compounds at the temperature of storage, handling, or processing.

(108) Unauthorized emissions--Emissions of any air contaminant except water, nitrogen, ethane, noble gases, hydrogen, and oxygen that exceed any air emission limitation in a permit, rule, or order of the commission or as authorized by Texas Health and Safety Code, §382.0518(g).

(109) Unplanned maintenance, startup, or shutdown activity--For activities with unauthorized emissions that are expected to exceed a reportable quantity or with excess opacity, an unplanned maintenance, startup, or shutdown activity is:

(A) a startup or shutdown that was not part of normal or routine facility operations, is unpredictable as to timing, and is not the type of event normally authorized by permit; or

(B) a maintenance activity that arises from sudden and unforeseeable events beyond the control of the operator that requires the immediate corrective action to minimize or avoid an upset or malfunction.

(110) Upset event--An unplanned and unavoidable breakdown or excursion of a process or operation that results in unauthorized emissions. A maintenance, startup, or shutdown activity that was reported under §101.211 of this title (relating to Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements), but had emissions that exceeded the reported amount by more than a reportable quantity due to an unplanned and unavoidable breakdown or excursion of a process or operation is an upset event.

(111) Utility boiler--A boiler used to produce electric power, steam, or heated or cooled air, or other gases or fluids for sale.

(112) Vapor combustor--A partially enclosed combustion device used to destroy volatile organic compounds by smokeless combustion without extracting energy in the form of process heat or steam. The combustion flame may be partially visible, but at no time does the device operate with an uncontrolled flame. Auxiliary fuel and/or a flame air control damping system that can operate at all times to control the air/fuel mixture to the combustor's flame zone, may be required to ensure smokeless combustion during operation.

(113) Vapor-mounted seal--A primary seal mounted so there is an annular space underneath the seal. The annular vapor space is bounded by the bottom of the primary seal, the tank wall, the liquid surface, and the floating roof or cover.

(114) Vent--Any duct, stack, chimney, flue, conduit, or other device used to conduct air contaminants into the atmosphere.

(115) Visible emissions--Particulate or gaseous matter that can be detected by the human eye. The radiant energy from an open flame is not considered a visible emission under this definition.

(116) Volatile organic compound--As defined in 40 Code of Federal Regulations §51.100(s), except §51.100(s)(2) - (4), as amended on January 21, 2009 (74 FR 3441).

(117) Volatile organic compound (VOC) water separator--Any tank, box, sump, or other container in which any VOC, floating on or contained in water entering such tank, box, sump, or other container, is physically separated and removed from such water prior to outfall, drainage, or recovery of such water.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 239-6087



SUBCHAPTER F. EMISSIONS EVENTS AND SCHEDULED MAINTENANCE, STARTUP, AND SHUTDOWN ACTIVITIES

DIVISION 1. EMISSIONS EVENTS

30 TAC §101.201

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.014, concerning Emission Inventory, which authorizes the commission to require submittal of information regarding emissions of air contaminants; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for measuring, monitoring, and maintaining records of emissions of air contaminants; THSC, §382.0215, concerning Assessment of Emissions Due to Emissions Events, which authorizes the commission to collect and assess unauthorized emissions data due to emissions events; THSC, §382.0216, concerning Regulation of Emissions Events, which authorizes the commission to establish criteria

for determining when emissions events are excessive and to require facilities to take action to reduce emissions from excessive emissions events; THSC, §382.05102, concerning Permitting Authority of Commission; Greenhouse Gas Emissions, which relates to the permitting authority of the commission for greenhouse gas emissions; THSC, §382.062, concerning Application, Permit and Inspection Fees, which authorizes the commission to charge these types of fees; and THSC, §382.085, concerning Unauthorized Emissions Prohibited, which prohibits emissions of air contaminants except as authorized by commission by rule or order. The amendment is also adopted under Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules; and Texas Government Code, §2001.006, concerning Actions Preparatory to Implementation of Statute or Rule, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. Additionally, the amendment is adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The adopted amendment implements House Bill 788 (82nd Legislature, 2013), THSC, §§382.002, 382.011, 382.012, 382.014, 382.016, 382.0215, 382.0216, 382.05102, and 382.062; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq.*

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 106. PERMITS BY RULE

SUBCHAPTER A. GENERAL REQUIREMENTS

30 TAC §106.2, §106.4

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §106.2 and §106.4.

Section 106.4 is adopted *with changes* to the proposed text as published in the November 8, 2013, issue of the *Texas Register* (38 TexReg 7886). Section 106.2 is adopted *without changes* to the proposed text and will not be republished.

The commission will submit §106.2 and §106.4 to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

In *Massachusetts v. EPA* (549 U.S. 497 (2007)) the Supreme Court of the United States ruled that greenhouse gases (GHGs) fit within the Federal Clean Air Act (FCAA or Act) definition of air pollutant. This ruling gave EPA the authority to regulate GHGs from new motor vehicles and engines if EPA made a finding under FCAA, §202(a) that six key GHGs taken in combination endanger both public health and welfare, and that combined emissions of GHGs from new motor vehicles and engines contribute to pollution that endangers public health and welfare. EPA issued its "Endangerment Finding" for GHGs on December 15, 2009 (Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, as published in the December 15, 2009, issue of the *Federal Register* (74 FR 66496)). Based on the Endangerment Finding, EPA subsequently adopted new emissions standards for motor vehicles (the "Tailpipe Rule" as published in the May 7, 2010, issue of the *Federal Register* (75 FR 25324)). The rule established standards for light-duty motor vehicles to improve fuel economy thereby reducing emissions of GHGs. The standards were effective January 2, 2011. EPA also reconsidered its interpretation of the timing of applicability of Prevention of Significant Deterioration (PSD) under the FCAA (the "Timing Rule" as published in the April 2, 2010, issue of the *Federal Register* (75 FR 17004)). EPA's interpretation of the FCAA is that PSD requirements for stationary sources of GHGs take effect when the first national rule subjects GHGs to regulation under the Act. EPA determined that once GHGs were actually being controlled under any part of the Act they were subject to regulation under the PSD program. Specifically, EPA took the position that beginning on January 2, 2011, GHG control requirements would be required under the PSD and Title V permitting programs because national standards for GHGs under the Tailpipe Rule were effective on January 2, 2011.

EPA's regulation of GHGs under the FCAA presented substantial difficulties for the EPA and states, particularly with regard to the PSD program. For instance, the most common of the GHGs, carbon dioxide (CO₂), is emitted in quantities that dwarf the Act's major source thresholds for program applicability. As a result, under EPA's Timing Rule, PSD requirements could have expanded from approximately 500 issued permits annually to more than 81,000 nationwide, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514, 31537 and 31538). To avoid this result, EPA excluded much of this new construction activity from the PSD program by altering the Act's statutory emission rate applicability thresholds for GHGs. This "Tailoring Rule," as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514) newly defined the statutory term "subject to regulation" and established higher GHGs emission thresholds for applicability of PSD and Title V permitting than specified in the FCAA. The Tailoring Rule also phased in permitting requirements in a multi-stepped process.

Before the *Massachusetts* decision in 2007, EPA took the position that GHGs are not regulated under the FCAA, and GHGs unquestionably were not regulated when EPA approved Texas' SIP in 1992. Texas has had an approved SIP since 1972, as published in the May 31, 1972, issue of the *Federal Register* (37 FR 10842). In 1983, Texas was delegated authority to implement the PSD program, as published in the February 9, 1983, issue of the *Federal Register* (48 FR 6023). Following this delegation, Texas submitted several SIP revisions to enable it to administer the PSD program (collectively the "PSD SIP submission"). EPA approved Texas' PSD SIP in 1992, granting the state full author-

ity to implement the PSD program, as published in the June 24, 1992, issue of the *Federal Register* (57 FR 28093).

The Texas PSD SIP submission and approval proceedings produced a well-developed record on how Texas would address the applicability of newly-regulated pollutants under the PSD program. During the SIP submission process, Texas consistently explained to EPA that the PSD provisions in the SIP are not prospective rulemaking, and do not incorporate future EPA interpretations of the Act or its regulations.

EPA's GHGs regulations created practical difficulties about how EPA could apply its Tailoring Rule in states with approved SIPs. In August 2010, Texas advised EPA that it could not retroactively reinterpret its SIP to cover GHGs, which were not regulated at the time Texas' SIP was approved in 1992 and were, in fact, a composite pollutant defined for the first time in the Tailoring Rule. Texas also explained that the PSD program only encompassed National Ambient Air Quality Standard (NAAQS) pollutants, but confirmed as a regulatory matter that the approved PSD program encompasses all federally regulated new source review (NSR) pollutants, including any pollutant that otherwise is subject to regulation under the FCAA, as stated in 30 TAC §116.12(14)(D).

Following promulgation of the Tailoring Rule, EPA issued a proposed "Finding of Substantial Inadequacy and SIP Call," as published in the September 2, 2010, issue of the *Federal Register* (75 FR 53892). This action proposed finding the SIPs of 13 states, including Texas', "substantially inadequate" because these SIPs did not apply PSD requirements to GHGs-emitting sources. EPA proposed to require these states (through their SIP-approved PSD programs) to regulate GHGs as defined in the Tailoring Rule. EPA also proposed a Federal Implementation Plan (FIP) that would apply specifically to states that did not or could not agree to reinterpret their SIPs to impose the Tailoring Rule and did not meet SIP submission deadlines. EPA finalized its GHG SIP Call in the December 12, 2010, issue of the *Federal Register* (75 FR 77698) and required Texas to submit revisions to its SIP by December 1, 2011.

EPA published an interim final rule partially disapproving Texas' SIP; imposing the GHGs FIP effective as of its date of publication, as published in the December 30, 2010, issue of the *Federal Register* (75 FR 82430). EPA stated that FCAA, §110(k)(6) authorized it to change its previous approval of Texas' PSD SIP into a partial approval and partial disapproval. EPA's basis was that it had erroneously approved Texas' PSD SIP submission because the SIP did not appropriately address the applicability of newly-regulated pollutants to the PSD program in the future. EPA further stated that its action was independent of the GHG SIP Call because that action was aimed at a narrower issue of applicability to GHGs, whereas its decision retroactively disapproving Texas' PSD SIP submission was addressed to Texas' purported failure to address, or assure the legal authority for, application of PSD to all pollutants newly subject to regulation. EPA published the final rule retroactively disapproving Texas' PSD SIP in part and promulgating the FIP as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178).

The effect of EPA's FIP is that major source preconstruction permitting authority is divided between two authorities - EPA for GHGs and the state of Texas for all other pollutants. Currently, major construction projects and expansions in Texas that require PSD permits must file applications with both EPA Region 6 (for GHGs) and TCEQ (for all non-GHG pollutants).

House Bill (HB) 788, 83rd Legislature, 2013 added new Texas Health and Safety Code (THSC), §382.05102. The new section grants TCEQ authority to authorize emissions of GHGs consistent with THSC, §382.051, to the extent required under federal law. THSC, §382.05102 directs the commission to adopt implementing rules, including a procedure to transition GHG PSD applications currently under EPA review to the TCEQ. Upon adoption, the rules must be submitted to EPA for review and approval into the Texas SIP. THSC, §382.05102 excludes permitting processes for GHGs from the contested case hearing procedures in THSC, Chapter 382; Texas Water Code, Chapter 5; and Texas Government Code, Chapter 2001. THSC, §382.05102 also requires that the commission repeal the rules adopted under this authority and submit a SIP revision to EPA, if (at a future date) emissions of GHGs are no longer required to be authorized under federal law.

The commission initiated this rulemaking to fulfill the directive from the legislature. The legislature found that "in the interest of the continued vitality and economic prosperity of the state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred authority for emissions of {GHGs}."

Texas has challenged in federal court EPA's GHG regulations as well as EPA's SIP Call and FIP. Implementation of HB 788 through this rulemaking is not adverse to Texas' claims in its ongoing challenges to EPA's actions regarding GHGs generally or relating to the SIP. The commission's action to conduct rulemaking for submittal and approval by EPA is consistent with Texas' position that state law does not give EPA the authority to automatically change state regulations.

The United States Supreme Court is currently considering Texas' challenge to EPA's authority to regulate stationary sources of GHGs under the FCAA. If the court issues a ruling that invalidates or renders unenforceable all or some of EPA's regulations of GHGs after adoption and submittal of these rules to EPA, the commission intends to follow the direction in THSC, §382.05102 to promptly repeal or amend the rules as necessary based on the court's order, and submit the changes or repeal to EPA to remove the provisions from the SIP.

Concurrently with this rulemaking, the commission is adopting new and amended rules to 30 TAC Chapters 39 (Public Notice), 55 (Requests for Reconsideration and Contested Case Hearings; Public Comment), 101 (General Air Quality Rules), 116 (Control of Air Pollution by Permits for New Construction or Modification), and 122 (Federal Operating Permits Program) to implement HB 788. Except where specifically noted, all adopted changes to Chapters 39, 55, 101, 106, 116 and 122 are necessary to achieve the goal of implementation of HB 788, obtaining SIP approval of certain rules, and the lifting of the FIP.

The commission's strategy for authorization of emissions of GHGs under the NSR program is that emissions above the thresholds established in adopted §116.164(a) must be authorized by PSD permits. EPA does not consider emissions lower than the tailored thresholds to be defined as subject to regulation and EPA does not require authorization of these emissions. Thus, the commission is adopting rule language that will comply with the specific intent of HB 788 to authorize emissions of GHGs only to the extent required under federal law. No emissions of GHGs may be authorized by any Permit by Rule (PBR) under Chapter 106 or standard permit under Chapter 116, Subchapter F, however emissions of non-GHGs

at the same facility may be authorized under this chapter or Chapter 116.

Section by Section Discussion

§106.2, Applicability

The commission adopts the amendment to §106.2 to establish that Chapter 106 does not apply to emissions of GHGs (as defined in adopted amendment to §101.1). Emissions of GHGs will not be authorized under PBRs; these emissions will be authorized by a PSD permit if any of the applicability conditions in adopted new §116.164 are met. However, PBRs will continue to be available as an authorization mechanism for emissions of non-GHGs.

§106.4, Requirements for Permitting by Rule

The commission adopts several revisions to §106.4 in order to address the use of PBRs for authorization of emissions of non-GHGs at sources which emit GHGs. The commission's intent is to ensure that PBRs remain a valid method of authorization for emissions of non-GHGs at facilities and projects which emit GHGs. Emissions of GHGs themselves will be authorized under a PSD permit, if the emissions meet or exceed the tailored thresholds. This is consistent with federal law.

The commission adopts the restructuring of §106.4(a)(1) into subparagraphs (A) - (E) in order to improve the readability and clarify the various emission limitations in this paragraph.

The commission adds rule language that excepts GHGs from the emission limits in §106.4, notwithstanding any rule language in a specific PBR. The commission also removes the terms "carbon dioxide" and "methane" from this section. These two gases have been removed from this section because CO₂ and methane are included in the adopted new definition of GHGs. Section 106.4(a) places limits on actual emissions authorized under PBR. Because GHGs will not be authorized under PBR, it is not necessary to include GHGs on the list of emission limits. While the commission is removing the terms "carbon dioxide" and "methane," this amendment will not affect how PBRs function, as GHGs will not be subject to an emission limit under §106.4(a), which is the current practice.

The amendment is necessary to ensure that a project or facility will not be ineligible for a PBR solely because of emissions of GHGs.

The commission also adopts §106.4(a)(3) to specify that projects and facilities which trigger PSD permit requirements due solely to emissions of GHGs are not excluded from using an applicable PBR to authorize the non-GHGs pollutants associated with the project or facility, notwithstanding any rule language in a specific PBR. In such a case, all applicable PSD requirements relating to the emissions of GHGs must be satisfied, and the emissions of non-GHG pollutants and facility parameters must meet all applicable PBR conditions, including §106.4 requirements. Projects and facilities which trigger PSD requirements due to emissions of non-GHGs pollutants cannot qualify for a PBR.

Additionally, the commission adds language which establishes that facilities or projects which require a PSD permit due to emissions of GHGs may not commence construction or operation until the PSD permit is issued. This amendment is necessary because many PBRs do not require registration or approval prior to construction, and therefore the PBR authorization may be available prior to issuance of the GHG PSD permit.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis (RIA) requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a RIA.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the revisions to Chapter 106 is to implement the provisions of HB 788 by ensuring that the PBR requirements do not apply to emissions of GHGs and to ensure that PBRs would continue to be available as an authorization mechanism for emissions of non-GHGs.

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a RIA for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted rules would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. This adopted rulemaking is in conjunction with changes to other chapters in 30 TAC that are necessary to implement provisions in HB 788. The intent of the legislation is to establish the TCEQ as the permitting authority for major sources of GHG emissions in Texas and to do so consistent with federal law.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the crite-

ria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the adopted rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA and thus allow EPA to lift its federal permitting program on GHG sources in Texas. In fact, the rules create no additional impacts since major GHG sources in Texas must currently obtain a PSD permit from EPA and the adopted rules merely supplant EPA as the authority for GHG PSD permitting in Texas. For these reasons, the rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The adopted rules implement requirements of the FCAA, specifically to adopt and implement SIPs, including a requirement to adopt and implement permit programs.

This rulemaking is one of several concurrent rulemakings that will implement provisions in HB 788 to establish the TCEQ as

the permitting authority for major sources of GHG emissions in Texas and to do so consistent with federal law. Specifically, the revisions to Chapter 106 implement the provisions of HB 788 by ensuring that the PBR requirements do not apply to emissions of GHGs and to ensure that PBRs would continue to be available as an authorization mechanism for emissions of non-GHG.

The rules were not developed solely under the general powers of the agency, but are authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act (TCAA) and the Texas Water Code), which are cited in the Statutory Authority section of this preamble. Further, the rules do not exceed a standard set by federal law or exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the draft RIA determination during the public comment period. No comments were received on the RIA determination.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution §17 or §19, Article I; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the adopted rulemaking action under Texas Government Code, §2007.043. The primary purpose of this rulemaking action, as discussed elsewhere in this preamble, is to implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of GHG emissions in Texas and to do so consistent with federal law. Specifically, the revisions to Chapter 106 would ensure that the PBR requirements do not apply to emissions of GHGs and to ensure that PBRs would continue to be available as an authorization mechanism for emissions of non-GHG.

The adopted rules will not create any additional burden on private real property. The rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The rulemaking will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Manage-

ment Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The adopted rules amend and update rules that govern the applicability of the PSD program to major sources of emissions of GHGs. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Effect on Sites Subject to the Federal Operating Permits Program

The adopted rules will not require any revisions to federal operating permits.

Public Comment

The commission held a public hearing on December 5, 2013. The public comment period ended on December 9, 2013. The commission received comments from Air Alliance Houston (AAH); Association of Electric Companies of Texas, Inc (AECT); C3 Petrochemicals (C3P); Calpine Corporation (Calpine), Environment Texas; Gas Processors Association (GPA); Golden Pass Products LLC (Golden Pass); Golden Spread Electric Cooperative, Inc.(GSEC); House Bill 788 Working Group (HB788WG); Jackson Walker L.L.P.; Lone Star Chapter of the Sierra Club (Sierra Club); Natgasoline, LLC; Occidental Chemical Corporation (OCC); OCI Beaumont, LLC; Pioneer Natural Resources (Pioneer); Public Citizen; State Representative Lon Burnam; Sustainable Energy and Economic Development Coalition (SEED); Texas Chemical Council (TCC); Texas Combined Heat and Power Initiative (TXCHPI); Texas Industry Project (TIP); Texas Oil and Gas Association (TXOGA); Texas Pipeline Association (TPA); Texas Solid Waste Association of North America (TxSWANA); Weaver Boos Consultants, LLC (Weaver); and Zephyr Environmental Corporation (Zephyr). This comprehensive list includes all of the commenters for all of the chapters of this concurrent rulemaking project. The individual comments are addressed in the Response to Comment section of the appropriate chapter. Eighteen of the commenters supported the rulemaking or portions of the rulemaking, six commenters opposed portions of the rulemaking, and 18 commenters suggested changes.

Response to Comments

Comment

AECT, HB788WG, GPA, Sierra Club, TIP, TCC, and TPA supported the proposed revisions to Chapter 106, to allow the use of PBR to authorize emissions of non-GHGs at new and modified sources that will also emit GHGs.

Response

The commission appreciates the support.

Comment

GPA, TIP, and TPA commented that additional rule language should be added to §106.4 to resolve inconsistencies with specific rule language in §106.352. Existing rule language in §106.352(b)(6)(F) states "All facilities at an OGS registered under this section must collectively emit less than or equal to 250 tons per year (tpy) of nitrogen oxides (NO_x) or carbon monoxide (CO); 15 tpy of particulate matter with less than 10 microns (PM₁₀); 10 tpy of particulate matter less than 2.5 microns (PM_{2.5}); and 25 tpy of volatile organic compounds (VOC), sulfur dioxide (SO₂), hydrogen sulfide (H₂S), or any other air contaminant except CO₂, water, nitrogen, methane, ethane, hydrogen, and oxygen." GPA and TPA suggested that the phrase "notwithstanding any provision in any specific permit by rule to the contrary" should be added to §106.4(a)(1). TIP suggested that similar language should be added to §106.4(a)(1)(E).

Response

The commission has changed the rule in response to these comments. The phrase "notwithstanding any provision in any specific permit by rule to the contrary" was added §106.1(a)(1)(E)(ii). The addition of this phrase to the general requirements for all PBRs ensures that PBRs can be used to authorize non-GHG pollutants (e.g., criteria pollutants) at sites that are also subject to GHG PSD permitting. The addition of the new language ensures that GHGs will not be subject to the limit of 25 tpy for any other air contaminant, if that requirement is specifically listed in an existing PBR. The commission's intent is that GHGs will not be regulated under PBRs, but under the PSD permitting program, if applicable. This adopted revision does not preclude the use of PBRs to authorize emissions of contaminants that are VOCs and are included in the definition of GHGs. For example, HFC-41 is included in the definition of GHGs because it is a hydrofluorocarbon, but it is also a VOC. Those emissions will require authorization as VOCs under §116.110(a).

Comment

Zephyr suggested edits to proposed language in §106.4(a)(3) to parallel existing language. Zephyr recommended that the rule language say "Any facility or group of facilities, which constitutes a new major stationary source or any change which constitutes a major modification which is subject to Chapter 116, Subchapter B, Division 6 of this title due solely to emissions of greenhouse gases may use a permit by rule under this chapter for authorization of air contaminants that are not greenhouse gases...."

Response

No change has been made to the rule in response to this comment. The adopted language is consistent with the nomenclature used in Chapter 116 relating to PSD permitting. Because it is a new practice to allow the use of PBRs for projects which trigger PSD review (although, only for GHGs at this time), the language needs to be consistent with the language in the PSD rules.

Comment

GPA and TPA commented that additional rule language should be added to §106.4(a)(3) to resolve inconsistencies with specific rule language in §106.352. Commenters state that existing rule language in §106.352(c)(2)(A), (g)(1) and (h)(1) limits the use of the PBR when the thresholds for major source or major modification are exceeded. GPA and TPA suggested that the phrase "notwithstanding any provision in any specific permit by rule to the contrary" should be added to §106.4(a)(3).

Response

The commission has changed the rule in response to these comments. The commission recognizes the potential conflict in §106.352(c)(2)(A) and (h)(1), which could be interpreted to prohibit the use of §106.352 with sources that obtain a GHG PSD permit. The commission's intent is that any applicable PBRs be eligible for use at sources that are required to obtain a GHG PSD permit due solely to emissions of GHGs. The addition of the language "notwithstanding any provision in any specific permits by rule to the contrary" to §106.4(a)(3) avoids the unintended consequence of precluding the use of PBRs for sources which must obtain GHG PSD permits. The commission respectfully does not agree that §106.352(g)(1) creates a potential conflict, because that paragraph specifically states "criteria pollutants" and GHGs are not criteria pollutants.

Comment

TPA commented that the permitting status of a source authorized by a PBR should be based on the global warming potential (GWP) values in effect when construction was commenced. TPA commented that if GWPs change in the future, in no event should there be a requirement for reanalysis of prior applicability determinations.

Response

The commission clarifies that emissions of GHGs are not eligible for authorization by PBR (or standard permits). The commission did not propose and is not establishing a minor source permitting program for emissions of GHGs. Emissions of GHGs are subject to PSD review if applicability criteria in §116.164 are met. The Response to Comments section in Chapter 116 of this rulemaking discusses the commission's intent regarding changes in the GWP values.

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also adopted under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop

a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.05196, concerning Permits by Rule, which authorizes the commission to adopt permits by rule for certain types of facilities determined to not make a significant contribution of air contaminants in the atmosphere; and THSC, §382.05102, which relates to the permitting authority of the commission for greenhouse gas emissions. An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendments are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The adopted amendments implement HB 788 (82nd Legislature, 2013), THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05102, and 382.05196; Texas Government Code, §2001.006; and FCAA, 42 USC, §§7401 *et seq.*

§106.4. Requirements for Permitting by Rule.

(a) To qualify for a permit by rule, the following general requirements must be met.

(1) Total actual emissions authorized under permit by rule from the facility shall not exceed the following limits, as applicable:

(A) 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO_x);

(B) 25 tpy of volatile organic compounds (VOC), sulfur dioxide (SO₂), or inhalable particulate matter (PM);

(C) 15 tpy of particulate matter with diameters of 10 microns or less (PM₁₀);

(D) 10 tpy of particulate matter with diameters of 2.5 microns or less (PM_{2.5}); or

(E) 25 tpy of any other air contaminant except:

(i) water, nitrogen, ethane, hydrogen, and oxygen; and

(ii) notwithstanding any provision in any specific permit by rule to the contrary, greenhouse gases as defined in §101.1 of this title (relating to Definitions).

(2) Any facility or group of facilities, which constitutes a new major stationary source, as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), or any modification which constitutes a major modification, as defined in §116.12 of this title, under the new source review requirements of the Federal Clean Air Act (FCAA), Part D (Nonattainment) as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder, must meet the permitting requirements of Chapter 116, Subchapter B of this title (relating to New Source Review Permits) and cannot qualify for a permit by rule under this chapter. Persons claiming a permit by rule under this chapter should see the requirements of §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas) to ensure that any applicable netting requirements have been satisfied.

(3) Any facility or group of facilities, which constitutes a new major stationary source, as defined in 40 Code of Federal Regulations (CFR) §52.21, or any change which constitutes a major modification, as defined in 40 CFR §52.21, under the new source review requirements of the FCAA, Part C (Prevention of Significant Deterioration) as amended by the FCAA Amendments of 1990, and regulations promulgated thereunder because of emissions of air contaminants other than greenhouse gases, must meet the permitting requirements of Chapter 116, Subchapter B of this title and cannot qualify for a permit by rule under this chapter. Notwithstanding any provision in any specific permit by rule to the contrary, a new major stationary source or major modification which is subject to Chapter 116, Subchapter B, Division 6 of this title due solely to emissions of greenhouse gases may use a permit by rule under this chapter for air contaminants that are not greenhouse gases. However, facilities or projects which require a prevention of significant deterioration permit due to emissions of greenhouse gases may not commence construction or operation until the prevention of significant deterioration permit is issued.

(4) Unless at least one facility at an account has been subject to public notification and comment as required in Chapter 116, Subchapter B or Subchapter D of this title (relating to New Source Review Permits or Permit Renewals), total actual emissions from all facilities permitted by rule at an account shall not exceed 250 tpy of CO or NO_x; or 25 tpy of VOC or SO₂ or PM; or 15 tpy of PM₁₀; or 10 tpy of PM_{2.5}; or 25 tpy of any other air contaminant except water, nitrogen, ethane, hydrogen, oxygen, and GHGs (as specified in §106.2 of this title (relating to Applicability)).

(5) Construction or modification of a facility commenced on or after the effective date of a revision of this section or the effective date of a revision to a specific permit by rule in this chapter must meet the revised requirements to qualify for a permit by rule.

(6) A facility shall comply with all applicable provisions of the FCAA, §111 (Federal New Source Performance Standards) and §112 (Hazardous Air Pollutants), and the new source review requirements of the FCAA, Part C and Part D and regulations promulgated thereunder.

(7) There are no permits under the same commission account number that contain a condition or conditions precluding the use of a permit by rule under this chapter.

(8) The proposed facility or group of facilities shall obtain allowances for NO_x if they are subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(b) No person shall circumvent by artificial limitations the requirements of §116.110 of this title (relating to Applicability).

(c) The emissions from the facility shall comply with all rules and regulations of the commission and with the intent of the Texas Clean Air Act (TCAA), including protection of health and property of the public, and all emissions control equipment shall be maintained in good condition and operated properly during operation of the facility.

(d) Facilities permitted by rule under this chapter are not exempted from any permits or registrations required by local air pollution control agencies. Any such requirements must be in accordance with Texas Health and Safety Code, §382.113 and any other applicable law.

The agency certifies that legal counsel has reviewed the adoption and found it 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 K. MOBILE SOURCE
INCENTIVE PROGRAMS
DIVISION 4. TEXAS CLEAN SCHOOL BUS
PROGRAM

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §§114.640, 114.642, 114.644, 114.646, and 114.648; and new §§114.640, 114.642, 114.644, 114.646, and 114.648 *without changes* to the proposal as published in the December 27, 2013, issue of the *Texas Register* (38 TexReg 9439). The rules will not be republished.

The adopted sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

House Bill (HB) 1796, 81st Legislature, 2009, authored by Representative Warren Chisum, amended the Clean School Bus Program (referred to as the Texas Clean School Bus Program, or TCSB), Texas Health and Safety Code (THSC), Chapter 390, to extend the expiration date for the TCSB Program from August 31, 2013 to August 31, 2019. The adopted rulemaking would allow for the continuance of the existing TCSB Program through August 31, 2019, or later if the program is extended or reauthorized by the Texas Legislature and provide for administrative cleanup.

The TCSB was originally established by the Texas Legislature in 2005 to fund efforts by school districts and other local or regional planning entities or nonprofit organizations to improve the health of children by reducing emissions of diesel exhaust from school buses. Reduction of emissions from diesel-powered school buses will also benefit the public in ozone nonattainment areas and throughout the state by reducing emissions of nitrogen oxides (NO_x), which are important contributors to ozone formation. Under the adopted sections, school districts, charter schools, regional planning organizations, councils of government, or similar regional planning agencies created under the Local Government Code, Chapter 391, or private nonprofit organizations would be eligible to apply for grants for the use of emission reducing catalysts, particulate filters, qualifying fuels, and other emission reducing add-on equipment or technology that the commission finds will reduce emissions.

Section by Section Discussion

The commission adopts the repeal of existing §§114.640, 114.642, 114.644, 114.646, and 114.648 as these requirements expired on August 31, 2013, and adopts new §§114.640,

114.642, 114.644, 114.646, and 114.648 to implement the TCSB.

§114.640, *Definitions*

Adopted new §114.640 provides definitions for the TCSB Program. Definitions specific to the TCSB include definitions of diesel exhaust, incremental cost, qualifying fuel, repower, and retrofit.

§114.642, *Applicability*

Adopted new §114.642 establishes program eligibility for school districts and charter schools, as well as for regional planning commissions, councils of government or similar regional planning agencies created under Local Government Code, Chapter 391, or private nonprofit organizations.

§114.644, *Clean School Bus Program Requirements*

Adopted new §114.644 establishes basic program requirements. The adopted section addresses the types of emission reduction projects that would be eligible to receive funding, as well as grant funding particulars such as prioritization and other specifics associated with grant eligibility.

§114.646, *Monitoring, Recordkeeping, and Reporting Requirements*

Adopted new §114.646 establishes that grant recipients must adhere to monitoring, recordkeeping, and reporting requirements of their grant, which will occur no less frequently than annually.

§114.648, *Expiration*

Adopted new §114.648 establishes that the TCSB Program will expire on August 31, 2019, unless the program is extended or reauthorized by the Texas Legislature.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Additionally, the adopted rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adoption to Chapter 114 would replace expired sections of the Texas Administrative Code (TAC) with new sections to provide for the continued implementation of the TCSB Program as required by the Texas Legislature. The TCSB Program is intended to reduce diesel exhaust emissions from school buses by funding eligible projects, and is a voluntary incentive program.

The Texas Legislature authorized the issuance of grants under the TCSB Program to protect the environment and reduce risks to human health from environmental exposure, but the adopted rulemaking is not expected to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, since the repeal and replacement with new sections are to provide for continued implementation of the TCSB Program, which is a voluntary program designed to assist school districts in reducing school bus emissions.

The adopted rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the national ambient air quality standards (NAAQS) in each air quality control region of the state. Since the TCSB Program was designed to provide emission reductions from school buses and funded by the Texas Legislature, the commission previously submitted the TCSB Program rules to the EPA as a revision to the Texas SIP, which EPA approved. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter (42 USC, Chapter 85). The provisions of the Federal Clean Air Act (FCAA) recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule.

The requirement to provide a fiscal analysis of adopted regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These rules are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 concluding that "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted the adopted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the

ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule adopted for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, the impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a) because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of these rules is to remove expired sections from the TAC and adopt new sections to provide for the continued implementation of the TCSB Program as required by the Texas Legislature. As discussed elsewhere in this preamble, the repeal to remove expired sections from the TAC and adopted new sections amount to a mere administrative clean-up to ensure that there is no confusion on the part of the public regarding the continuation of the TCSB Program, as intended by the Texas Legislature. Additionally, even if the adopted rulemaking was a major environmental rule, the adopted rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this adopted rulemaking. Therefore, this adopted rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b)

because the adopted rulemaking does not meet the definition of a "major environmental rule," nor does it meet any of the four applicability criteria for a major environmental rule.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period and received no comments.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The specific intent of these rules is to remove expired sections from the TAC and adopt new sections to provide for the continued implementation of the TCSB Program as required by the Texas Legislature. As discussed elsewhere in this preamble, the repeal to remove expired sections from the TAC and adopt new sections amount to a mere administrative clean-up to ensure that there is no confusion on the part of the public regarding the continuation of the TCSB Program, as intended by the Texas Legislature. The adopted rules would substantially advance this stated purpose by repealing the original sections in Chapter 114, Subchapter K, Division 4 and replacing those sections with new sections prescribing the requirements of the TCSB Program.

Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking because it is an action reasonably taken to fulfill an obligation mandated by state law. THSC, Chapter 390, Clean School Bus Program, requires the commission to establish and administer a clean school bus program designed to reduce the exposure of school children to diesel exhaust in and around diesel-fueled school buses. Consequently, the adopted rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4).

Nevertheless, the commission further evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a "taking" under Texas Government Code, Chapter 2007. Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. These adopted rules create a voluntary program for school districts in the state to apply for and receive grants for the offset of incremental cost of projects that reduce diesel exhaust emissions.

In addition, because the subject adopted regulations do not provide more stringent requirements they do not burden, restrict, or limit an owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these rules will not constitute a taking under the Texas Government Code, Chapter 2007. For these reasons, Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), concerning rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be

considered during the rulemaking process. The commission reviewed this action for consistency and determined the rulemaking for Chapter 114 does not impact any CMP goals or policies, because it revises voluntary incentive grant programs and does not govern air pollution emissions.

The commission invited public comment regarding the consistency with the CMP during the public comment period and received no comments.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 114 does not contain applicable requirements under 30 TAC Chapter 122, Federal Operating Permits; therefore, owners or operators subject to the Federal Operating Permit Program will not be required to revise their operating permits, consistent with the revision process in Chapter 122, to include the revised Chapter 114 requirements for each emission unit at their sites affected by the revisions to Chapter 114.

Public Comment

The commission held a public hearing on January 21, 2014. The comment period closed on January 27, 2014. The commission received written comments from the Regional Transportation Council of the North Central Texas Council of Governments (NCTCOG). The NCTCOG supported the rulemaking and provided recommendations for expanding the scope of the TCSB.

Response to Comments

The NCTCOG recommended that the TCSB be expanded to allow for replacements and include a NO_x reduction component. As part of their overall comment to allow for school bus replacements, NCTCOG suggested the following changes: 1) a change to the definition of qualifying fuel to include any renewable or alternative fuel registered or verified by the EPA other than standard gasoline or diesel; 2) adding a definition of replacement to clarify that project eligibility includes school bus replacement activities; 3) expanding the definition of retrofit to include both NO_x and particulate matter retrofits approved by either the EPA or the California Air Resources Board; and 4) expanding the list of eligible projects to specifically include NO_x retrofits, engine repowers, and school bus replacements. The NCTCOG also commented that §114.644(e) be revised to disallow the removal of old equipment from the State of Texas, including retrofits and engines, as well as chassis, upon the inclusion of school bus replacements in the TCSB.

The commission acknowledges the comment provided by the NCTCOG. The commission has made no changes in response to this comment. The TCSB was established to reduce particulate matter in and around the school bus. The inclusion of NO_x emissions reductions, as recommended by the NCTCOG, would fall outside the scope of the TCSB. Other programs under the Texas Emissions Reduction Plan (TERP) umbrella, such as the Texas Clean Fleet Program and the Texas Natural Gas Vehicle Grant Program, offer grants for school bus replacements.

The NCTCOG also commented that a portion of funds be earmarked for administrative costs to cover the expense of compliance and enforcement of the program.

The commission has made no changes in response to this comment. The adopted rules reflect THSC, §390.005, which states "the recipient may not use the grant to pay for administrative expenses."

The NCTCOG commented that it supports the TCSB and encourages the full funding of TERP through the appropriation of all revenue collected under the program. NCTCOG further encouraged the commission to request full funding of TERP as budgets are prepared for the next biennium.

The commission appreciates NCTCOG's support for funding the TERP programs, however, the comment is outside the scope of this rulemaking. Decisions on appropriation levels are made by the Texas Legislature. Also, how the commission structures the biennial appropriations request is guided by direction from the LBB. The commission will continue to work with members of the legislature and the LBB to help them determine the appropriation funding levels for the TERP programs. No changes to the proposed text were made in response to this comment.

30 TAC §§114.640, 114.642, 114.644, 114.646, 114.648

Statutory Authority

The repeals are adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC, and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The rulemaking is also adopted under Texas Health and Safety Code (THSC), §382.002, policy and purpose of the Texas Clean Air Act (TCAA), THSC, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; and THSC, §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air. Finally, the rulemaking is adopted under THSC, Chapter 386, which established the Texas Emissions Reduction Program and THSC, Chapter 390, which established the Texas Clean School Bus Program, and as part of the implementation of House Bill 1796, 81st Legislature, 2009.

The repeals implement THSC, §§382.002, 382.011, and 382.017 and THSC, Chapter 386 and Chapter 390, and House Bill 1796, 81st Legislature, 2009.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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30 TAC §§114.640, 114.642, 114.644, 114.646, 114.648

Statutory Authority

The new sections are adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC, and

other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The rulemaking is also adopted under Texas Health and Safety Code (THSC), §382.002, policy and purpose of the Texas Clean Air Act (TCAA), THSC, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; and THSC, §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air. Finally, the rulemaking is adopted under THSC, Chapter 386, which established the Texas Emissions Reduction Program and THSC, Chapter 390, which established the Texas Clean School Bus Program, and as part of the implementation of House Bill 1796, 81st Legislature, 2009.

The adopted new sections implement THSC, §§382.002, 382.011, and 382.017 and THSC, Chapter 386 and Chapter 390, and House Bill 1796, 81st Legislature, 2009.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts the amendments to §§116.12, 116.111, 116.160, 116.610 and 116.611; and new §116.164 and §116.169.

Sections 116.12, 116.164, 116.169, 116.610, and 116.611 are adopted *with changes* to the proposed text as published in the November 8, 2013, issue of the *Texas Register* (38 TexReg 7892). Section 116.111 and §116.160 are adopted *without changes* to the proposed text and will not be republished.

The commission will submit the amendments to §§116.12, 116.111, 116.160, 116.610 and 116.611; and new §§116.164, and 116.169(a) to the United States Environmental Protection Agency (EPA) as revisions to the State Implementation Plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

In *Massachusetts v. EPA* (549 U.S. 497 (2007)) the Supreme Court of the United States ruled that greenhouse gases (GHGs) fit within the Federal Clean Air Act (FCAA or Act) definition of air pollutant. This ruling gave EPA the authority to regulate GHGs from new motor vehicles and engines if EPA made a finding under FCAA, §202(a) that six key GHGs taken in combination endanger both public health and welfare, and that combined emissions of GHGs from new motor vehicles and engines

contribute to pollution that endangers public health and welfare. EPA issued its "Endangerment Finding" for GHGs on December 15, 2009 (Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, as published in the December 15, 2009, issue of the *Federal Register* (74 FR 66496)). Based on the Endangerment Finding, EPA subsequently adopted new emissions standards for motor vehicles (the "Tailpipe Rule" as published in the May 7, 2010, issue of the *Federal Register* (75 FR 25324)). The rule established standards for light-duty motor vehicles to improve fuel economy thereby reducing emissions of GHGs. The standards were effective January 2, 2011. EPA also reconsidered its interpretation of the timing of applicability of Prevention of Significant Deterioration (PSD) requirements under the FCAA (the "Timing Rule" as published in the April 2, 2010, issue of the *Federal Register* (75 FR 17004)). EPA's interpretation of the FCAA is that PSD requirements for stationary sources of GHGs take effect when the first national rule subjects GHGs to regulation under the Act. EPA determined that once GHGs were actually being controlled under any part of the Act they were subject to regulation under the PSD program. Specifically, EPA took the position that beginning on January 2, 2011, GHG control requirements would be required under the PSD and Title V permitting programs because national standards for GHGs under the Tailpipe Rule were effective on January 2, 2011.

EPA's regulation of GHGs under the FCAA presented substantial difficulties for the EPA and states, particularly with regard to the PSD program. For instance, the most common of the GHGs, carbon dioxide (CO₂), is emitted in quantities that dwarf the Act's major source thresholds for program applicability. As a result, under EPA's Timing Rule, PSD requirements could have expanded from approximately 500 issued permits annually to more than 81,000 nationwide, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514, 31537 and 31538). To avoid this result, EPA excluded much of this new construction activity from the PSD program by altering the Act's statutory emission rate applicability thresholds for GHGs. This "Tailoring Rule," as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514) newly defined the term "subject to regulation" and established higher GHGs emission thresholds for applicability of PSD and Title V permitting than specified in the FCAA. The Tailoring Rule also phased in permitting requirements in a multi-stepped process.

Before the *Massachusetts* decision in 2007, EPA took the position that GHGs are not regulated under the FCAA, and GHGs unquestionably were not regulated when EPA approved Texas' SIP in 1992. Texas has had an approved SIP since 1972, as published in the May 31, 1972, issue of the *Federal Register* (37 FR 10842). In 1983, Texas was delegated authority to implement the PSD program, as published in the February 9, 1983, issue of the *Federal Register* (48 FR 6023). Following this delegation, Texas submitted several SIP revisions to enable it to administer the PSD program (collectively the "PSD SIP submission"). EPA approved Texas' PSD SIP in 1992, granting the state full authority to implement the PSD program, as published in the June 24, 1992, issue of the *Federal Register* (57 FR 28093).

The Texas PSD SIP submission and approval proceedings produced a well-developed record on how Texas would address the applicability of newly-regulated pollutants under the PSD program. During the SIP submission process, Texas consistently explained to EPA that the PSD provisions in the SIP are not prospective rulemaking, and do not incorporate future EPA interpretations of the Act or its regulations.

EPA's GHGs regulations created practical difficulties about how EPA could apply its Tailoring Rule in states with approved SIPs. In August 2010, Texas advised EPA that it could not retroactively reinterpret its SIP to cover GHGs, which were not regulated at the time Texas' SIP was approved in 1992 and were, in fact, a composite pollutant defined for the first time in the Tailoring Rule. Texas also explained that the PSD program only encompassed National Ambient Air Quality Standard (NAAQS) pollutants, but confirmed as a regulatory matter that the approved PSD program encompasses all federally regulated new source review (NSR) pollutants, including any pollutant that otherwise is subject to regulation under the FCAA, as stated in §116.12(14)(D).

Following promulgation of the Tailoring Rule, EPA issued a proposed "Finding of Substantial Inadequacy and SIP Call," as published in the September 2, 2010, issue of the *Federal Register* (75 FR 53892). This action proposed finding the SIPs of 13 states, including Texas', "substantially inadequate" because these SIPs did not apply PSD requirements to GHGs-emitting sources. EPA proposed to require these states (through their SIP-approved PSD programs) to regulate GHGs as defined in the Tailoring Rule. EPA also proposed a Federal Implementation Plan (FIP) that would apply specifically to states that did not or could not agree to reinterpret their SIPs to impose the Tailoring Rule and did not meet SIP submission deadlines. EPA finalized its GHG SIP Call in the December 12, 2010, issue of the *Federal Register* (75 FR 77698) and required Texas to submit revisions to its SIP by December 1, 2011.

EPA published an interim final rule partially disapproving Texas' SIP; imposing the GHGs FIP effective as of its date of publication, as published in the December 30, 2010, issue of the *Federal Register* (75 FR 82430). EPA stated that FCAA, §110(k)(6) authorized it to change its previous approval of Texas' PSD SIP into a partial approval and partial disapproval. EPA's basis was that it had erroneously approved Texas' PSD SIP submission because the SIP did not appropriately address the applicability of newly-regulated pollutants to the PSD program in the future. EPA further stated that its action was independent of the GHG SIP Call because that action was aimed at a narrower issue of applicability to GHGs, whereas its decision retroactively disapproving Texas' PSD SIP submission was addressed to Texas' purported failure to address, or assure the legal authority for, application of PSD to all pollutants newly subject to regulation. EPA published the final rule retroactively disapproving Texas' PSD SIP in part and promulgating the FIP as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178).

The effect of EPA's FIP is that major source preconstruction permitting authority is divided between two authorities - EPA for GHGs and the state of Texas for all other pollutants. Currently, major construction projects and expansions in Texas that require PSD permits must file applications with both EPA Region 6 (for GHGs) and TCEQ (for all non-GHG pollutants).

House Bill (HB) 788, 83rd Legislature, 2013 added Texas Health and Safety Code (THSC), §382.05102. THSC, §382.05102 grants TCEQ the authority to authorize emissions of GHGs consistent with THSC, §382.051, to the extent required under federal law. THSC, §382.05102 directs the commission to adopt implementing rules, including a procedure to transition GHG PSD applications currently under EPA review to the TCEQ. Upon adoption, the rules must be submitted to EPA for review and approval into the Texas SIP. THSC, §382.05102 excludes permitting processes for GHGs from the contested case hearing procedures in THSC, Chapter 382; Texas Water Code (TWC),

Chapter 5; and Texas Government Code, Chapter 2001. THSC, §382.05102 also requires that the commission repeal the rules adopted under this authority and submit a SIP revision to EPA, if (at a future date) emissions of GHGs are no longer required to be authorized under federal law.

The commission initiated this rulemaking to fulfill the directive from the legislature. The legislature found that "in the interest of the continued vitality and economic prosperity of the state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred authority for emissions of {GHGs}."

Texas has challenged in federal court EPA's GHG regulations as well as EPA's SIP Call and FIP. Implementation of HB 788 through this rulemaking is not adverse to Texas' claims in its ongoing challenges to EPA's actions regarding GHGs generally or relating to the SIP. The commission's action to conduct rulemaking for submittal and approval by EPA is consistent with Texas' position that state law does not give EPA the authority to automatically change state regulations.

The United States Supreme Court is currently considering Texas' challenge to EPA's authority to regulate stationary sources of GHGs under the FCAA. If the court issues a ruling that invalidates or renders unenforceable all or some of EPA's regulations of GHGs after adoption and submittal of these rules to EPA, the commission intends to follow the direction in THSC, §382.05102 to promptly repeal or amend the rules as necessary based on the court's order, and submit the changes or repeal to EPA to remove the provisions from the SIP.

Concurrently with this rulemaking, the commission is adopting revisions to Chapters 39 (Public Notice), 55 (Requests for Reconsideration and Contested Case Hearings; Public Comment), 101 (General Air Quality Rules), 106 (Permits by Rule), and 122 (Federal Operating Permits Program) to implement HB 788. Except where specifically noted, all adopted changes to Chapters 39, 55, 101, 106, 116, and 122 are necessary to achieve the goal of implementation of HB 788, obtaining SIP approval of certain rules, and rescission of the FIP.

Section by Section Discussion

Section 116.12, Nonattainment and Prevention of Significant Deterioration Review Definitions

The commission adopts amendments to §116.12 to add the definitions of carbon dioxide equivalent (CO₂e) emissions and the pollutant GHGs. The commission adopts amendments to the definitions of federally regulated NSR pollutant, major stationary source, and major modification.

The adopted definition of GHGs references the adopted definition in §101.1(42), Definitions, and establishes that the regulated pollutant GHGs is an aggregate group of six GHGs including: CO₂, nitrous oxide (N₂O), methane (CH₄), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆). HFCs are compounds containing only hydrogen, fluorine, and carbon atoms. PFCs are compounds containing only carbon and fluorine atoms. This definition is consistent with EPA's definition in 40 Code of Federal Regulations (CFR) §51.166(b)(48)(i). Other gases that are considered GHGs are not included in the definition of the pollutant GHGs.

The adopted definition in §116.12(7) of CO₂e emissions is consistent with EPA's definition in 40 CFR §51.166(b)(48)(ii). The new definition is necessary to establish the threshold for sources

to be considered major for GHGs, consistent with EPA's Tailoring Rule. The CO₂e emissions are determined by multiplying the mass amount in tons per year (tpy) of emissions of each of the gases (that are included in the definition of the pollutant of GHGs) by the global warming potential (GWP) of the gas, and adding the results. The GWPs are published in the 40 CFR Part 98, Subpart A, Table A-1 - Global Warming Potentials. For example, a source emits 5 tpy CO₂, 25 tpy of CH₄, and 10 tpy of the hydrofluorocarbon trifluoromethane (CHF₃). The GWP of CO₂e is 1, the GWP of CH₄ is 25, and the GWP of CHF₃ is 14,800. The CO₂e of the source would be 148,630 tpy CO₂e. This value is reached by multiplying 5 tpy CO₂ times 1, 25 tpy CH₄ by 25, and 10 tpy CHF₃ by 14,800, then adding each result to total 148,630 tpy CO₂e.

The commission is not adopting EPA's deferral for CO₂ emissions from bioenergy and other biogenic sources as published in the July 20, 2011, issue of the *Federal Register* (76 FR 43490). The deferral expires July 21, 2014, and would not be in effect for GHG PSD permitting under the Texas SIP. Further discussion is included in the Response to Comments section of this preamble.

The adopted amendment to the definition of federally regulated NSR pollutant in §116.12(15) will establish GHGs emitted over the federal Tailoring Rule thresholds as a pollutant subject to Texas' PSD permitting program.

Sources that emit GHGs are only subject to the PSD permitting program if they meet or exceed the thresholds adopted in new §116.164.

The new definition of GHGs in §116.12(16) establishes that the regulated pollutant GHGs is the aggregate group of six GHGs including: CO₂, N₂O, CH₄, HFCs, PFCs, and CF₆. This definition is consistent with EPA's definition in 40 CFR §51.166(b)(48). HFCs are compounds containing only hydrogen, fluorine, and carbon atoms. PFCs are compounds containing only carbon and fluorine atoms. Other gases that are commonly considered GHGs are not included in the definition of the pollutant GHGs.

The adopted amendment to the definition of "Major stationary source" and "Major modification" (in §116.12(19) and (20), respectively) reference adopted new §116.164 in order to simplify understanding of the thresholds established specifically for GHGs.

The commission also adopts the clarifying amendment to §116.12, including renumbering to accommodate the new definitions; deleting the sentence, "The terms in this section are applicable to permit review for major source construction and major source modification in nonattainment areas" because the definitions apply in attainment areas as well; and clarifying the title and citation of a referenced section in the footnote to Table I - Major Source/Major Modification Emission Thresholds.

§116.111, General Application

The commission adopts the amendment to §116.111 to add subsection (a)(2)(i)(ii) to establish the requirement to obtain authorization under the PSD permitting program for sources of GHGs which meet the thresholds in new §116.164. The amendment is necessary because the existing language in subparagraph (i) only requires PSD review in attainment areas. The amendment clarifies that authorization of GHGs above the tailored thresholds is required statewide. The amendment includes relettering subparagraph (i) to accommodate the two conditions which require PSD review. Consistent with current practice, the commission intends to issue a separate GHG PSD permit.

§116.160, Prevention of Significant Deterioration Requirements

The commission adopts the amendment to subsection (a) to require that new major sources of GHGs or major modifications of GHGs comply with the requirements of the PSD permitting program regardless of the location of the sources. The GHG PSD permitting requirements are statewide because there is no NAAQS for GHGs. This is consistent with the federal PSD permitting regulations.

The adopted amendment to subsection (a) will result in the applicable PSD requirements applying to sources that emit GHGs above the thresholds in §116.164. The federal PSD rules, like the preconstruction requirements in the THSC, require a best available control technology (BACT) determination and an air quality analysis. As EPA's guidance on PSD permitting for GHGs indicates, the focus of the application review is on the control technology choice. EPA has recognized that the unique nature of emissions of GHGs and impacts present challenges to permitting authorities conducting PSD review for these emissions. For instance, EPA has indicated that no air quality analysis is required for GHG PSD permits. In "PSD and Title V Permitting Guidance for Greenhouse Gases," (dated March 2011) prepared by EPA's Office of Air Quality Planning and Standards, EPA stated that, "...monitoring for GHGs is not required because EPA regulations provide an exemption in 40 CFR §52.21(i)(5)(iii) and §51.166(i)(5)(iii) for pollutants that are not listed in the appropriate section of the regulations, and GHGs are not currently included in that list. However, 40 CFR §52.21(m)(1)(ii) and §51.166(m)(1)(ii) of EPA's regulations apply to pollutants for which no NAAQS exists. These provisions call for collection of air quality monitoring data "as the Administrator determines is necessary to assess ambient air quality for that pollutant in any (or the) area that the emissions of that pollutant would affect." In the case of GHGs, the exemption in 40 CFR §52.21(i)(5)(iii) and §51.166(i)(5)(iii) is controlling since GHGs are not currently listed in the relevant paragraph. Nevertheless, EPA does not consider it necessary for applicants to gather monitoring data to assess ambient air quality for GHGs under 40 CFR §52.21(m)(1)(ii) and §51.166(m)(1)(ii), or similar provisions that may be contained in state rules based on EPA's rules. GHGs do not affect "ambient air quality" in the sense that EPA intended when these parts of EPA's rules were initially drafted." A NAAQS for GHGs has not been established due to the extreme difficulty in determining what concentration level is requisite to protect public health and welfare. The uniformity of GHG concentrations throughout the ambient air also make localized impacts determinations problematic. Considering the nature of emissions of GHGs and their global impacts, EPA stated that it is not "practical or appropriate to expect permitting authorities to collect monitoring data for purpose of assessing ambient air impacts of GHGs."

Furthermore, consistent with EPA's statement in the Tailoring Rule, EPA stated, "...it is not necessary for applicants or permitting authorities to assess impacts from GHGs in the context of the additional impacts analysis or Class I area provisions of the PSD regulations for the following policy reasons. Although {it is EPA's position that emissions of GHGs} contribute to global warming and other climate changes that result in impacts on the environment, including impacts on Class I areas and soils and vegetation due to the global scope of the problem, climate change modeling and evaluations of risks and impacts of emissions of GHGs is typically conducted for changes in emissions orders of magnitude larger than the emissions from individual projects that might be analyzed in PSD permit reviews. Quan-

tifying the exact impacts attributable to a specific GHGs source obtaining a permit in specific places and points would not be possible with current climate change modeling. Given these considerations, emissions of GHGs would serve as the more appropriate and credible proxy for assessing the impact of a given facility. Thus, EPA believes that the most practical way to address the considerations reflected in the Class I area and additional impacts analysis is to focus on reducing emissions of GHGs to the maximum extent. In light of these analytical challenges, compliance with the best available control technology analysis is the best technique that can be employed at present to satisfy the additional impacts analysis and Class I area requirements of the rules related to GHGs." TCEQ intends to implement the GHG PSD permitting requirements consistent with the EPA's recognition of the unique nature of emissions of GHGs. The "PSD and Title V Permitting Guidance for Greenhouse Gases," (EPA-457/B-11-001 March 2011) guidance is available on the EPA's Web site: <http://www.epa.gov/nsr/ghg-docs/ghgpermittingguidance.pdf>.

Further, because GHG emissions are typically non-toxic, relatively inactive and nonflammable, concentrations of GHGs high enough to produce health effects are extremely unlikely to be found in ambient air. Therefore, while health effects of GHG emissions will be evaluated consistent with the preceding statement when determining issuance of a GHG PSD permit, modeling or additional impacts review of GHGs will not be conducted as part of the review of an application for a GHG PSD permit. In addition, it is not necessary to review individual emissions of GHGs for purposes of global effects on the climate because no numerical standard exists. As discussed elsewhere in this preamble, this is because of the inherent difficulty in determining: 1) the appropriate concentration level as well as; 2) localized impacts because of the uniformity of GHG concentrations throughout the ambient air. The impacts review for individual air contaminants will continue to be addressed, as applicable, in the state's traditional minor and major NSR permits program per Chapter 116.

The commission adopts subsection (b)(2) to include references to the netting requirements for applicability thresholds in §116.164 for GHGs. The amendment establishes the emission netting thresholds for GHGs which may cause an existing source to become subject to the PSD permitting program when the source is undergoing a modification. The subsection is relettered to clarify that the *de minimis* threshold test (netting) includes the threshold for GHGs on mass basis and CO₂e emissions for modifications of emissions of GHGs.

The commission amends subsection (c) to clarify that emissions of GHGs have the threshold specified in adopted new §116.164.

§116.164, Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources

The commission adopts new §116.164 to establish the specific PSD permitting major source thresholds for emissions of GHGs. Consistent with EPA's Tailoring Rule, emissions of GHGs at sources that emit or will emit GHGs must be evaluated on a mass basis and as CO₂e emissions. In new subsection (a), there are five circumstances which will require a source to conduct PSD review for emissions of GHGs. Two are considered by EPA as "anyway sources" or "anyway modifications" because they are subject to PSD permitting due to emissions of a regulated NSR pollutant that is not GHGs. In the rule language these two categories are §116.164(a)(1) and (2), respectively. Two categories are considered by EPA as "non-anyway sources"

and "non-anyway modifications" because they are not subject to PSD permitting for a regulated NSR pollutant other than GHGs. In the rule language these categories are §116.164(a)(3) and (4), respectively. These sources will become subject to PSD permitting for GHGs as discussed in this preamble. The final category is existing sources that are not major for any pollutants. In the rule language this category is in §116.164(a)(5).

EPA's approach to regulating GHGs is that the emissions of GHGs (on a mass basis) must first meet or exceed the definition of a "major stationary source" in 40 CFR §52.21(b)(1)(i) (for EPA and delegated state air permit programs) or 40 CFR §51.166(b)(1)(i) (for approved state air permit programs). The Tailoring Rule established that emissions of CO₂e must meet or exceed the tailored thresholds established in the federal definition of "subject to regulation" in 40 CFR §52.21(b)(49) and §51.166(b)(48). EPA details this approach in the preamble for the Tailoring Rule, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31523 and 31524), and page 9 of EPA's guidance (EPA-457/B-11-001 March 2011, PSD and Title V Permitting Guidance for Greenhouse Gases), available on EPA's Web site: <http://www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf>.

The EPA evaluated potential streamlining mechanisms as part of Step 3 of the Tailoring Rule. The commission intends to explore options to efficiently process GHG PSD applications. The commission has existing authority to establish a streamlined application review and permit issuance process for groups of sources, such as sources that belong to the same industrial source category, or that have common processes and equipment. The executive director has researched streamlining options presented in the FCAA Advisory Committee GHG Permit Streamlining Workgroup Final Report, available on EPA's Web site: <http://www.epa.gov/nsr/ghgdocs/20120914CAAACPermit-Streamlining.pdf>. The commission will work with stakeholders during implementation of the GHG PSD permitting program to identify and develop appropriate streamlining options.

The first circumstance adopted in §116.164(a)(1) is a new major stationary source subject to the PSD permitting program because of emissions of one or more pollutants that are not GHGs. EPA calls this category "new anyway sources" because these are major sources subject to PSD permitting for a pollutant that is not GHGs as defined in 40 CFR §51.166(b)(1). These sources became subject to PSD permitting for GHGs as a result of Step 1 of the Tailoring Rule (effective January 2, 2011) under 40 CFR §51.166(b)(48)(iv)(a). Additional information on this category can be found in Appendix A and in Table II-A, Summary of PSD Applicability Criteria for New Sources of GHGs, in EPA's guidance.

These sources must include GHGs in the PSD review if the source emits or has the potential to emit 75,000 tpy of CO₂e or more. For example, a new source is proposed that will have the potential to emit: 300 tpy of volatile organic compounds (VOC); 5,000 tpy CO₂; and 4,500 tpy CH₄. Under the existing PSD permitting program in Texas, this source is subject to PSD permitting because its emissions of VOC exceed the major source threshold in 40 CFR §51.166(b)(1). In addition, the emissions of GHGs must be evaluated against the threshold in §116.164(a)(1) to determine if the PSD review must include GHGs. In this example, the source will have a potential to emit 99,500 tpy CO₂e (multiply 5,000 tpy CO₂ by the GWP of 1, multiply 4,500 tpy CH₄ by the GWP of 25, and add the two results to get 117,500 tpy CO₂e). This source would be required to include emissions of GHGs in

the PSD review because the source would emit greater than or equal to 75,000 tpy CO₂e.

The second circumstance adopted in §116.164(a)(2) is an existing major stationary source subject to the PSD permitting program because of emissions of a pollutant(s) that are not GHGs. EPA calls these "anyway modifications." These are major sources subject to PSD permitting for a pollutant that is not GHGs as defined in 40 CFR §51.166(b)(1). These sources became subject to PSD permitting for GHGs as a result of Step 1 of the Tailoring Rule under 40 CFR §51.166(b)(48)(iv)(b) when these sources will have a modification that results in an emissions increase of a regulated NSR pollutant and an emissions increase of CO₂e as defined in 40 CFR §51.166(b)(48)(iii). Because an emission rate for GHGs is not listed in 40 CFR §51.166(b)(23)(i), any GHGs emission rate greater than zero on a mass basis is considered significant, according to 40 CFR §51.166(b)(23)(ii). The modification must also meet the tailored threshold of 75,000 tpy CO₂e or more in 40 CFR §51.166(b)(48)(iv)(b). Therefore, if the project causes a significant net emissions increase for a non-GHG pollutant, then the project is a major modification for GHGs only if it also results in a net emissions increase for GHGs at or above the threshold in 40 CFR §51.166(b)(48)(iv)(b) as well. Additional information on this category can be found in Appendix C and in Table II-B, Summary of PSD Applicability Criteria for Modified Sources of GHGs, in EPA's guidance.

When the existing source has a major modification (as defined in §116.12) of a pollutant(s) that is not GHGs, the source must include GHGs in the PSD review if there is also a net emissions increase equal to or greater than 75,000 tpy CO₂e. For example, an existing source major for PSD permitting is proposing changes in operation that would have the potential to emit net increases of: 450 tpy of nitrogen oxides (NO_x), 150 tpy of carbon monoxide (CO); 7,000 tpy CO₂; and 3,600 tpy CH₄. Under the existing PSD permitting program in Texas, this action meets the definition of a major modification for NO_x and CO, and those pollutants are subject to PSD review. In addition, the emissions of GHGs must be evaluated against the threshold in §116.164(a)(2) to determine if the PSD review must include GHGs. In this example, the source will have a potential to emit 97,000 tpy CO₂e (multiply 7,000 tpy CO₂ by the GWP of 1, multiply 3,600 tpy CH₄ by the GWP of 25, and add the two results to get 97,000 tpy CO₂e). This source would be required to include emissions of GHGs in the PSD review because the action meets the definition of a major modification in §116.12 for a federally regulated NSR pollutant that is not GHGs, and there would be a net emission increase of GHGs that exceeds zero tpy GHGs on mass basis, and 75,000 tpy CO₂e or more, as established in new §116.164(a)(2).

In another example for the second circumstance, an existing source major for PSD permitting (for non-GHGs) is proposing changes in operation that would have the potential to emit net increases of 35 tpy NO_x, 15 tpy CO, 1,000 tpy CO₂, and 3,700 tpy CH₄. The net emission increases of NO_x and CO do not meet the definition of a major modification in §116.12 because the proposed potential emissions of both NO_x and CO are below the significant levels in 40 CFR §51.166(b)(23). While the CO₂e emissions of the proposed modification are 93,500 tpy CO₂e, which is over the significant threshold in §116.164, the emissions of GHGs are not subject to PSD review for this action because the source is not also undergoing a major modification for a federally regulated NSR pollutant that is not GHGs.

The third circumstance adopted in §116.164(a)(3) is a new stationary source that is major for GHGs only (these sources are minor for all non-GHG pollutants). EPA calls these "non-anyway sources" because they are subject to PSD only because of emissions of GHGs. These sources became subject to PSD permitting for GHGs as a result of Step 2 of the Tailoring Rule under 40 CFR §51.166(b)(48)(v)(a). Additional information on this category can be found in Appendix B and in Table II-A in EPA's guidance.

These sources will be subject to the PSD permitting program for only GHGs if both the mass basis emissions of GHGs and the CO₂e emissions meet or exceed the thresholds in §116.164(a)(3). These sources must have mass basis emissions of GHGs that are greater than or equal to 250 tpy, or 100 tpy if the source is listed in 40 CFR §51.166(b)(1)(i). Additionally, these sources must meet or exceed the tailored threshold of 100,000 tpy CO₂e. If both of the thresholds are met, the source is subject to the PSD permitting program solely because of emissions of GHGs.

For example, a new proposed source would have the potential to emit 35 tpy NO_x, 20 tpy CO, 500 tpy CO₂, and 12 tpy of the perfluorocarbon perfluoropropane (PFC-218) with the GWP of 8,830. The emissions of NO_x and CO are not over the major source thresholds for those pollutants. The mass basis for GHGs would be 512 tpy, which exceeds the 250 tpy threshold. The CO₂e emissions would be 106,460 tpy, which exceeds the 100,000 tpy threshold. This new source would be subject to PSD permitting solely because of emissions of GHGs. Since this source is not major for any pollutant other than GHGs (the emissions of NO_x and CO are not over the significant thresholds in 40 CFR §51.166(b)(23)), only the GHGs are subject to PSD review. All other pollutants would be subject to appropriate minor source authorization.

In another example for the third circumstance, a proposed new source would have the potential to emit 45 tpy NO_x, 15 tpy CO, 90 tpy CO₂, and 6 tpy SF₆ (the GWP of SF₆ is 22,800). The emissions of NO_x and CO are below the major source thresholds. The mass basis of emissions of GHGs is 96 (90 tpy CO₂ plus 6 tpy SF₆). While the CO₂e emissions are 136,890 tpy CO₂e, the source is not considered major for GHGs because the mass basis is not over the threshold of 100 tpy GHGs if the source is listed on the named source category list in 40 CFR §51.166(b)(1)(i), or greater than or equal to 250 tpy GHG if the source is not on the list. Both the mass basis threshold and the tailored CO₂e threshold must be met or exceeded for the source to be considered a major source and subject to the PSD permitting program.

The fourth circumstance, adopted in new §116.164(a)(4), is an existing stationary source that is major for GHGs and is proposing a major modification for GHGs. EPA calls these "non-anyway modifications." These sources became subject to PSD permitting for GHGs in Step 2 of the Tailoring Rule under 40 CFR §51.166(b)(48)(v)(b). These are existing sources that emit or have the potential to emit over the major source thresholds for GHGs. When the source will make changes that result in a net increase in emissions of GHGs above zero on a mass basis and greater than or equal to the tailored threshold of 75,000 tpy CO₂e in 40 CFR §51.166(b)(48)(v)(b), it becomes subject to PSD permitting. As previously noted, because GHGs are not listed in 40 CFR §51.166(b)(23)(i), any emission rate greater than zero is considered significant according to 40 CFR §51.166(b)(23)(ii). Additional information on this category can be found in Appendix D and in Table II-B in EPA's guidance.

These sources are existing major sources of GHGs if two thresholds are met or exceeded: the mass basis emissions of GHGs meet or exceed the defined threshold, and CO₂e meets or exceeds the tailored threshold. These sources must have mass basis emissions of GHGs that are greater than or equal to 250 tpy, or 100 tpy if the source is listed in 40 CFR §51.166(b)(1)(i). Additionally, these sources must meet or exceed the tailored threshold of 100,000 tpy CO₂e. These existing major sources are subject to the PSD permitting program when there is a physical change or change in method of operation that results in a net emissions increase of greater than zero tpy GHGs on a mass basis and greater than or equal to 75,000 tpy CO₂e. In the following example, an existing source emits or has the potential to emit the following: 50 tpy NO_x, 30 tpy CO, 45 tpy SO₂, 5,000 tpy CO₂, 250 tpy CH₄, and 4 tpy SF₆. The source is currently a minor source in regard to criteria pollutants; however, the source is an existing major source in regard to GHGs. This is because the source currently has the potential to emit 5,000 tpy CO₂, 250 tpy of CH₄, and 4 tpy of SF₆. The total mass basis is 5,254 tpy GHGs. The GWP of CO₂ is 1, CH₄ is 25, and SF₆ is 22,800, so the source emits or has the potential to emit 125,450 tpy CO₂e emissions. Both the mass basis and tailored GHGs thresholds are exceeded. This source is considered a major stationary source for GHGs. If the source proposes a change in operation that affects emissions of GHGs, the next step would be to calculate the proposed net emissions increases that will result from the proposed change in operation. If the net emissions increase is greater than zero tpy of GHGs on a mass basis, and greater than or equal to 75,000 tpy CO₂e, then the emissions of GHGs will be subject to PSD review as part of a major modification.

In another example of the fourth circumstance, an existing source is authorized to emit the following: 500 tpy SO₂, 95,000 tpy CO₂, and 250 tpy CH₄. The source is currently a major source of SO₂ and GHGs. This source is proposing changes in operation that would have the potential to emit net increases of: 15 tpy SO₂, 70,000 tpy CO₂; and 500 tpy CH₄. The netted emission increases of SO₂ does not meet the definition of a major modification in §116.12 because the proposed potential emissions of SO₂ are below the significant levels in 40 CFR §51.166(b)(23). However, because the net emissions increase is greater than zero tpy of GHGs on a mass basis, and greater than or equal to 75,000 tpy CO₂e (82,500 tpy CO₂e in this example), then the emissions of GHGs would be subject to PSD review as a major modification.

The fifth circumstance in adopted §116.164(a)(5) is an existing minor stationary source with emissions below the major source thresholds for all pollutants. This category of sources was not specifically addressed by EPA in the Tailoring Rule, however, an existing minor source that has a physical change or change in the method of operation that would constitute a major stationary source in and of itself is considered a new major stationary source and subject to PSD according to 40 CFR §51.166(b)(1)(i)(C). Additional information on this category can be found in Appendix D and Table II-B in EPA's guidance.

For example, the source has the potential to emit 20 tpy NO_x, 10 tpy CO, 0.5 tpy SO₂, and 90 tpy CO₂. The emissions of GHGs for this source are below both the mass basis threshold of 250 tpy (or 100 tpy if the source is on the named source category list), and under the tailored 100,000 tpy CO₂e threshold. The emissions of GHGs from this source would become subject to the PSD permitting program if the source proposed a change that would result in an emissions increase greater than or equal to 100,000 tpy CO₂e, and greater than or equal to 250 tpy GHGs

(or 100 tpy GHGs, if the source is listed on the named source category list).

The commission adopts new §116.164(b) to clarify that emissions of GHGs at a new or modified facility that are below the thresholds in EPA's Tailoring Rule, as described by the conditions in §116.164(a), do not require preconstruction authorization, consistent with HB 788 and EPA's interpretation of GHG PSD permitting requirements. This is appropriate because EPA does not consider emissions lower than the tailored thresholds to be defined as "subject to regulation" and EPA does not require authorization of these emissions. The Texas Clean Air Act (TCAA) allows the commission to develop rules to establish a level of emissions for groups of facilities that do not require preconstruction authorization. In addition, emission increases below those thresholds resulting from a change at an existing permitted facility are not defined as a modification that requires preconstruction authorization under the TCAA. In order to demonstrate that emissions of GHGs from new or modified facilities or sources will not trigger PSD review, owners or operators must keep sufficient records to demonstrate authorization is not required for these emissions of GHGs. Records are required to be maintained for a minimum of five years. The commission intends to develop guidance to help smaller sources determine the type of records that are necessary to demonstrate compliance with this subsection. Sources will continue to be required to seek authorization for emissions from new or modified sources that are not GHGs.

§116.169, Greenhouse Gases Program Transitions

The commission adopts new §116.169 to fulfill requirements established in HB 788. This rule provides for the transition of certain PSD permitting applications which were previously submitted to EPA. Once EPA approves the SIP revisions and rescinds the FIP, the commission will accept the transfer of and review applications. The commission will work with EPA and applicants to determine if the commission or EPA will complete review of the application and issuance of a GHG PSD permit. Based on these discussions, TCEQ expects EPA will retain the authority to issue the PSD permits for those specific sources whose applications are not transferred to the TCEQ. Based on comments received, subsection (b) has been added to this section stating that GHG emissions are subject to the PSD permitting requirements of §116.164 unless a change occurs in federal law. Additionally, the title of this section has been modified to correctly identify this section.

§116.610, Applicability

The commission adopts the amendment to §116.610(a)(1) and (b) to clarify that sources of GHGs may use standard permits to authorize emissions of pollutants that are not GHGs. GHGs will not be authorized under standard permits. Instead, emissions of GHGs which meet or exceed the thresholds set in the EPA's Tailoring Rule are subject to the PSD permitting program. Sources subject to the PSD permitting program solely because of emissions of GHGs may continue to utilize standard permits to authorize emissions of pollutants that are not GHGs, in conjunction with a PSD permit that authorizes GHGs, notwithstanding any rule language in a specific standard permit. Projects which trigger PSD requirements due to emissions of non-GHGs cannot qualify for a standard permit.

§116.611, Registration to Use a Standard Permit

The commission adopts the amendment to §116.611, which currently allows a source to begin construction 45 days after the ex-

ecutive director receives the registration for a standard permit. The adopted amendment to subsection (b) clarifies that sources which are subject to the PSD permitting program solely because of emissions of GHGs, and using a standard permit to authorize emissions of pollutants that are not GHGs, may not begin construction until the source is issued a GHG PSD permit.

The commission adopts the amendment to subsection (c) to establish a deadline for sources that are currently operating to certify emissions of GHGs. Since GHGs were not previously subject to permitting requirements, sources will have the opportunity to evaluate potential to emit GHGs and certify emissions, if necessary. These sources will have 12 months after EPA's final action approving the revisions to the Federal Operating Permits Program to certify emissions of GHGs to avoid applicability of Title V permitting. New sources of GHGs would be required to certify emissions no later than the date of operation.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis (RIA) requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a RIA.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the revisions to Chapter 116 is to add six GHGs to the pollutants regulated under the commission's PSD permitting program and to establish the emissions thresholds for applicability of the program consistent with federal requirements in the final PSD and Title V GHG Tailoring Rule in the June 3, 2010, issue of the *Federal Register* (75 FR 31514).

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a RIA for a major environmental rule, which are listed in Texas Government, §2001.0225(a). Texas Government, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted rules would implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. This rulemaking will implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of emissions of GHGs in Texas and to do so

consistent with federal law. Specifically, amendments to Chapter 116 will add the following terms to nonattainment and PSD definitions: GHGs, and CO₂e emissions. The rulemaking will also amend definitions and the PSD rules in Subchapter B to subject GHGs to PSD permitting requirements at specific Tailoring Rule thresholds.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the adopted rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA and thus allow EPA to lift its federal permitting program on GHG sources in Texas. In fact, the rules create no additional impacts since major GHG sources in Texas must currently obtain a PSD permit from EPA and the adopted rules merely supplant EPA as the authority for GHG PSD permitting in Texas. For these reasons, the rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto*

Ins. Co., 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The adopted rules implement requirements of the FCAA, specifically to adopt and implement SIPs, including a requirement to adopt and implement permit programs.

This rulemaking will implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of emissions GHGs in Texas and to do so consistent with federal law. Specifically, amendments to Chapter 116 will add the following terms to nonattainment and PSD definitions: GHGs, and CO₂e emissions. The rulemaking will also amend definitions and the PSD rules in Subchapter B to subject GHGs to PSD permitting requirements at specific Tailoring Rule thresholds.

The rules were not developed solely under the general powers of the agency, but are authorized by specific sections of THSC, Chapter 382 (also known as the TCAA), which is cited in the Statutory Authority section of this preamble. Further, the rules do not exceed a standard set by federal law or exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the draft RIA determination during the public comment period. No comments were received on the RIA determination.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution §17 or §19, Article I; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the adopted rulemaking action under the Texas Government Code, §2007.043. The primary purpose of this rulemaking, as dis-

cussed elsewhere in this preamble, is to implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of emissions of GHGs in Texas and to do so consistent with federal law. Specifically, amendments to Chapter 116 would add the following terms to nonattainment and PSD definitions: GHGs, and CO₂e emissions. The rulemaking will also amend definitions and the PSD rules in Subchapter B to subject GHGs to PSD permitting requirements at specific Tailoring Rule thresholds.

The adopted rules will not create any additional burden on private real property. The rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The rulemaking will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The adopted rules amend and update rules that govern the applicability of the PSD program to major sources of GHG emissions. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Effect on Sites Subject to the Federal Operating Permits Program

PSD is an applicable requirement under Chapter 122, Federal Operating Permits. This rulemaking affects the issuance or amendment of a PSD permit for major GHG sources, and therefore will result in new or revised federal operating permits for those sources.

Public Comment

The commission held a public hearing on December 5, 2013. The public comment period ended on December 9, 2013. The commission received comments from Air Alliance Houston

(AAH), Association of Electric Companies of Texas Inc, (AECT); C3 Petrochemicals (C3P); Calpine Corporation (Calpine); Environment Texas; Gas Processors Association (GPA); Golden Pass Products LLC (Golden Pass); Golden Spread Electric Cooperative, Inc. (GSEC); House Bill 788 Working Group (HB788WG); Jackson Walker L.L.P.; Lone Star Chapter of the Sierra Club (Sierra Club); Natgasoline, LLC; Occidental Chemical Corporation (OCC); OCI Beaumont, LLC; Pioneer Natural Resources (Pioneer); Public Citizen; State Representative Lon Burnam; Sustainable Energy and Economic Development Coalition (SEED); Texas Chemical Council (TCC); Texas Combined Heat and Power Initiative (TXCHPI); Texas Industry Project (TIP); Texas Oil and Gas Association (TXOGA); Texas Pipeline Association (TPA); Texas Solid Waste Association of North America (TxSWANA); Weaver Boos Consultants, LLC (Weaver); and Zephyr Environmental Corporation (Zephyr). This comprehensive list includes all of the commenters for all of the chapters of this concurrent rulemaking project. The individual comments are addressed in the Response to Comment section of the appropriate chapter. Eighteen of the commenters supported the rulemaking or portions of the rulemaking, six commenters opposed portions of the rulemaking, and 18 commenters suggested changes.

Response to Comments

30 TAC §116.12 Comments

Comment

HB788WG and TIP commented regarding the date of the table which lists GWPs which was incorporated in proposed §116.12(7) and §122.10(3). HB788WG commented that TCEQ should include in the final definition of CO₂e a reference to a specific version of EPA's GWP table at 40 CFR Part 98, Subpart A, Table A-1. The commenter suggested including the January 2, 2014, effective date of the referenced table in the rule language. HB788WG commented that Texas permit holders should be provided the predictability and certainty afforded by GWP values that are set in rule, and that will not change absent changes to the TAC and the Texas SIP. TIP commented that the EPA's revisions to the GWP table were effective January 1, 2014, and that TCEQ's rule should reflect the most up-to-date GWP values as of the date of adoption.

Response

No change was made to the rule in response to these comments. The commission agrees that the proposed definition of CO₂e will reflect the most up-to-date version of the GWP Table in 40 CFR, Part 98, Subpart A, Table A-1. The state-federal partnership created by Congress in the FCAA, gives state and local governments the primary responsibility for air pollution control and prevention; and granted EPA responsibility to promulgate reasonable standards and regulations for the states to implement. Through the present and past rulemakings, TCEQ has accepted responsibility to implement FCAA permitting requirements in Texas. In several circumstances, the commission has chosen, by necessity, to incorporate certain EPA promulgated requirements and procedures, where a state action to effectuate future federal rule changes would be duplicative (or redundant) and cause delays in permitting.

When EPA updates the GWPs, there is stakeholder participation and adequate notice given so applicants will have certainty regarding the appropriate GWPs. The GWPs are set at the federal level, so they will apply if TCEQ conducts rulemaking or not.

This is consistent with the TCEQ's implementation of emission factors derived by EPA.

Furthermore, the legislature directed TCEQ to permit GHGs "to the extent" these emissions require authorization under federal law. 40 CFR Part 98, Subpart A, Table A-1 is required to be used under federal PSD and Title V requirements for determining when tailored thresholds are triggered for new or modified major sources of GHG.

Comment

GPA, HB788WG, TIP, and TPA requested clarification regarding the commission's intent for GWPs that change in the future. HB788WG commented that TCEQ should provide certainty with regard to PSD applicability determinations based on potentially shifting GWP values in the preamble to the final rule. HB788WG and TIP requested TCEQ confirm the commission's intent regarding "retroactive" application of GWP values when calculating GHG PSD applicability for permit actions. HB788WG, TIP, and TPA requested clarification on TCEQ's concurrence with EPA's intent as stated in the November 29, 2013, issue of the *Federal Register* (78 FR 71915 - 71916), "PSD permitting obligations should not be affected for a source or modification that has either already obtained a PSD permit or begun actual construction at a time when it was legitimately considered a source that did not require a PSD permit." GPA, TIP, and TPA commented that TCEQ should prevent a change in the GWPs from having a retroactive effect on a source's preconstruction authorization or synthetic minor certification.

Response

No change was made to the rule in response to these comments. The commission clarifies that changes to the GWP values will not require any retroactive review for previously issued preconstruction authorizations, and the commission concurs with the quote from EPA provided by the commenters. Once TCEQ becomes the permitting authority for GHG PSD, a source would obtain all preconstruction authorizations from a single permitting authority. Therefore, if a source is not subject to GHG PSD permitting according to §116.164 at the time the authorization for non-GHG emissions is issued, a subsequent change in the GWPs would not require GHG PSD permitting. The GHG PSD applicability in adopted §116.164(a) relies on an action taken by the owner or operator, such as applying for authorization for new construction or a modification of an existing source.

Applicability of the Title V program is based on the definition of major source in §122.10(14)(H). The Title V threshold is based on potential to emit, and is not dependent on construction or modification undertaken by an owner or operator. If the GWPs change, the owner or operator must evaluate their potential to emit with the revised GWPs. Changes to GWPs could affect a source's certification below Title V thresholds under §116.611 and §122.122. Depending on the limits in the certification, a GWP change could result in the need to revise the certification. For example, if an owner or operator of a source certifies to a limit in tpy of CO₂e, and the GWP change would result in an exceedance of the certified limit, a revised certification may be needed. Sources with emissions of GHGs that exceed the major source threshold in §122.10(14)(H) would be required to apply for a Title V permit.

Comment

GPA and TIP commented that existing permit conditions with CO₂e limitations (which were based on prior GWP values) should

continue to use the GWPs that were in effect when the permit was issued. GPA suggested that updating permit conditions should be considered an administrative change that should not require public notice and comment. TIP commented that some EPA-issued permits specify the GWPs to be used to determine compliance with the permit. GPA commented that existing permit conditions expressed in CO₂e emissions could be updated in periodic Title V renewals by a simple ratio of the new GWP to the prior-GWP.

Response

No change was made to the rule in response to these comments. The commission clarifies that, consistent with the current policy applied to changes in emission factors, updates to reflect new GWPs in emission limits expressed as CO₂e could be updated as a correction to a previously issued GHG PSD permit, at the applicant's request. Corrections conducted because EPA changed GWP values would not be considered modifications because they are not a physical or operational change, and would not be subject to public notice requirements.

The Title V permit cannot be used as a mechanism to change any existing permit conditions or limitations in a GHG PSD (or any NSR) permit. However, changes to GHG PSD permits or applicable requirements may result in the need to revise the Title V permit.

Comment

GPA commented that changes in GWPs could be treated the same as changes to emission factors in AP-42. GPA commented that at TCEQ's January 15, 2013, Annual Emissions Inventory Workshop, TCEQ staff indicated that changes in AP-42 factors should not be retroactively applied. The commenter quoted the example, "AP-42 factor was updated in June 2012. Do not use the updated AP-42 factor to determine emissions for the 2011 {emissions inventory questionnaire}. Updated AP-42 factor can be used for the 2012 inventory." GPA commented that TCEQ has long taken the position that, where previously unknown emissions or emission sources are discovered at existing plant sites, TCEQ uses the rules that were in effect at the time the source was constructed or modified in determining whether the source is subject to federal PSD or nonattainment rules (Interoffice memorandum from Ruben Herrera, P.E., through John Steib, Air Permits Division Director, to NSR Engineers (July 5, 2000)). GPA commented these practices support by analogy the position that changes in GWP factors should not be applied retroactively to alter the permitting status of an existing source.

Response

No change was made to the rule in response to this comment. The commission clarifies that the requirements for emissions inventory reporting are not necessarily the same for air permitting.

If previously unknown emissions or emission sources are discovered at existing plant sites, the PSD rules that were in effect at the time the source was constructed would be used to determine PSD applicability. However, consistent with TCEQ's long-standing practice for non-GHGs, the emission calculations would be based on the most current EPA-derived emission factors, or source-specific factors if justified, to determine if PSD applies. Therefore, the GWPs in EPA rule would be used to determine GHG PSD applicability following the GHG rules in effect when the emissions were identified. If an owner or operator determines these sources were not subject to GHG PSD permitting, records should be kept according to §116.164(b).

Additionally, if the GWPs change while TCEQ is conducting the GHG PSD review of the application, the commission will work with applicants to ensure that the final permit is based on the most up-to-date GWPs.

Comment

Sierra Club and TCC commented that the exception for biogenic emissions proposed in §116.12(7)(B) should be removed from the rule language. Sierra Club commented that the exception would have little practical effect because of the July 21, 2014, expiration date. Sierra Club also commented that facilities using organic material should be subject to the same rules as other industries when it comes to GHG PSD permits. TCC and TIP commented that the District of Columbia Circuit Court struck down the federal biomass deferral rule on July 12, 2013, in *Center for Biological Diversity, et al. v. EPA*, No. 11-1101. (*Center for Biological Diversity v. EPA*, No. 11-1101 & consolidated cases (D.C. Cir. Jul. 12, 2013.)). TCC commented that TCEQ should either remove this clause from the rule, or provide that this portion will sunset if a final non-appealable judgment vacates EPA's biomass deferral rule.

TIP commented that unless that July 12, 2013, court decision is superseded, it appears that EPA may lack a legal basis to approve a rule that includes a deferral for biomass CO₂ emissions. TIP recommended that the proposal be amended to provide that the biomass deferral will sunset if a final, non-appealable judgment by a court of competent jurisdiction vacates the EPA's biomass deferral rule. Alternatively, TIP suggested the biomass deferral not be included as part of the SIP revisions. TXOGA commented that the exception for biogenic emissions should only apply to the extent required by federal regulation. TXOGA suggested that TCEQ provide an adequate opportunity for notice and comment before taking state action to promulgate such an exception if not federally required. Environment Texas commented that the rule should include a provision on how the emissions from biogenic sources will be determined after expiration date of July 21, 2014.

Zephyr commented that the language in §116.12(7)(B) forces the exclusion of biogenic derived GHGs, instead of simply allowing for their disuse. Zephyr commented that this would result in the lowering of historic baselines, penalizing applicants that have been making the effort to use renewable fuel sources. Zephyr suggested changing "shall" to "may" in §116.12(7)(B), and requested clarification that after July 21, 2014, the baseline actuals do not need to exclude these emissions. Zephyr also requested adding language to extend the deadline if EPA extends the date based on the promised study of bio fuels.

TxSWANA commented in support of the biogenic CO₂ exclusion. Additionally, TxSWANA commented that the TCEQ should consider adding rule language making it clear that, if EPA creates a permanent biogenic CO₂ exclusion, it would become permanent in Texas without the need for further rulemaking.

Response

The commission has changed the rules in §116.12(7)(B) and §122.10(3)(B) in response to these comments. The commission has removed the proposed biomass exclusion from the adopted definition of CO₂e. As several commenters stated, the United States Court of Appeals for the District of Columbia Circuit recently vacated the biomass deferral included in federal rule (*Center for Biological Diversity v. EPA*, No. 11-1101 and consolidated cases). The deferral language that was vacated is identical to the proposed exclusion in the definitions. The Circuit Court's ruling is

abated pending a decision by the United States Supreme Court on the main GHG rules (*Utility Air Regulatory Group v. EPA*, S. Ct. Nos. 12-1146, *et al*), meaning the biomass deferral is not formally vacated and subject to appeal. EPA has not indicated that it will appeal the Circuit Court's decision. However, in EPA's parallel processed proposal on the SIP rules, EPA has indicated it will take no action on §116.12(7)(B) in the February 18, 2014, issue of the *Federal Register* (79 FR 9123). Therefore, the deferral for biomass emissions in CO₂e calculations will not be in effect for GHG PSD permitting under the Texas SIP.

Regardless of whether EPA decides to appeal and regardless of EPA's proposal on the SIP approval of the adopted rules in this rulemaking, the deferral in §116.12(7)(B) is set to expire July 21, 2014. The commission expects that EPA will approve these GHG PSD program rules as adopted into the SIP and lift the FIP soon after the rules are adopted. The timing of the EPA's SIP and FIP actions may be approximately the same time as the biomass deferral expiration. TCEQ cannot issue GHG PSD permits until the FIP is lifted and therefore this exclusion will likely expire and be unavailable to permit applicants. Therefore, the commission has removed the biomass deferral language from Chapter 116 and Chapter 122.

Comment

TIP commented about potential implications for an EPA promulgated new source performance standard (NSPS) and the definition of "federally regulated new source review pollutant" in §116.12. TIP commented that paragraph (15)(B) of the definition provides that a federally regulated NSR pollutant includes "any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), §111." TIP commented that if EPA finalizes an NSPS for GHG emissions, an argument could be raised that GHGs are "subject to any standard promulgated under Federal Clean Air Act (FCAA), §111." TIP requested that TCEQ clarify that the proposed rule amendments will avoid a situation in which EPA promulgation of an NSPS for GHG emissions causes all GHG emissions to become subject to permitting under Texas law. TIP requested that the TCEQ provide clarification that its definition of "Federally regulated new source review pollutant" will not result in a situation where GHG emissions require authorization below the PSD permitting thresholds in proposed §116.164. TIP recommended adding the language "For greenhouse gases, notwithstanding subparagraph (15)(B),..." to §116.12(15)(E).

Response

The commission has changed the rule in response to this comment. In the most recent proposal for GHG NSPS for new electric generating units, EPA reiterates its previous interpretation that "the Tailoring Rule thresholds continue to apply even when the EPA promulgates the first NSPS for GHGs..." as published in the January 8, 2014, issue of the *Federal Register* (79 FR 1430, 1488). EPA requested comment from states whether they can interpret their SIPs to apply the Tailoring Rule thresholds to the NSPS prong of the definition of "regulated NSR pollutant" or whether their respective SIPs must be revised. TCEQ has not yet commented on this proposal and Texas SIP rules relating to GHG PSD permitting at tailored thresholds have yet to be approved by EPA. Nevertheless, the commission interprets the proposed rules in Chapter 116 to apply the tailored thresholds (as adopted in §116.164) to major sources even if a GHG NSPS is finally promulgated. However, given that these thresholds are not contained in the definition section of Chapter 116, the commission is further clarifying this interpretation by adding

language to the NSPS prong of the definition of "Federally regulated new source review pollutant" in §116.12(15) so that it will read: "(B) Except for greenhouse gases any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), §111." The new language does not exempt GHGs from regulation under the PSD program. The additional language in subparagraph (B) maintains that GHGs that may ultimately be subject to FCAA, §111 standard will be regulated under PSD at the Tailoring Rule thresholds consistent with EPA interpretation and rule.

Comment

Pioneer, TXOGA, and Zephyr suggested a revision to the definition of major stationary source in proposed §116.12(19). The commenters suggested adding a phrase "or greenhouse gases" so the definition would read, "Any stationary source that emits, or has the potential to emit, a threshold quantity of emissions or more of any air contaminant (including volatile organic compounds (VOCs)) for which a national ambient air quality standard has been issued, or greenhouse gases." The commenters suggested the edit because there is not a NAAQS for GHGs.

Response

The commission has changed the rule in response to this comment. Adding the phrase "or greenhouse gases" clarifies the commission's intent that a source can be considered a "major stationary source" based on emissions of GHGs, without regard to an established NAAQS, as consistent with federal law.

30 TAC §116.111 Comments

Comment

TPA commented that revisions may be needed in §116.111(a)(2)(J) to ensure clarity regarding the agency's intention regarding requirements for air dispersion modeling for GHG PSD permits. TPA commented that paragraph generally provides that computerized air dispersion modeling may be required by the executive director to determine air quality impacts from a project. TPA commented that there is no limitation within that paragraph to exclude GHG emissions from the requirement. TPA suggested additional language be added to the rule: "...provided however that air dispersion modeling may not be required for any gas listed in §101.1(42) of this title unless the gas is also listed in §101.89(A) of this title, and then only if the modeling is conducted for a purpose other than assessing impact on climate change or global warming conditions..." TPA commented that it may be appropriate for gases with an established RQ to be modeled for specific health or environmental impacts, but in no event would it be appropriate to conduct modeling of any of the GHG component gases for generalized global warming or climate change purposes.

Response

No change has been made to the rule in response to this comment. Section 116.111(a)(2)(J) provides the executive director the discretion to require an applicant to conduct modeling. It is not the TCEQ's practice to amend the rule to exclude specific regulated pollutants (or pollutants possibly subject to regulation) from an air dispersion modeling demonstration. The TCEQ does not intend to require air dispersion modeling for GHG emissions, with the possible exceptions as noted in the commenter's description: "if the modeling is conducted for purposes other than assessing impact on climate change or global warming conditions."

30 TAC §116.160 Comments

Comment

Representative Lon Burnam, AAH, Environment Texas, Sierra Club, Public Citizen, and SEED requested a process for public input in BACT determinations. Representative Burnam suggested meetings every two years to set BACT emission limit standards. Representative Burnam commented that the biannual reviews could address only the top 25 major stationary sources emitting GHGs for purposes of administrative efficiency. AAH and Sierra Club suggested annual stakeholder meetings. Environment Texas suggested an initial round of meetings and then a biannual or annual review to establish BACT for the most common or largest sources of emissions of GHGs. Public Citizen suggested monthly meetings to determine BACT for different industries or processes. Public Citizen and SEED suggested annual meetings.

Response

As discussed elsewhere in the Response to Comments section of this preamble, BACT reviews will be conducted in a manner consistent with how PSD BACT reviews for other pollutants are currently reviewed. Stakeholders will have opportunity to comment on the BACT proposed by an applicant and on the BACT proposed by the executive director in the draft permit, according to the SIP-approved public participation rules in Chapter 39 and Chapter 55.

Comment

AECT commented that the preamble for Chapter 116 states that the scope of review for GHG PSD applications will be limited to BACT determination for GHG, and that none of the air quality analyses that are specified in the PSD rules must be conducted for GHGs during the PSD review. AECT requested that TCEQ add rule language to §116.160 that states that the scope of review for GHG PSD permit applications will be limited to the BACT determination for GHGs, to provide both TCEQ and GHG PSD permit applicants a clear and strong foundation to rebut assertions by protestants that air quality analyses should be required.

Response

No change has been made to the rule in response to this comment. Section 116.111(a)(2)(I)(ii) requires new or modified sources of GHGs that trigger PSD comply with applicable PSD review requirements. The commission is utilizing EPA's current published interpretation regarding air quality analyses for emissions of GHGs. The suggested rule language is not necessary because there is no NAAQS set for GHGs, and the technology does not exist to evaluate local impacts. Therefore, an air quality analysis is not required for GHG PSD permit applications and is thus not an "applicable" element of PSD review, as stated in §116.111.

Comment

AECT requested clarification regarding the method to be used to conduct the BACT analysis for GHG PSD applications. AECT commented that EPA's "top down" BACT review process is not necessary for GHG PSD applications because EPA approved the TCEQ PSD permitting rules as part of the Texas SIP in the June 24, 1992, issue of the *Federal Register* (57 FR 28093-28098).

Environment Texas and Sierra Club suggested that TCEQ incorporate EPA's five-step "top down" BACT analysis method for GHG PSD permits.

Response

No change was made to the rule in response to these comments. The commission clarifies that BACT reviews for GHG PSD permits will be conducted in the manner consistent with how PSD BACT reviews for other pollutants are currently reviewed. The Air Permit Reviewer Reference Guide for Air Pollution Control (APDG 6110v2 01/2011) describes the BACT review process. The TCEQ uses a three-tier approach to evaluate the BACT proposals in minor NSR air permit applications. EPA has agreed to accept the three-tier approach as equivalent to the top-down method for PSD review when the following are considered: 1) Recently issued/approved permits within the state of Texas; 2) Recently issued/approved permits in other states; and 3) Control technologies contained within the EPA's RACT/BACT/LAER Clearinghouse.

The referenced guidance is available on the TCEQ Web site: http://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/airpoll_guidance.pdf.

Section IV of the guidance, Specific Control Evaluations, says an applicant may choose to follow either the federal top-down approach for BACT reviews or the TCEQ three tier approach for BACT reviews, as long as the applicant provides information on the various control options and, when a less stringent control option is proposed, provides a detailed rationale and supporting documentation for eliminating the more stringent options.

While the commission has incorporated by reference the definition of BACT in federal rule in §116.160(c)(1)(A), it agrees with AECT that the SIP approval of the state's PSD program allows the use of the state's three-tier BACT review process. Therefore, there is no need for incorporation of EPA's method as a method for BACT reviews for GHG PSD permit applications.

Comment

Environment Texas and Sierra Club commented that the BACT analysis should consider add-on control technology (such as integrated gasification combined cycle and carbon capture technologies), the process itself within the plant and efficiencies that can be gained, and fuel switching. They also commented that alternative technologies (such as turbine inlet air chilling, solar photovoltaic, thermal technology, and energy storage to enhance power production or replace the need for fuel gas) that reduce GHGs should also be considered in a BACT analysis. Sierra Club suggested additional rule language to §116.111(a)(2)(I)(ii).

Response

No change has been made to the rules in response to these comments. BACT reviews are conducted in accordance with the Air Permit Reviewer Reference Guide for Air Pollution Control (APDG 6110v2 01/2011). This guidance allows for the consideration of innovative technology and technological advancement (Section IV, Specific Control Evaluations). In addition, the emission reduction options may include pollution prevention as well as add-on abatement equipment and good engineering practice or best management practice. Additionally, the scope of a PSD BACT review applies to each proposed individual new or existing modified source and pollutant emitting activity at which a significant net emissions increase would occur. Individual BACT determinations are performed for each pollutant subject to a PSD review emitted from the same proposed or existing modified sources.

The adopted amendment to §116.111(a)(2)(I)(ii) requires compliance with the applicable requirements for PSD in Chapter 116 for applications for GHG PSD permits. Specifically, in §116.160(c)(1)(A), the commission has incorporated by reference the definition of BACT in federal rule. This rule and the SIP approval of the state's PSD program, together with current guidance, allows for the dynamic nature of BACT determinations.

Comment

TXCHPI commented that environmental permitting regulations penalize Combined Heat and Power (CHP) by not allowing credit for the emission reductions from the reduced output of other power plants on the grid. This penalty is particularly significant in Texas because of the large industrial base needing large amounts of thermal energy. CHP systems can efficiently serve those needs while generating much more electric power than is used on site and this surplus electricity can be exported into the competitive power market. TXCHPI commented that the energy efficiency of CHP should be considered BACT. An output based standard which measures both the power and thermal energy output of a system can, and should, be used to demonstrate the efficiency of a CHP system.

Response

No change has been made to the rule in response to this comment. The commission is incorporating GHGs into the existing PSD requirements in the commission's rules, in order to be consistent with federal requirements and to fulfill the intent of HB 788. Existing state and federal PSD rules do not allow for emission reduction credits from off-site sources to be considered in the PSD permitting process. While the TCEQ supports efforts to increase energy efficiency, including the use of combined heat and power, the TCEQ cannot consider off-site generated emission reduction credits from CHP units in the current rulemaking. The demonstration of efficiency and considerations of both the power and thermal output of an individual CHP may be pertinent considerations in the BACT determination and would be considered in that review.

Comment

TCC supported TCEQ's incorporation of general PSD concepts, including baseline, netting, and plant-wide applicability limits (PAL). TIP commented that they interpret the TCEQ's proposal to retain all applicable PSD permitting concepts that inform the program's applicability, including the use of a multiple year period to calculate "baseline actual emissions," evaluation of site-wide "net" emissions increases and decreases, and PALs.

Response

No change was made to the rules in response to these comments. The commission is incorporating GHGs into the existing PSD requirements in the commission's rules in order to be consistent with federal requirements and fulfill the intent of HB 788. This rulemaking incorporates the PSD concepts of baseline actual emission rates and site-wide net emissions for GHG PSD permits. EPA promulgated GHG PAL requirements as part of the Tailoring Rule, Step 3 as published in the July 12, 2012, issue of the *Federal Register* (77 FR 41051), amending the PSD rules in 40 CFR §52.21. However, the commission did not incorporate these new GHG PAL requirements in 40 CFR §52.21 as part of this rulemaking.

30 TAC §116.164 Comments

Comment

Zephyr suggested adding the reference to the definition of GHGs in §101.1 to §116.164(a).

Response

No change has been made in response to this comment. It is not necessary to reference a definition each time a term is used. Section 116.10 incorporates the definitions in §101.1.

Comment

TIP and TPA supported that TCEQ will not require permitting of GHG emissions that are not subject to PSD review under the thresholds set by EPA's Tailoring Rule.

Response

The commission appreciates the support.

Comment

HB788WG commented that rule language changes were needed to clarify the intent of proposed new §116.164(a)(4). The commenter recommended changing the catchphrase of §116.164(a)(4) to "GHGs major modification at an existing source that is a major stationary source for GHGs."

Response

The commission has changed the rule in response to this comment, as suggested by the commenter. Section 116.164(a)(4) is intended to address GHG major modifications at existing sources major for at least GHGs.

Comment

TPA requested clarification on the commission's intent regarding modifications at sources which are PSD major sources, solely due to emissions of GHGs. TPA provided a specific example and requested the commission's concurrence with EPA's conclusion, as referenced in the guidance document *Triggering PSD at Non-AnyWay Sources and Modifications*, located on the Web site <http://www.epa.gov/nsr/ghgdocs/TriggeringPSDatNonAnyWaySourcesandMods.pdf>.

TPA's provided example: "Assume you have an existing source of GHG emissions whose PTE for CO₂e exceeds 100,000 tpy and has a mass-based emission level of greater than 250 tpy for GHGs. Assume this existing source has never undergone PSD permitting for GHGs because its construction predated the Tailoring Rule and because it's non-GHG emissions are not major for PSD. A modification is planned for this site with the following project emissions increases: increase in GHG emission is below 60,000 tpy CO₂e, and increase in NO_x and SO₂ is 60 tpy, each. Under EPA's policy, the project will not trigger PSD review, even though the NO_x and SO₂ increments exceed the significance level, because EPA's "major for one, major for all" PSD policy would apply only if the project's GHG emissions are subject to regulation under the Tailoring Rule."

Response

No change was made to the rules in response to this comment. The commission intends to apply EPA's published guidance on *Triggering PSD at Non-AnyWay Sources and Modifications* to the provided example.

Comment

HB788WG commented that rule language changes were needed to clarify the intent of proposed new §116.164(a)(5) and to more closely track EPA's Tailoring Rule. The commenter

recommended changing the rule language to "Existing source that is not major. The existing stationary source undertakes a physical change or change in the method of operation where the change alone will emit or have the potential to emit 100 tpy or more GHG on a mass basis, if the source is listed on the named source category list in 40 CFR §51.166(b)(1)(i), or 250 tpy or more GHGs on a mass basis; and 100,000 tpy or more CO₂e."

Response

No change has been made to the rule in response to this comment. The adopted rule fulfills the commission's intent that an existing minor source will trigger PSD review for GHGs if the physical or operational change in and of itself results in an increase of emissions of GHGs that is greater than or equal to the major source thresholds in EPA's Tailoring Rule and §116.164.

Comment

HB788WG commented that a rule language change was needed to clarify the intent of proposed new §116.164(b). The commenter suggested changing "and" to "or" in the list "...do not require authorization under this subchapter, Subchapter F of this chapter (relating to Standard Permits), Subchapter G of this chapter (relating to Flexible Permits), and Chapter 106 of this title (relating to Permits by Rule) for emissions of GHGs."

Response

The commission agrees with the comment and has made this change to §116.164(b) because these are different types of authorizations rather than a list of authorizations that would cumulatively be required.

Comment

GPA commented in opposition to the recordkeeping requirements proposed in §116.164(b). GPA and TPA requested clarification that the intent of the proposed section was that records of the amount of GHG emissions from the source must be created and maintained; however, the proposed rule language did not specify GHGs. TPA suggested a clarifying edit which would include GHGs in §116.164(b). GPA commented that keeping such records would be unreasonably burdensome, and suggested that companies be required to provide records upon request, instead of maintaining records of GHG emissions from multiple sources not expected to exceed the GHG thresholds. Pioneer and TXOGA commented requesting clarification regarding the extent of records the agency would consider sufficient. TIP requested clarification on the appropriate retention period for these records, and suggested the retention period not exceed five years.

Response

The commission has changed the rule in response to these comments to clarify the commission's basis for the recordkeeping requirement. The purpose of the recordkeeping requirement is that owners and operators with new construction, physical changes, or changes in operation that will emit GHGs can demonstrate that none of the conditions in §116.164(a), regarding the applicability of PSD requirements for emissions of GHGs, are met. The commission does not intend to require recordkeeping of all emissions of GHGs for purposes of reporting to TCEQ.

The commission is requiring that records be available to air pollution control agencies with jurisdiction to demonstrate non-applicability of GHG PSD requirements for specific construction or modifications of facilities.

Records should be maintained and available upon request for a minimum of five years. This is consistent with current record retention practice. Major sources of GHGs will need records of emissions of GHGs from construction or physical or operational changes that were not subject to GHG PSD permitting when a source conducts the *de minimis* threshold test (netting) for future physical or operational changes. The commission did not establish a maximum record retention period because owners or operators may want to keep records for periods longer than five years to verify emission changes that occur within the netting window and non-applicability of §116.164(a).

Comment

TXOGA commented that language should be added to §116.164(b) clarifying how a GHG PSD permit holder should document changes to an existing GHG PSD permit if a change is made that increases GHG emissions below the PSD threshold either at renewal or at the next modification. TXOGA requested clarification on the process to update emission limitations, the need to certify emissions, and if there is a requirement to report regarding the changes. TCC requested clarification in proposed §116.164(b) regarding how a GHG PSD permit holder should document changes to an existing GHG PSD permit if a change is made that decreases GHG emissions below the PSD threshold, such as at a renewal or next modification.

Response

No change has been made in response to this comment. Section 116.164(b) is intended to establish that increases in emissions below the thresholds adopted in §116.164(a) do not require authorization. Because these increases in emissions are not regulated by federal law, codifying specific requirements to certify or report the non-regulated changes would be analogous to creating a minor source program for emissions of GHGs. The commission does not interpret HB 788 as providing that authority. Records of increases or decreases will be essential when owners or operators are conducting a GHG PSD netting analysis, as required in §116.160(b)(2). The commission anticipates that the executive director will provide options for owners or operators to voluntarily notify TCEQ of non-major modifications with emissions of GHGs. PSD permits do not have renewal requirements.

Comment

TCC and Zephyr requested clarification on what process should be followed to formally recognize non-PSD increases of GHGs above GHG PSD permit limits. Zephyr suggested that the TCEQ Form APD-CERT be used. TIP supported the use of existing synthetic minor tools under Chapters 106, 116, and 122. TIP suggested that a mechanism be available to update the existing GHG PSD permit so that the permit holder may reflect non-PSD changes, if desired.

Response

No change was made to the rule in response to these comments. The commission anticipates that the executive director will provide options for owners or operators to voluntarily notify TCEQ of non-major modifications with emissions of GHGs. The commission did not propose and is not establishing a minor source permitting program for emissions of GHGs, but anticipates that owners or operators may want to take voluntarily actions with regard to non-major modifications or new construction that include emissions of GHGs. The commission will develop guidance to assist owners or operators during implementation.

Comment

Weaver commented the proposed rule would require owners and operators of sites that are minor sources of emissions of GHGs and are authorized by standard permits and permits by rule to keep records sufficient to demonstrate the amount of emissions of GHGs from the sources and make the records available when requested, but are not required to submit the records.

Response

No changes were made to the rule in response to this comment. The purpose of the recordkeeping requirement is that owners and operators with new construction, physical changes, or changes in operation that will emit GHGs can demonstrate that none of the conditions in §116.164(a), regarding the applicability of PSD requirements for emissions of GHGs, are met. The intent is not to require recordkeeping of all emissions of GHGs for purposes of reporting to TCEQ. The commission intends that records be available to demonstrate non-applicability of GHG PSD requirements for specific construction or modifications of facilities, and may be needed for future netting.

However, because Title V applicability is based on a source's potential to emit, the commission clarifies that owners or operators may choose to submit a certification in order to avoid Title V applicability, and the certification must include records or data to support the certification.

Comment

Sierra Club commented in general support of new §116.164 and §116.169, as well as the new rules related to standard permits.

Response

The commission appreciates the support.

30 TAC §116.169 Comments

Comment

AECT, GSEC, Golden Pass, OCC, and TCC requested clarification regarding the commission's intent regarding the transition of pending applications from EPA to TCEQ as proposed in §116.169. Specifically, the commenters requested clarification on a specific sentence in the preamble "...TCEQ expects EPA will retain PSD permit implementation authority for those specific sources that have submitted GHG PSD applications to EPA, but for which final agency action or the exhaustion of all administrative and judicial appeals processes have not yet been concluded or completed upon the effective date of EPA's final SIP approval of the new and amended sections in this chapter and rescission of the FIP." (See the November 8, 2013, issue of the *Texas Register* (38 TexReg 7898).) Commenters thought this sentence contradicted the intent of proposed language in §116.169.

Response

The commission has clarified the preamble language in response to the comments. The commission will accept transfer of any application, complete the review, and issue the GHG PSD permit if requirements are met (consistent with the SIP approval of these rules). EPA's federal register notice of the FIP recession will outline the transition process. EPA proposed information regarding the transition process in the February 18, 2014, issue of the *Federal Register* (79 FR 9123).

Comment

AECT and Golden Pass commented that it is critical that each company that has a pending GHG PSD permit application be given the sole right to decide whether to transfer the applica-

tion to TCEQ or allow EPA to complete the application review. AECT requested that rule language in proposed new §116.169 be updated to reflect such, and requested that TCEQ ask EPA to include such language in SIP approval and rescission of the FIP. C3P, Natgasoline, and OCI Beaumont commented that a smooth transition for pending applications was their primary concern. They encouraged TCEQ and EPA to work with applicants to ensure that applications proceed through the permitting process in a timely fashion, whether the application transitions to TCEQ or if EPA continues to process the application. TPA commented that input from EPA and the applicant should be taken into account in the transition process. GSEC and TIP commented that preference of the applicant be given significant weight in determining the transition of the application. OCC and GPA commented that applications should only be transferred to TCEQ upon request of the permit applicant, and requested additional clarification on the transition process.

Response

The commission has not changed rule language in response to these comments. The commission will accept any application that is transferred from EPA. EPA proposed additional information on the transition process in the February 18, 2014, issue of the *Federal Register* (79 FR 9123).

Comment

C3P, Natgasoline, and OCC requested clarification on the priority that GHG PSD applications will receive once transferred to TCEQ. C3P and Natgasoline commented that TCEQ already gives priority in its PSD air permitting program to those applications which are designated economic development projects by the Texas Governor's Office of Economic Development. C3P and Natgasoline commented that to receive this designation, these projects must meet certain requirements in terms of their contribution to the Texas economy, and they encouraged TCEQ to give the same high priority to its review of GHG applications for designated Economic Development Projects. OCC requested clarification on the priority level transferred applications will receive.

Response

No change was made to the rule in response to these comments. The executive director will review transferred applications and will prioritize them on a case-by-case basis, consistent with other PSD and NSR applications. Further, the commission works with the Texas Governor's Office of Economic Development and individual applicants to expedite review of applications, as appropriate.

Comment

GPA requested clarification on the actions TCEQ intends to take on permits that are transferred from EPA under §116.169. GPA and TPA suggested that the transfer of an application should not result in restarting the clock or the review process on the application. They suggested that TCEQ should pick up the application where EPA left off and proceed forward with review rather than re-doing work (such as BACT determinations) that EPA may have already completed.

Response

No change was made to the rule in response to these comments. The commission intends to appropriately conduct the review of each application to ensure all applicable requirements are met. TCEQ will process the applications in accordance with SIP-ap-

proved rules and current processes. TCEQ will not unnecessarily repeat work conducted by EPA where it is consistent with TCEQ rules and processes.

Comment

AECT requested that TCEQ take all appropriate action to cause the transition of authority of the GHG PSD permitting program from EPA to TCEQ to occur as soon as possible. GSEC strongly encourages the TCEQ to continue its efforts and to take all steps necessary to have the proposed rule adopted by March 2014, and commends and encourages TCEQ to continue working with EPA to have the SIP revisions approved and rescission of the FIP completed in a timely manner. GPA commented that it is urgent that TCEQ act as quickly as possible to complete this rulemaking and supported efforts to parallel process the rulemaking and EPA's SIP approval and rescission of the FIP. TCC commented that it is imperative that the transition take place quickly and efficiently.

Response

No change was made to the rule in response to these comments. The commission is committed to timely implementation of the requirements of HB 788. On December 2, 2013, the executive director sent a letter to EPA Region 6 requesting that EPA parallel process the GHG rules in order to expedite approval into the Texas SIP and rescission of the FIP. The EPA published proposed approval of SIP revisions in the February 18, 2014, issue of the *Federal Register* (79 FR 9123). The commission will continue to work with EPA as appropriate to facilitate approval of SIP revisions and rescission of the FIP.

Comment

TCC commented that rule language in §116.169 should be edited to reflect that TCEQ should be able to accept GHG PSD permit applications from EPA when the FIP is rescinded "as to greenhouse gases," rather than in its entirety.

Response

No change has been made in response to this comment. Adopted §116.169 states that the commission will accept transfer of GHG PSD applications filed with EPA upon the effective date of approval of Chapter 116 and rescission of the FIP. The changes to the PSD program are specific to GHGs and are intended by the commission to obtain authority to issue PSD permits for these emissions. If the EPA's FIP rescission is less broadly applicable, it should not prohibit or impinge on the transition of GHG PSD permitting authority. The EPA published proposed approval of SIP revisions in the February 18, 2014, issue of the *Federal Register* (79 FR 9123).

Comment

AECT, TCC, TIP, and TXOGA requested clarification in the rule or preamble that after the date TCEQ becomes the GHG PSD permitting authority in Texas, TCEQ will handle all changes (modifications, renewals, etc...) to GHG PSD permits that EPA has issued, as well as enforcement of EPA-issued permits. AECT requested that TCEQ ask EPA to include language to that effect in its SIP approval and rescission of the FIP. TCC and TIP requested clarification that a permit holder would not need to reapply to TCEQ if they have been issued a permit by EPA, and that an EPA-issued GHG PSD permit satisfies the requirement to obtain a permit from TCEQ. TIP commented that TCEQ should be able to administer these permits in the same manner as a GHG PSD permit originally issued by the TCEQ.

TIP commented that the authority would be necessary to allow non-PSD changes at sources for which the EPA has previously issued GHG PSD permits. TIP commented that an appropriate provision could be included in proposed §116.169.

Response

No change has been made in response to these comments. The executive director submitted a letter to EPA Region 6 on January 13, 2014, clarifying the commission's intent to fully administer EPA-issued permits, including enforcement authority and permitting actions. Correspondence between EPA and TCEQ regarding Texas Air Permitting Program can be found on this Web site: http://www.tceq.texas.gov/permitting/air/announcements/nsr_announce_9_5_07.html.

Comment

TIP requested that the TCEQ confirm that an EPA-issued GHG PSD permit is sufficient to allow a source to begin construction after the TCEQ GHG permitting program is in place. While TIP did not believe that the TCEQ intended to prevent a source from relying on an EPA-issued GHG PSD permit, it is important for such a clarification to be made. TIP commented that the TCEQ's existing PSD permitting rule in §116.160 incorporates by reference numerous features of the federal PSD rule in 40 CFR §52.21 but provides that in the reference-incorporated sections, "The term 'executive director' shall replace the word 'administrator'. . ." TIP commented that this manner of incorporation by reference could be taken to imply that PSD review must be conducted by the TCEQ (as opposed to simply mean that PSD review by TCEQ or EPA must occur). TIP commented that this matter will be especially important if there is a time period during which the EPA GHG permitting FIP remains in place after the TCEQ GHG permitting program becomes effective under state law.

Response

No changes have been made in response to this comment. The commission confirms that once a source has obtained all necessary preconstruction permits, whether issued by TCEQ or EPA, construction may begin. EPA-issued PSD permits remain legally valid authorizations after TCEQ obtains authority to issue PSD permits for GHG emissions. On January 13, 2014, the executive director submitted a letter to EPA Region 6, confirming both agencies' understanding that once the FIP was rescinded, TCEQ would have authority to administer and enforce any EPA-issued GHG PSD permit. An integral element of this authority is the recognition that EPA-issued permits are validly issued permits that do not require further action by TCEQ to provide the authority to construct if all other preconstruction authorizations have been obtained. Correspondence between EPA and TCEQ regarding Texas Air Permitting Program can be found on this Web site: http://www.tceq.texas.gov/permitting/air/announcements/nsr_announce_9_5_07.html.

Comment

C3P, Natgasoline, and OCI Beaumont commented that it may be more expeditious for TCEQ to begin the State's review of applications prior to obtaining federal approval. TCC supported the idea of EPA and TCEQ entering into a work-share agreement, whereby TCEQ would begin work on certain GHG PSD permits that EPA believes will ultimately be transferred to TCEQ, in order to promote an efficient and timely transition.

Response

No change was made to the rule in response to these comments. The commission and EPA have entered a tentative work-share agreement for some of the applications submitted to EPA. The commission is assisting with BACT reviews, drafting statements of basis, and drafting permits. EPA remains the issuing authority for the permits and will be responsible for the public notice process and responding to comments. The commission is committed to an efficient transition, but will not have legal authority to issue notice of GHG PSD permit applications or issue permits until EPA approves the necessary SIP revisions that are part of this rulemaking, and rescinds the FIP.

Comment

AECT requested clarification that permit applications which are transferred from EPA to TCEQ will no longer be subject to non-PSD federal requirements, such as biological assessments.

Response

No change has been made to the rule in response to this comment. The commission clarifies that federal agency reviews (other than those derived from the FCAA) and biological assessments are required only for federal actions, such as EPA-issued GHG PSD permits. TCEQ-issued PSD permits under a SIP-approved program are not federal actions that trigger such review. A SIP-approved PSD permitting program differs from a delegated program where a state or local permitting authority has been delegated the authority by EPA to issue PSD permits in accordance with federal program requirements, and therefore acts in EPA's stead. Further, TCEQ's PSD rules do not include the requirement for sources to conduct biological assessments or obtain concurrence from federal agencies.

30 TAC §116.610 Comments

Comment

TPA supported the proposed revisions to Chapter 116, to allow the use of standard permits to authorize emissions of non-GHGs at new and modified sources that will also emit GHGs.

Response

The commission appreciates the support.

Comment

GPA and TPA commented that additional rule language should be added to §116.610(b) to resolve inconsistencies with specific rule language in the Air Quality Standard Permit for Oil and Gas Handling and Production Facilities. GPA commented that subsections (c)(2)(A) and (h)(1) of the standard permit prohibit its use for a source that is considered major. GPA and TPA suggested that the phrase "notwithstanding any provision in any specific standard permit to the contrary" should be added to §116.610(b).

Response

The commission has changed the rule in response to these comments. The commission recognizes the potential conflict in subsections (c)(2)(A) and (h)(1) of the Air Quality Standard Permit for Oil and Gas Handling and Production Facilities, which could be interpreted to prohibit the use of it with sources that obtain a GHG PSD permit. The commission's intent is that all standard permits be eligible for use at sources that are required to obtain a GHG PSD permit due solely to emissions of GHGs. The addition of the language "notwithstanding any provision in any standard permit to the contrary" to §116.610(b) avoids the unintended consequence of precluding the use of standard permits for sources

which must obtain GHG PSD permits. Additionally, the commission clarified that the exemption applies to "any project" in order to maintain consistency with the current practice of issuing standard permits on a project basis.

30 TAC §116.611 Comments

Comment

GPA, Pioneer, TCC, TIP, TPA, and TXOGA suggested alternatives to the 90-day deadline to certify emissions in order to avoid Title V applicability that was proposed in §116.611(c)(3)(A) and §122.122(e)(3)(A). GPA, TIP and TPA suggested a deadline of one year. Pioneer and TXOGA suggested a deadline of 180 days. TCC suggested a deadline of 120 days.

Response

The commission has changed the rule in response to these comments. In the proposal, the commission invited comment regarding the time limit in §122.122(e)(3) to file certified registrations for existing sites that do not have a federally enforceable emission rate for their emissions of GHGs, such as a PSD permit. The commission proposed a deadline of 90 days based on previous rule language requiring sites that had established certified registrations prior to the 2002 amendments to submit those registrations to TCEQ 90 days after the amendments were adopted. The 2002 amendments were necessary to address deficiencies in the Texas Title V program as determined by EPA. Those amendments did not trigger Title V applicability for a new category of sources for the first time, as do the amendments for emissions of GHGs in this rulemaking.

In §122.130, sources of GHGs that trigger Title V for the first time have up to 12 months after EPA approval of these program rules to submit an abbreviated application to TCEQ. This is consistent with federal and state application due dates when an EPA or TCEQ action causes a site to become subject to Title V. Given that site owners or operators have up to 12 months to submit an abbreviated application if they are subject to Title V, it is reasonable to provide more time to certify that a site is not subject to the Title V permitting program. Changing the submittal deadline from 90 days to up to 12 months provides a reasonable time for owner or operators to quantify emissions of GHGs and is consistent with the time allowed for initial Title V applications to be submitted to TCEQ.

For consistency, the commission has changed §122.130(b)(3) from proposal to remove the reference to SIP approval of §122.122. Subsequent to proposal of this rulemaking, EPA Region 6 informed the commission that, in addition to submitting §122.122 as a revision to the SIP, amendments to Chapter 122, including the Potential to Emit section, must be submitted as a separate revision to Texas' Federal Operating Permits Program. Although EPA has proposed approval of revisions to the SIP, it has not done so for the operating permits program revisions. Therefore, the commission anticipates EPA will propose action on the Chapter 122 amendments shortly after the commission adopts and submits these amended sections to EPA. Thus, EPA action on the operating permits program revision will result in Title V permitting of GHG major sources and trigger the 12-month application clock.

General

Comment

AECT, HB788WG, and TIP commented that rule language should be added to provide that if federal law changes and

PSD permitting for GHGs is no longer required, then GHG PSD permits would no longer be required in Texas. HB788WG commented that it was important that the rescission language appears in the rules, and that the rescission language have the opportunity to be included in the Texas SIP. They commented that questions about how EPA might act on such a proposed SIP revision should not prevent the TCEQ from including this important language.

Response

The commission has changed the rule in response to these comments. New subsection (b) has been added to §116.169 stating that GHG emissions are subject to the PSD permitting requirements of §116.164 unless a change in federal law occurs. This new subsection provides the commission with the authority to issue permits consistent with state and federal law, which may change based on the litigation that was considered by the United States Supreme Court on February 24, 2014, for which a decision is expected in about June 2014. This subsection will not be submitted as a revision to the SIP.

For those sections that will be submitted to EPA as a SIP revision, THSC, §382.05102 (HB 788) specifically directs TCEQ to repeal these PSD rules and submit them to EPA as a SIP revision if authorization to emit GHGs is no longer required under federal law. This language correctly reflects the FCAA SIP revision process for repealing PSD SIP approved program rules. Rulemaking under the APA and the federal requirements for notice and comment of SIP changes will be necessary if the rules and SIP need to be changed to reflect changes in PSD permitting requirements under federal law.

Comment

AECT commented that TCEQ should combine each GHG PSD permit (issued by EPA or TCEQ) with the related non-GHG permit into a single permit at the next appropriate opportunity.

Response

No changes have been made to the rules in response to this comment. The executive director is still in the process of making final determinations regarding the integration of GHG PSD permits with non-GHG authorizations. The executive director is still in the process of implementation activities, and will work with stakeholders to determine viable options.

Comment

AECT commented that TCEQ should change the permitting process after TCEQ becomes the permitting authority so that projects that will be subject to GHG PSD review and subject to NSR for non-GHGs will apply for and obtain a single permit that covers both the GHG and non-GHG pollutants.

Calpine, GPA, and TPA commented in support of the commission's proposal to segregate the review process and issue separate GHG PSD permits from authorizations for non-GHG emissions. Calpine recommended that the agency develop a process allowing the harmonization of GHG and non-GHG specific permit actions. Calpine also commented that the monitoring, record-keeping, and reporting requirements should be consistent between the permits. GPA and TPA commented that the dual permit system would not allow procedural requirements for non-GHG applications to hinder the progress of a GHG PSD application.

Response

The commission appreciates the support and understands the commenters' concern for timely permit application review. The executive director is still in the process of implementation activities, and will work with stakeholders to determine viable options. However, no final decisions have been made, and there is no need to include any such implementation activity decisions in the rule.

Comment

AECT and Calpine commented that a separate permit application fee should not be charged for a GHG PSD application, in addition to the application fee for the corresponding non-GHG NSR permit application fee. Calpine suggested that GHG PSD permits should be treated consistently with TCEQ's current practice of assessing the single highest applicable fee to a project that triggers multiple permit programs (e.g., state NSR, PSD, and nonattainment).

Response

No changes have been made to the rules in response to these comments. The commission clarifies that there is a single fee for a project with multiple permit applications under Chapter 116, Subchapter B, consistent with §116.163.

Comment

Calpine, GPA, and TPA supported TCEQ's intent to provide streamlining options for authorizing GHG PSD permits. GPA and TPA commented the use of streamlining tools such as general permits or the use of presumptive BACT are appropriate for certain sources.

Response

The commission appreciates the support.

Comment

Representative Burnam commented that in congruence with the opinions of the general public and the scientific community, the relationship between GHGs and climate change should be acknowledged.

Response

No changes have been made to the rules in response to this comment. The comment reflects EPA's basis for regulating GHGs from stationary sources under the PSD program. The commission does not find it necessary to include a discussion about the causes of global climate change in this rulemaking.

Comment

TPA commented that some facilities inject CO₂ underground for long-term storage or for use in enhanced oil recovery. TPA commented that there should be an incentive for taking such steps to prevent release of GHGs to the atmosphere. TPA commented that the issue may be beyond the scope of the current rulemaking, but asked that the agency begin thinking about how to incentivize operations that effectively remove CO₂ emissions from venting to the atmosphere altogether.

Response

No changes have been made to the rules in response to this comment. The commission agrees that this concept is beyond the scope of the current rulemaking. HB 788 authorized TCEQ, to the extent that GHGs require authorization under federal law, to authorize GHGs in a manner consistent with the existing requirement to obtain a PSD permit under the TCAA.

SUBCHAPTER A. DEFINITIONS

30 TAC §116.12

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also adopted under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0517, concerning Determination of Administrative Completion of Application, which specifies when the commission shall determine applications are administratively complete; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.05102, which relates to the permitting authority of the commission for emissions of GHGs. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules and, Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendment is also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The adopted amendment implements House Bill 788, 83rd Legislature, 2013, THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.0513, 382.05102, 382.0515, 382.0517, 382.0518, and 383.05195; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq.*

§116.12. Nonattainment and Prevention of Significant Deterioration Review Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, and in §101.1 of this title (relating to Definitions), the following words and

terms, when used in Subchapter B, Divisions 5 and 6 of this chapter (relating to Nonattainment Review Permits and Prevention of Significant Deterioration Review); and Subchapter C, Division 1 of this chapter (relating to Plant-Wide Applicability Limits), have the following meanings, unless the context clearly indicates otherwise.

(1) Actual emissions--Actual emissions as of a particular date are equal to the average rate, in tons per year, at which the unit actually emitted the pollutant during the 24-month period that precedes the particular date and that is representative of normal source operation, except that this definition shall not apply for calculating whether a significant emissions increase has occurred, or for establishing a plant-wide applicability limit. Instead, paragraph (3) of this section relating to baseline actual emissions shall apply for this purpose. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period. The executive director may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions, e.g., when the allowable limit is reflective of actual emissions. For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(2) Allowable emissions--The emissions rate of a stationary source, calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits that restrict the operating rate, or hours of operation, or both), and the most stringent of the following:

(A) the applicable standards specified in 40 Code of Federal Regulations Part 60 or 61;

(B) the applicable state implementation plan emissions limitation including those with a future compliance date; or

(C) the emissions rate specified as a federally enforceable permit condition including those with a future compliance date.

(3) Baseline actual emissions--The rate of emissions, in tons per year, of a federally regulated new source review pollutant.

(A) For any existing electric utility steam generating unit, baseline actual emissions means the average rate, in tons per year, at which the unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the five-year period immediately preceding when the owner or operator begins actual construction of the project. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation.

(B) For an existing facility (other than an electric utility steam generating unit), baseline actual emissions means the average rate, in tons per year, at which the facility actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the ten-year period immediately preceding either the date the owner or operator begins actual construction of the project, or the date a complete permit application is received for a permit. The rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply with the exception of those required under 40 Code of Federal Regulations Part 63, had such major stationary source been required to comply with such limitations during the consecutive 24-month period.

(C) For a new facility, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and for

all other purposes during the first two years following initial operation, shall equal the unit's potential to emit.

(D) The actual average rate shall be adjusted downward to exclude any non-compliant emissions that occurred during the consecutive 24-month period. For each regulated new source review pollutant, when a project involves multiple facilities, only one consecutive 24-month period must be used to determine the baseline actual emissions for the facilities being changed. A different consecutive 24-month period can be used for each regulated new source review pollutant. The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount. Baseline emissions cannot occur prior to November 15, 1990.

(E) The actual average emissions rate shall include fugitive emissions to the extent quantifiable. Until March 1, 2016, emissions previously demonstrated as resulting from planned maintenance, startup, or shutdown activities; historically unauthorized; and subject to reporting under Chapter 101 of this title (relating to General Air Quality Rules) shall be included to the extent that they have been authorized, or are being authorized.

(4) Basic design parameters--For a process unit at a steam electric generating facility, the owner or operator may select as its basic design parameters either maximum hourly heat input and maximum hourly fuel consumption rate or maximum hourly electric output rate and maximum steam flow rate. When establishing fuel consumption specifications in terms of weight or volume, the minimum fuel quality based on British thermal units content shall be used for determining the basic design parameters for a coal-fired electric utility steam generating unit. The basic design parameters for any process unit that is not at a steam electric generating facility are maximum rate of fuel or heat input, maximum rate of material input, or maximum rate of product output. Combustion process units will typically use maximum rate of fuel input. For sources having multiple end products and raw materials, the owner or operator shall consider the primary product or primary raw material when selecting a basic design parameter. The owner or operator may propose an alternative basic design parameter for the source's process units to the executive director if the owner or operator believes the basic design parameter as defined in this paragraph is not appropriate for a specific industry or type of process unit. If the executive director approves of the use of an alternative basic design parameter, that basic design parameter shall be identified and compliance required in a condition in a permit that is legally enforceable.

(A) The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter.

(B) If design information is not available for a process unit, the owner or operator shall determine the process unit's basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.

(C) Efficiency of a process unit is not a basic design parameter.

(5) Begin actual construction--In general, initiation of physical on-site construction activities on an emissions unit that are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities other than preparatory activities that mark the initiation of the change.

(6) Building, structure, facility, or installation--All of the pollutant-emitting activities that belong to the same industrial grouping, are located in one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities are considered to be part of the same industrial grouping if they belong to the same "major group" (i.e., that have the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 supplement.

(7) Carbon dioxide equivalent (CO₂e) emissions--shall represent an amount of greenhouse gases (GHGs) emitted, and shall be computed by multiplying the mass amount of emissions in tons per year (tpy) for the GHGs, as defined in §101.1 of this title (relating to Definitions), by the gas's associated global warming potential as published in 40 Code of Federal Regulations Part 98, Subpart A, Table A-1 - Global Warming Potentials, and summing the resultant values.

(8) Clean coal technology--Any technology, including technologies applied at the precombustion, combustion, or post-combustion stage, at a new or existing facility that will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam that was not in widespread use as of November 15, 1990.

(9) Clean coal technology demonstration project--A project using funds appropriated under the heading "Department of Energy-Clean Coal Technology," up to a total amount of \$2.5 billion for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the United States Environmental Protection Agency. The federal contribution for a qualifying project shall be at least 20% of the total cost of the demonstration project.

(10) Commence--As applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(A) begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(B) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(11) Construction--Any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in actual emissions.

(12) Contemporaneous period--For major sources the period between:

(A) the date that the increase from the particular change occurs; and

(B) 60 months prior to the date that construction on the particular change commences.

(13) *De minimis* threshold test (netting)--A method of determining if a proposed emission increase will trigger nonattainment or prevention of significant deterioration review. The summation of the proposed project emission increase in tons per year with all other creditable source emission increases and decreases during the contemporaneous period is compared to the significant level for that pollutant. If the significant level is exceeded, then prevention of significant deterioration and/or nonattainment review is required.

(14) Electric utility steam generating unit--Any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is included in determining the electrical energy output capacity of the affected facility.

(15) Federally regulated new source review pollutant--As defined in subparagraphs (A) - (E) of this paragraph:

(A) any pollutant for which a national ambient air quality standard has been promulgated and any constituents or precursors for such pollutants identified by the United States Environmental Protection Agency;

(B) except for greenhouse gases, any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), §111;

(C) any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI;

(D) any pollutant that otherwise is subject to regulation under the FCAA; except that any or all hazardous air pollutants either listed in FCAA, §112 or added to the list under FCAA, §112(b)(2), which have not been delisted under FCAA, §112(b)(3), are not regulated new source review pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under FCAA, §108; or

(E) greenhouse gases that meet or exceed the thresholds established in §116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources).

(16) Greenhouse gases (GHGs)--as defined in §101.1 of this title (relating to Definitions).

(17) Lowest achievable emission rate--For any emitting facility, that rate of emissions of a contaminant that does not exceed the amount allowable under applicable new source performance standards promulgated by the United States Environmental Protection Agency under 42 United States Code, §7411, and that reflects the following:

(A) the most stringent emission limitation that is contained in the rules and regulations of any approved state implementation plan for a specific class or category of facility, unless the owner or operator of the proposed facility demonstrates that such limitations are not achievable; or

(B) the most stringent emission limitation that is achieved in practice by a specific class or category of facilities, whichever is more stringent.

(18) Major facility--Any facility that emits or has the potential to emit 100 tons per year or more of the plant-wide applicability limit (PAL) pollutant in an attainment area; or any facility that emits or has the potential to emit the PAL pollutant in an amount that is equal to or greater than the major source threshold for the PAL pollutant in Table I of this section for nonattainment areas.

(19) Major stationary source--Any stationary source that emits, or has the potential to emit, a threshold quantity of emissions or more of any air contaminant (including volatile organic compounds (VOCs)) for which a national ambient air quality standard has been issued, or greenhouse gases. The major source thresholds are identified in Table I of this section for nonattainment pollutants and the major source thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations (CFR)

§51.166(b)(1). For greenhouse gases, the major source thresholds are specified in §116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources). A source that emits, or has the potential to emit a federally regulated new source review pollutant at levels greater than those identified in 40 CFR §51.166(b)(1) is considered major for all prevention of significant deterioration pollutants. A major stationary source that is major for VOCs or nitrogen oxides is considered to be major for ozone. The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this definition whether it is a major stationary source, unless the source belongs to one of the categories of stationary sources listed in 40 CFR §51.165(a)(1)(iv)(C).

(20) Major modification--As follows.

(A) Any physical change in, or change in the method of operation of a major stationary source that causes a significant project emissions increase and a significant net emissions increase for any federally regulated new source review pollutant. At a stationary source that is not major prior to the increase, the increase by itself must equal or exceed that specified for a major source. At an existing major stationary source, the increase must equal or exceed that specified for a major modification to be significant. The major source and significant thresholds are provided in Table I of this section for nonattainment pollutants. The major source and significant thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations §51.166(b)(1) and (23), respectively and in §116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources).

Figure: 30 TAC §116.12(20)(A)

(B) A physical change or change in the method of operation shall not include:

- (i) routine maintenance, repair, and replacement;
- (ii) use of an alternative fuel or raw material by reason of an order under the Energy Supply and Environmental Coordination Act of 1974, §2(a) and (b) (or any superseding legislation) or by reason of a natural gas curtailment plan under the Federal Power Act;
- (iii) use of an alternative fuel by reason of an order or rule of 42 United States Code, §7425;
- (iv) use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;
- (v) use of an alternative fuel or raw material by a stationary source that the source was capable of accommodating before December 21, 1976 (unless such change would be prohibited under any federally enforceable permit condition established after December 21, 1976) or the source is approved to use under any permit issued under regulations approved under this chapter;
- (vi) an increase in the hours of operation or in the production rate (unless the change is prohibited under any federally enforceable permit condition that was established after December 21, 1976);
- (vii) any change in ownership at a stationary source;
- (viii) any change in emissions of a pollutant at a site that occurs under an existing plant-wide applicability limit;
- (ix) the installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standard during the project and after it is terminated;

(x) for prevention of significant deterioration review only, the installation or operation of a permanent clean coal technology demonstration project that constitutes re-powering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the unit. This exemption shall apply on a pollutant-by-pollutant basis; or

(xi) for prevention of significant deterioration review only, the reactivation of a clean coal-fired electric utility steam generating unit.

(21) Necessary preconstruction approvals or permits--Those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations that are part of the applicable state implementation plan.

(22) Net emissions increase--The amount by which the sum of the following exceeds zero: the project emissions increase plus any sourcewide creditable contemporaneous emission increases, minus any sourcewide creditable contemporaneous emission decreases. Baseline actual emissions shall be used to determine emissions increases and decreases.

(A) An increase or decrease in emissions is creditable only if the following conditions are met:

- (i) it occurs during the contemporaneous period;
- (ii) the executive director has not relied on it in issuing a federal new source review permit for the source and that permit is in effect when the increase in emissions from the particular change occurs; and

(iii) in the case of prevention of significant deterioration review only, an increase or decrease in emissions of sulfur dioxide, particulate matter, or nitrogen oxides that occurs before the applicable minor source baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(B) An increase in emissions is creditable if it is the result of a physical change in, or change in the method of operation of a stationary source only to the extent that the new level of emissions exceeds the baseline actual emission rate. Emission increases at facilities under a plant-wide applicability limit are not creditable.

(C) A decrease in emissions is creditable only to the extent that all of the following conditions are met:

- (i) the baseline actual emission rate exceeds the new level of emissions;
- (ii) it is federally enforceable at and after the time that actual construction on the particular change begins;
- (iii) the executive director has not relied on it in issuing a prevention of significant deterioration or a nonattainment permit;
- (iv) the decrease has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change; and
- (v) in the case of nonattainment applicability analysis only, the state has not relied on the decrease to demonstrate attainment or reasonable further progress.

(D) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(23) Offset ratio--For the purpose of satisfying the emissions offset reduction requirements of 42 United States Code, §7503(a)(1)(A), the emissions offset ratio is the ratio of total actual reductions of emissions to total emissions increases of such pollutants. The minimum offset ratios are included in Table I of this section under the definition of major modification. In order for a reduction to qualify as an offset, it must be certified as an emission credit under Chapter 101, Subchapter H, Division 1 or 4 of this title (relating to Emission Credit Banking and Trading; or Discrete Emission Credit Banking and Trading), except as provided for in §116.170(b) of this title (relating to Applicability of Emission Reductions as Offsets). The reduction must not have been relied on in the issuance of a previous nonattainment or prevention of significant deterioration permit.

(24) Plant-wide applicability limit--An emission limitation expressed, in tons per year, for a pollutant at a major stationary source, that is enforceable and established in a plant-wide applicability limit permit under §116.186 of this title (relating to General and Special Conditions).

(25) Plant-wide applicability limit effective date--The date of issuance of the plant-wide applicability limit permit.

(26) Plant-wide applicability limit major modification--Any physical change in, or change in the method of operation of the plant-wide applicability limit source that causes it to emit the plant-wide applicability limit pollutant at a level equal to or greater than the plant-wide applicability limit.

(27) Plant-wide applicability limit permit--The new source review permit that establishes the plant-wide applicability limit.

(28) Plant-wide applicability limit pollutant--The pollutant for which a plant-wide applicability limit is established at a major stationary source.

(29) Potential to emit--The maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or enforceable operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, may be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions, as defined in 40 Code of Federal Regulations §51.165(a)(1)(viii), do not count in determining the potential to emit for a stationary source.

(30) Project net--The sum of the following: the project emissions increase, minus any sourcewide creditable emission decreases proposed at the source between the date of application for the modification and the date the resultant modification begins emitting. Baseline actual emissions shall be used to determine emissions increases and decreases. Increases and decreases must meet the creditability criteria listed under the definition of net emissions increase in this section.

(31) Projected actual emissions--The maximum annual rate, in tons per year, at which an existing facility is projected to emit a federally regulated new source review pollutant in any rolling 12-month period during the five years following the date the facility resumes regular operation after the project, or in any one of the ten years following that date, if the project involves increasing the facility's design capacity or its potential to emit that federally regulated new source review pollutant. In determining the projected actual emissions, the owner or operator of the major stationary source shall include unauthorized emissions from planned maintenance, startup, or shutdown activities, which were historically unauthorized and subject to reporting under Chapter 101 of this title (relating to General

Air Quality Rules), to the extent they have been authorized, or are being authorized; and fugitive emissions to the extent quantifiable; and shall consider all relevant information, including, but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the state or federal regulatory authorities, and compliance plans under the approved state implementation plan.

(32) Project emissions increase--The sum of emissions increases for each modified or affected facility determined using the following methods:

(A) for existing facilities, the difference between the projected actual emissions and the baseline actual emissions. In calculating any increase in emissions that results from the project, that portion of the facility's emissions following the project that the facility could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth may be excluded from the project emission increase. The potential to emit from the facility following completion of the project may be used in lieu of the projected actual emission rate; and

(B) for new facilities, the difference between the potential to emit from the facility following completion of the project and the baseline actual emissions.

(33) Replacement facility--A facility that satisfies the following criteria:

(A) the facility is a reconstructed unit within the meaning of 40 Code of Federal Regulations §60.15(b)(1), or the facility replaces an existing facility;

(B) the facility is identical to or functionally equivalent to the replaced facility;

(C) the replacement does not alter the basic design parameters of the process unit;

(D) the replaced facility is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable. If the replaced facility is brought back into operation, it shall constitute a new facility. No creditable emission reductions shall be generated from shutting down the existing facility that is replaced. A replacement facility is considered an existing facility for the purpose of determining federal new source review applicability.

(34) Secondary emissions--Emissions that would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the source or modification itself. Secondary emissions must be specific, well-defined, quantifiable, and impact the same general area as the stationary source or modification that causes the secondary emissions. Secondary emissions include emissions from any off-site support facility that would not be constructed or increase its emissions, except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions that come directly from a mobile source such as emissions from the tail pipe of a motor vehicle, from a train, or from a vessel.

(35) Significant facility--A facility that emits or has the potential to emit a plant-wide applicability limit (PAL) pollutant in an amount that is equal to or greater than the significant level for that PAL pollutant.

(36) Small facility--A facility that emits or has the potential to emit the plant-wide applicability limit (PAL) pollutant in an amount less than the significant level for that PAL pollutant.

(37) Stationary source--Any building, structure, facility, or installation that emits or may emit any air pollutant subject to regulation under 42 United States Code, §§7401 *et seq.*

(38) Temporary clean coal technology demonstration project--A clean coal technology demonstration project that is operated for a period of five years or less, and that complies with the state implementation plan and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-6087



SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 1. PERMIT APPLICATION

30 TAC §116.111

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also adopted under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements;

THSC, §382.0517, concerning Determination of Administrative Completion of Application, which specifies when the commission shall determine applications are administratively complete; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.05102, which relates to the permitting authority of the commission for emissions of greenhouse gases. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules and, Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendment is also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The adopted amendment implements House Bill 788, 83rd Legislature, 2013, THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.0513, 382.05102, 382.0515, 382.0517, 382.0518, and 383.05195; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq.*

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 6. PREVENTION OF SIGNIFICANT DETERIORATION REVIEW

30 TAC §§116.160, 116.164, 116.169

Statutory Authority

The amendment and new sections are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment and new sections are also adopted under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.003, concerning Definitions, which defines certain terms used in the Chapter 382; THSC, §382.011, concerning General

Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.05101 concerning De Minimis Air Contaminants, which authorizes the commission to develop by rule criteria to establish a *de minimis* level of air contaminants below which a permit, standard permit or permit by rule is not required; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0517, concerning Determination of Administrative Completion of Application, which specifies when the commission shall determine applications are administratively complete; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.05102, which relates to the permitting authority of the commission for emissions of greenhouse gases. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules and, Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendment and new sections are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The adopted amendment and new sections implement House Bill 788, 83rd Legislature, 2013, THSC, §§382.002, 382.003, 382.011, 382.012, 382.017, 382.051, 382.05101, 382.0513, 382.05102, 382.0515, 382.0517, 382.0518, and 383.05195; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq.*

§116.164. *Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources.*

(a) Greenhouse Gases (GHGs) are subject to Prevention of Significant Deterioration review under the following conditions:

(1) New source, major for non-GHGs. The stationary source is a new major stationary source for a federally regulated new source review (NSR) pollutant that is not GHGs, and will emit or have the potential to emit 75,000 tons per year (tpy) or more carbon dioxide equivalent (CO₂e); or

(2) Existing source, major for non-GHGs. The stationary source is an existing major stationary source for a federally regulated NSR pollutant that is not GHGs, and will have a significant net emissions increase of a federally regulated NSR pollutant that is not GHGs, and a net emissions increase greater than zero tpy GHGs on a mass basis and 75,000 tpy or more CO₂e.

(3) New source, major for GHGs Only. The new stationary source that will emit or has the potential to emit greater than or

equal to 100 tpy GHGs on a mass basis, if the source is listed on the named source category list in 40 Code of Federal Regulations (CFR) §51.166(b)(1)(i), or greater than or equal to 250 tpy GHGs on a mass basis; and 100,000 tpy or more CO₂e.

(4) GHGs major modification at an existing source that is a major stationary source for GHGs.

(A) The existing stationary source emits or has the potential to emit greater than or equal to 100 tpy GHGs on a mass basis, if the source is listed on the named source category list in 40 CFR §51.166(b)(1)(i), or greater than or equal to 250 tpy GHGs on a mass basis; and 100,000 tpy or more CO₂e; and

(B) the stationary source undertakes a physical change or change in the method of operation that will result in a net emissions increase greater than zero tpy GHGs on a mass basis, and a net emissions increase of 75,000 tpy or more CO₂e.

(5) Existing source that is not major. The existing stationary source undertakes a physical change or change in the method of operation that will result in an emissions increase greater than or equal to 100 tpy GHGs on a mass basis, if the source is listed on the named source category list in 40 CFR §51.166(b)(1)(i), or greater than or equal to 250 tpy GHGs on a mass basis; and 100,000 tpy or more CO₂e.

(b) New stationary sources with emissions of GHGs, or existing stationary sources that undertake a physical change or change in the method of operations that includes emissions of GHGs, that do not meet any of the conditions in subsection (a) of this section do not require authorization under this subchapter, Subchapter F of this chapter (relating to Standard Permits), Subchapter G of this chapter (relating to Flexible Permits), or Chapter 106 of this title (relating to Permits by Rule) for emissions of GHGs. Owners or operators of these sources must keep records sufficient to demonstrate the amount of emissions of GHGs from the source as a result of construction, a physical change or a change in method of operation do not require authorization under subsection(a) of this section. Records must be made available at the request of personnel from the commission or any local air pollution control agency having jurisdiction. Records must be maintained for a minimum of five years from the date of the construction, physical change, or change in method of operation.

§116.169. *Greenhouse Gases Program Transitions.*

(a) Upon the effective date of the United States Environmental Protection Agency (EPA) approval of this chapter and rescission of the Federal Implementation Plan as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178), the commission will accept transfer of and review applications previously filed with EPA for greenhouse gas prevention of significant deterioration permits. These applications will be subject to the applicable requirements of this chapter.

(b) Section 116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gas Sources) will not apply to greenhouse gases at a source that would not be subject to Prevention of Significant Deterioration Review for greenhouse gases under a change in federal law on or after March 26, 2014.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. STANDARD PERMITS

30 TAC §116.610, §116.611

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also adopted under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0517, concerning Determination of Administrative Completion of Application, which specifies when the commission shall determine applications are administratively complete; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; THSC, §382.05102, which relates to the permitting authority of the commission for emissions of GHGs; and THSC, §382.05195 concerning Standard Permits, which authorizes the commission to issue standard permits for new or existing similar facilities. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules and, Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendments are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The adopted amendments implement House Bill 788, 83rd Legislature, 2013, THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.0513, 382.05102, 382.0515, 382.0517, 382.0518 and 383.05195; and Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7401 *et seq.*

§116.610. Applicability.

(a) Under the Texas Clean Air Act, §382.051, a project that meets the requirements for a standard permit listed in this subchapter or issued by the commission is hereby entitled to the standard permit, provided the following conditions listed in this section are met. For the purposes of this subchapter, project means the construction or modification of a facility or a group of facilities submitted under the same registration.

(1) Any project that results in a net increase in emissions of air contaminants from the project other than water, nitrogen, ethane, hydrogen, oxygen, or greenhouse gases (GHGs) as defined in §101.1 of this title (relating to Definitions), or those for which a national ambient air quality standard has been established must meet the emission limitations of §106.261 of this title (relating to Facilities (Emission Limitations)), unless otherwise specified by a particular standard permit.

(2) Construction or operation of the project must be commenced prior to the effective date of a revision to this subchapter under which the project would no longer meet the requirements for a standard permit.

(3) The proposed project must comply with the applicable provisions of the Federal Clean Air Act (FCAA), §111 (concerning New Source Performance Standards) as listed under 40 Code of Federal Regulations (CFR) Part 60, promulgated by the United States Environmental Protection Agency (EPA).

(4) The proposed project must comply with the applicable provisions of FCAA, §112 (concerning Hazardous Air Pollutants) as listed under 40 CFR Part 61, promulgated by the EPA.

(5) The proposed project must comply with the applicable maximum achievable control technology standards as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA, §112, 40 CFR Part 63)).

(6) If subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) the proposed facility, group of facilities, or account must obtain allocations to operate.

(b) Any project that constitutes a new major stationary source or major modification as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) because of emissions of air contaminants other than greenhouse gases is subject to the requirements of §116.110 of this title (relating to Applicability) rather than this subchapter. Notwithstanding any provision in any specific standard permit to the contrary, any project that constitutes a new major stationary source or major modification which is subject to Subchapter B, Division 6 of this chapter (relating to Prevention of Significant Deterioration Review) due solely to emissions of greenhouse gases may use a standard permit under this chapter for air contaminants that are not greenhouse gases.

(c) Persons may not circumvent by artificial limitations the requirements of §116.110 of this title.

(d) Any project involving a proposed affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) shall comply with all applicable requirements under Subchapter E of

this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)). Affected sources subject to Subchapter E of this chapter may use a standard permit under this subchapter only if the terms and conditions of the specific standard permit meet the requirements of Subchapter E of this chapter.

§116.611. Registration to Use a Standard Permit.

(a) If required, registration to use a standard permit shall be sent by certified mail, return receipt requested, or hand delivered to the executive director, the appropriate commission regional office, and any local air pollution program with jurisdiction, before a standard permit can be used. The registration must be submitted on the required form and must document compliance with the requirements of this section, including, but not limited to:

- (1) the basis of emission estimates;
- (2) quantification of all emission increases and decreases associated with the project being registered;
- (3) sufficient information as may be necessary to demonstrate that the project will comply with §116.610(b) of this title (relating to Applicability);
- (4) information that describes efforts to be taken to minimize any collateral emissions increases that will result from the project;
- (5) a description of the project and related process; and
- (6) a description of any equipment being installed.

(b) Construction may begin any time after receipt of written notification from the executive director that there are no objections or 45 days after receipt by the executive director of the registration, whichever occurs first, except where a different time period is specified for a particular standard permit or the source obtains a prevention of significant deterioration permit for greenhouse gases as provided in §116.164(a) of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources).

(c) In order to avoid applicability of Chapter 122 of this title (relating to Federal Operating Permits), a certified registration shall be submitted. The certified registration must state the maximum allowable emission rates and must include documentation of the basis of emission estimates and a written statement by the registrant certifying that the maximum emission rates listed on the registration reflect the reasonably anticipated maximums for operation of the facility. The certified registration shall be amended if the basis of the emission estimates changes or the maximum emission rates listed on the registration no longer reflect the reasonably anticipated maximums for operation of the facility. The certified registration shall be submitted to the executive director; to the appropriate commission regional office; and to all local air pollution control agencies having jurisdiction over the site. Certified registrations must also be maintained in accordance with the requirements of §116.115 of this title (relating to General and Special Conditions).

- (1) Certified registrations established prior to December 11, 2002, shall be submitted on or before February 3, 2003.
- (2) Certified registrations established on or after December 11, 2002, shall be submitted no later than the date of operation.
- (3) Certified registrations established for greenhouse gases (as defined in §101.1 of this title (relating to Definitions)) on or after the effective date of EPA's final action approving amendments to §122.122 of this title (relating to Potential to Emit) into the State Implementation Plan shall be submitted:

(A) for existing sites that emit or have the potential to emit greenhouse gases, no later than 12 months after the effective date of EPA's final action approving amendments to §122.122 of this title as a revision to the Federal Operating Permits Program; or

(B) for new sites that emit or have the potential to emit greenhouse gases, no later than the date of operation.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 122. FEDERAL OPERATING PERMITS PROGRAM

The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts the amendments to §§122.10, 122.122 and 122.130 *with changes* to the proposed text as published in the November 8, 2013, issue of the *Texas Register* (38 TexReg 7912).

The commission will submit §122.122 to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

In *Massachusetts v. EPA* (549 U.S. 497 (2007)) the Supreme Court of the United States ruled that greenhouse gases (GHGs) fit within the Federal Clean Air Act (FCAA or Act) definition of air pollutant. This ruling gave EPA the authority to regulate GHGs from new motor vehicles and engines if EPA made a finding under FCAA, §202(a) that six key GHGs taken in combination endanger both public health and welfare, and that combined emissions of GHGs from new motor vehicles and engines contribute to pollution that endangers public health and welfare. EPA issued its "Endangerment Finding" for GHGs on December 15, 2009 (Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, as published in the December 15, 2009, issue of the *Federal Register* (74 FR 66496)). Based on the Endangerment Finding, EPA subsequently adopted new emissions standards for motor vehicles (the "Tailpipe Rule" as published in the May 7, 2010, issue of the *Federal Register* (75 FR 25324)). The rule established standards for light-duty motor vehicles to improve fuel economy thereby reducing emissions of GHGs. The standards were effective January 2, 2011. EPA also reconsidered its interpretation of the timing of applicability of Prevention of Significant Deterioration (PSD) under the FCAA (the "Timing Rule" as published in the April 2, 2010, issue of the *Federal Register* (75 FR 17004)). EPA's interpretation of the FCAA is that PSD requirements for stationary sources of GHGs take effect when the first national rule subjects GHGs to regulation under the Act. EPA determined that once GHGs

were actually being controlled under any part of the Act they were subject to regulation under the PSD program. Specifically, EPA took the position that beginning on January 2, 2011, GHGs control requirements would be required under the PSD and Title V permitting programs because national standards for GHGs under the Tailpipe Rule were effective on January 2, 2011.

EPA's regulation of GHGs under the FCAA presented substantial difficulties for the EPA and states, particularly with regard to the PSD program. For instance, the most common of the GHGs, carbon dioxide (CO₂), is emitted in quantities that dwarf the Act's major source thresholds for program applicability. As a result, under EPA's Timing Rule, PSD requirements could have expanded from approximately 500 issued permits annually to more than 81,000 nationwide, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514, 31537 and 31538). To avoid this result, EPA excluded much of this new construction activity from the PSD program by altering the Act's statutory emission rate applicability thresholds for GHGs. This "Tailoring Rule," as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514) newly defined the statutory term "subject to regulation" and established higher GHGs emission thresholds for applicability of PSD and Title V permitting than specified in the FCAA. The Tailoring Rule also phased in permitting requirements in a multi-stepped process.

Before the *Massachusetts* decision in 2007, EPA took the position that GHGs are not regulated under the FCAA, and GHGs unquestionably were not regulated when EPA approved Texas' SIP in 1992. Texas has had an approved SIP since 1972, as published in the May 31, 1972, issue of the *Federal Register* (37 FR 10842). In 1983, Texas was delegated authority to implement the PSD program, as published in the February 9, 1983, issue of the *Federal Register* (48 FR 6023). Following this delegation, Texas submitted several SIP revisions to enable it to administer the PSD program (collectively the "PSD SIP submission"). EPA approved Texas' PSD SIP in 1992, granting the state full authority to implement the PSD program, as published in the June 24, 1992, issue of the *Federal Register* (57 FR 28093).

The Texas PSD SIP submission and approval proceedings produced a well-developed record on how Texas would address the applicability of newly-regulated pollutants under the PSD program. During the SIP submission process, Texas consistently explained to EPA that the PSD provisions in the SIP are not prospective rulemaking, and do not incorporate future EPA interpretations of the Act or its regulations.

EPA's GHGs regulations created practical difficulties about how EPA could apply its Tailoring Rule in states with approved SIPs. In August 2010, Texas advised EPA that it could not retroactively reinterpret its SIP to cover GHGs, which were not regulated at the time Texas' SIP was approved in 1992 and were, in fact, a composite pollutant defined for the first time in the Tailoring Rule. Texas also explained that the PSD program only encompassed National Ambient Air Quality Standard (NAAQS) pollutants, but confirmed as a regulatory matter that the approved PSD program encompasses all federally regulated new source review (NSR) pollutants, including any pollutant that otherwise is subject to regulation under the FCAA, as stated in 30 TAC §116.12(14)(D).

Following promulgation of the Tailoring Rule, EPA issued a proposed "Finding of Substantial Inadequacy and SIP Call," as published in the September 2, 2010, issue of the *Federal Register* (75 FR 53892). This action proposed finding the SIPs of 13 states, including Texas', "substantially inadequate" because

these SIPs did not apply PSD requirements to GHGs-emitting sources. EPA proposed to require these states (through their SIP-approved PSD programs) to regulate GHGs as defined in the Tailoring Rule. EPA also proposed a Federal Implementation Plan (FIP) that would apply specifically to states that did not or could not agree to reinterpret their SIPs to impose the Tailoring Rule and did not meet SIP submission deadlines. EPA finalized its GHG SIP Call in the December 12, 2010, issue of the *Federal Register* (75 FR 77698) and required Texas to submit revisions to its SIP by December 1, 2011.

EPA published an interim final rule partially disapproving Texas' SIP; imposing the GHGs FIP effective as of its date of publication, as published in the December 30, 2010, issue of the *Federal Register* (75 FR 82430). EPA stated that FCAA, §110(k)(6) authorized it to change its previous approval of Texas' PSD SIP into a partial approval and partial disapproval. EPA's basis was that it had erroneously approved Texas' PSD SIP submission because the SIP did not appropriately address the applicability of newly-regulated pollutants to the PSD program in the future. EPA further stated that its action was independent of the GHG SIP Call because that action was aimed at a narrower issue of applicability to GHGs, whereas its decision retroactively disapproving Texas' PSD SIP submission was addressed to Texas' purported failure to address, or assure the legal authority for, application of PSD to all pollutants newly subject to regulation. EPA published the final rule retroactively disapproving Texas' PSD SIP in part and promulgating the FIP as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178).

The effect of EPA's FIP is that major source preconstruction permitting authority is divided between two authorities - EPA for GHGs and the State of Texas for all other pollutants. Currently, major construction projects and expansions in Texas that require PSD permits must file applications with both EPA Region 6 (for GHGs) and TCEQ (for all non-GHG pollutants).

Although Texas has an EPA-approved Title V operating permit program, it currently lacks the approval to permit sources that are major sources subject to Title V as a result of their emissions of GHG. In EPA's "Action to Ensure Authority to Implement Title V Permitting Programs Under the Greenhouse Gas Tailoring Rule," as published in the December, 30, 2010, issue of the *Federal Register* (75 FR 82254), EPA stated in footnote 8 that in this situation, there is no obligation for these major GHG sources to apply for a Title V permit until such time as the state amends its rules to make the permit program applicable to them.

House Bill (HB) 788, 83rd Legislature, 2013, added Texas Health and Safety Code (THSC), §382.05102. THSC, §382.05102 grants TCEQ authority to authorize emissions of GHGs consistent with THSC, §382.051, to the extent required under federal law. THSC, §382.05102 directs the commission to adopt implementing rules, including a procedure to transition GHG PSD applications currently under EPA review to the TCEQ. Upon adoption, the rules must be submitted to EPA for review and approval into the Texas SIP. THSC, §382.05102 excludes permitting processes for GHGs from the contested case hearing procedures in THSC, Chapter 382; Texas Water Code, Chapter 5; and Texas Government Code, Chapter 2001. THSC, §382.05102 also requires that the commission repeal the rules adopted under this authority and submit a SIP revision to EPA, if (at a future date) emissions of GHGs are no longer required to be authorized under federal law. The amendments to §§122.10, 122.122, and 122.130 will be submitted to EPA for approval as revisions to Texas' Federal Operating Permits Program.

The commission initiated this rulemaking to fulfill the directive from the legislature. The legislature found that "in the interest of the continued vitality and economic prosperity of the state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred authority for emissions of {GHGs}."

Texas has challenged in federal court EPA's GHG regulations as well as EPA's SIP Call and FIP. Implementation of HB 788 through this rulemaking is not adverse to Texas' claims in its ongoing challenges to EPA's actions regarding GHGs generally or relating to the SIP. The commission's action to conduct rulemaking for submittal and approval by EPA is consistent with Texas' position that state law does not give EPA the authority to automatically change state regulations.

The United States Supreme Court is currently considering Texas' challenge to EPA's authority to regulate stationary sources of GHGs under the FCAA. If the court issues a ruling that invalidates or renders unenforceable all or some of EPA's regulations of GHGs after adoption and submittal of these rules to EPA, the commission intends to follow the direction in THSC, §382.05102 to promptly repeal or amend the rules as necessary based on the court's order, and submit the changes or repeal to EPA to remove the provisions from the SIP.

Concurrently with this rulemaking, the commission is adopting new and amended rules to 30 TAC Chapters 39 (Public Notice), 55 (Requests for Reconsideration and Contested Case Hearings; Public Comment), 101 (General Air Quality Rules), 106 (Permits by Rule), and 116 (Control of Air Pollution by Permits for New Construction or Modification) to implement HB 788. Except where specifically noted, all adopted changes to Chapters 39, 55, 101, 106, 116, and 122 are necessary to achieve the goal of implementation of HB 788, obtaining SIP approval of certain rules, and rescission of the FIP.

Section by Section Discussion

§122.10, General Definitions

The commission adopts the amendment to §122.10 to modify the definition of air pollutant to include the pollutant GHGs, amend the definition of applicable requirement, add the definition of carbon dioxide equivalent (CO₂e) emissions, and amend the definition of major source. The commission also adopts nonsubstantive changes to correct errors and appropriately renumber paragraphs.

The commission amends the definition of "Air pollutant" in §122.10(1) to include the pollutant GHGs. The definition of GHGs establishes that the regulated pollutant GHGs is the aggregate group of six GHGs including: CO₂, nitrous oxide (N₂O), methane (CH₄), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆). This definition is consistent with EPA's definition in 40 Code of Federal Regulations (CFR) §51.166(b)(48). HFCs are compounds containing only hydrogen, fluorine, and carbon atoms. PFCs are compounds containing only carbon and fluorine atoms. Other gases that are commonly considered GHGs are not included in the definition of the pollutant GHGs.

The definition of "Applicable requirement" in §122.10(2)(I)(xi) is amended to add EPA-issued PSD permits to the list of federal requirements applicable to a site. Federal operating permits must include all state and federal air quality related requirements applicable to the particular site covered by the permit. This ad-

dition is necessary to incorporate EPA-issued GHG permits in operating permits as applicable requirements, as these are not currently included in the definition.

The definition of CO₂e emissions in §122.10(3) is consistent with EPA's definition in 40 CFR §51.166(b)(48). The new definition is necessary to establish the threshold for sites to be considered major for GHGs, consistent with EPA's Tailoring Rule. The CO₂e emissions are determined by multiplying the mass amount (in tons per year (tpy)) of emissions of each of the gases (that are included in the definition of the pollutant GHGs) by the global warming potential (GWP) of the gas, and adding the results. The GWPs are published in the 40 CFR Part 98, Subpart A, Table A-1 - Global Warming Potentials. For example, a site has the potential to emit 5 tpy CO₂, 25 tpy of CH₄, and 10 tpy of the hydrofluorocarbon trifluoromethane (CHF₃). The GWP of CO₂e is 1, the GWP of CH₄ is 25, and the GWP of CHF₃ is 14,800. The CO₂e emissions of the source would be 148,630 tpy CO₂e. This value is reached by multiplying 5 tpy CO₂ times 1, 25 tpy CH₄ by 25, and 10 tpy CHF₃ by 14,800; then adding each result to total 148,630 tpy CO₂e.

The commission is not adopting EPA's deferral for CO₂ emissions from bioenergy and other biogenic sources as published in the July 20, 2011, issue of the *Federal Register* (76 FR 43490). The deferral expires July 21, 2014, and would not be in effect for GHG PSD permitting under the Texas SIP. Further discussion is included in the response to comments section.

The commission amends the definition of major source in §122.10(14) to establish the specific Title V permitting major source thresholds for emissions of GHGs. The major source thresholds for Title V sources are contained in §122.10(14)(H) and referenced in §122.10(14)(C). Consistent with EPA's Tailoring Rule, sites that emit or have the potential to emit GHGs must evaluate both their emissions of GHGs on a mass basis and as CO₂e emissions to determine Title V applicability. To evaluate the mass basis element of applicability, the potential emissions (in tpy) of each of the six GHGs would be added together. If the total meets or exceeds 100 tpy, the CO₂e emissions total must also be calculated to determine Title V applicability. The potential emissions of each of the six GHGs would be multiplied by its respective GWP, and the results would be added together. If the total is greater than or equal to 100,000 tpy CO₂e, the site would be subject to the Title V permitting program. If either one of the thresholds is not met or exceeded, the site is not subject to the Title V permitting program. For example, a site emits or has the potential to emit 10,000 tpy CO₂ and 3,500 tpy CH₄. The total emissions of GHGs on a mass basis exceed 100 tpy GHGs, so the CO₂e emissions must be calculated. The GWP of CO₂ is one and the GWP of CH₄ is 25. Multiply 10,000 tpy CO₂ by the GWP of 1, multiply 3,500 tpy CH₄ by the GWP of 25, and add the two results to get 97,500 tpy CO₂e. This site would not be subject to the Title V permitting program, because both thresholds were not exceeded.

In another example, a site emits or has the potential to emit 20,000 tpy CO₂ and 4,500 tpy CH₄. This site would be a major source and subject to the Title V permitting program because the 24,500 tpy GHGs on a mass basis is equal to or greater than 100 tpy GHGs, and the 132,500 CO₂e emissions are greater than 100,000 tpy CO₂e. To get this result, multiply 20,000 tpy CO₂ by the GWP of 1, multiply 4,500 tpy CH₄ by the GWP of 25, and add the two results to get 132,500 tpy CO₂e.

The commission amends §122.10(2)(F)(iii) and (J)(vii) to correct the title of referenced sections.

§122.122, *Potential to Emit*

The commission adopts the amendment to §122.122(e) to clarify that existing sites may certify emissions below major source thresholds. Since the pollutant GHGs is being added to the Title V (and PSD) permitting program, sites with sources of GHGs which are currently operating may have the potential to emit over the major source thresholds, but actual emissions may be below the thresholds. These sites will have 12 months after EPA's final action approving revisions to the Federal Operating Permits Program to certify emissions of GHGs in order to avoid applicability of Title V permitting. Sites with new sources of GHGs would be required to certify emissions no later than the date of operation.

The commission adopts the amendment to §122.122(e)(1) and (2) to reflect the current requirements and reference the specific date those provisions were effective.

§122.130, *Initial Application Due Dates*

The commission adopts §122.130(b)(3) to establish the deadline for sources that are subject to Title V permitting to submit an application. If a source becomes subject to the Title V program for the first time because of emissions of GHGs, owners or operators will have to submit an abbreviated application no later than 12 months after EPA's final action approving the Federal Operating Permits Program revision.

The commission adopts nonsubstantive changes to §122.130(c) to expand the acronym for "Code of Federal Regulations."

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis (RIA) requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a (RIA).

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the revisions to Chapter 122 is to implement relevant provisions of HB 788 to add six GHGs to the pollutants subject to the Operating Permits Program and to establish the emissions thresholds for applicability of the program consistent with federal requirements in the final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule in the June 3, 2010, issue of the *Federal Register* (75 FR 31514).

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a RIA for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted rules implement requirements of the FCAA. Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. One of the requirements of 42 USC, §7410 is for states to include programs for the regulation of the modification and construction of any stationary source within the area covered by the plan as necessary to assure that the NAAQS are achieved, including a permit program as required in FCAA, Parts C and D, or NSR. Title V of the FCAA (42 USC, §§7661 - 7661e) requires each state to adopt and implement an Operating Permits Program consistent with EPA regulations. This rulemaking will implement provisions in HB 788 to establish the TCEQ as the Title V permitting authority for major sources of emissions of GHGs in Texas and will do so consistent with federal law governing this program. Specifically, the amendments to Chapter 122 add six GHGs to the pollutants subject to the Operating Permits Program, establish the emissions thresholds for applicability of the program consistent with federal requirements in the Tailoring Rule, and ensure that relevant sections of Chapter 122 can be a federally approved part of the Texas SIP.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633, 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the adopted rules may have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, the rules fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code

but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." (*Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with *per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). Cf. *Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The adopted rules do not exceed an express requirement in federal or state law. This rulemaking implements relevant provisions of THSC, §382.05102, as added by HB 788, 83rd Legislature, 2013. The rules do not exceed a requirement of a delegation agreement or any contract between the state and a federal agency, because there is no agreement applicable to this rulemaking, and are not adopted solely under the general powers of the agency but are authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act (TCAA)), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the draft RIA determination during the public comment period. No comments were received on the RIA determination.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution §17 or §19, Article I; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the adopted rulemaking under the Texas Government Code, §2007.043. The primary purpose of this rulemaking, as discussed elsewhere in this preamble, is to implement provisions in HB 788 to establish the TCEQ as the permitting authority for major sources of emissions of GHGs in Texas and to do so consistent with federal law. Specifically, the amendments to Chapter 122 add six GHGs to the pollutants subject to the Federal Operating Permits Program and establish the emissions thresholds for applicability of the program consistent with federal requirements in the Tailoring Rule.

The adopted rules will not create any additional burden on private real property. The rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The rulemaking will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The adopted rules amend and update rules that govern the applicability of the Title V program to major sources of emissions of GHGs. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Effect on Sites Subject to the Federal Operating Permits Program

This rulemaking impacts owners and operators of sites subject to the Texas Operating Permits Program (Title V) requiring applications for or revisions to operating permits. The rules also create new Title V sources subject to the program for only emissions of GHGs.

Public Comment

The commission held a public hearing on December 5, 2013. The public comment period ended on December 9, 2013. The commission received comments from Air Alliance Houston (AAH); Association of Electric Companies of Texas, Inc (AECT); C3 Petrochemicals (C3P); Calpine Corporation (Calpine); Environment Texas; Gas Processors Association (GPA); Golden Pass Products LLC (Golden Pass); Golden Spread Electric Cooperative, Inc. (GSEC); House Bill 788 Working Group (HB788WG); Jackson Walker L.L.P.; Lone Star Chapter of the Sierra Club (Sierra Club); Natgasoline, LLC; Occidental Chemical Corporation (OCC); OCI Beaumont, LLC; Pioneer Natural Resources (Pioneer); Public Citizen; State Representative Lon Burnam; Sustainable Energy and Economic Development Coalition (SEED); Texas Chemical Council (TCC); Texas Combined Heat and Power Initiative (TXCHPI); Texas Industry Project (TIP); Texas Oil and Gas Association (TXOGA); Texas Pipeline Association (TPA); Texas Solid Waste Association of North America (TxSWANA); Weaver Boos Consultants, LLC (Weaver); and Zephyr Environmental Corporation (Zephyr). This comprehensive list includes all of the commenters for all of the chapters of this concurrent rulemaking project. The individual comments are addressed in the Response to Comment section of the appropriate chapter. Eighteen of the commenters supported the rulemaking or portions of the rulemaking, six commenters opposed portions of the rulemaking, and 18 commenters suggested changes.

Response to Comments

Comment

TCC supported the changes made to Chapter 122, including the proposed modified definition of "Air pollutant" to include the pollutant GHGs, the proposed calculation method for quantifying GHGs with regard to Title V applicability; and the proposed requirement to submit an abbreviated application within 12 months of EPA's approval of Texas' Federal Operating Permit revision or the revision to the SIP, if a facility becomes subject to the Title V program as a result of rulemaking to add GHG sources.

Response

The commission appreciates the support.

30 TAC §122.10 Comments

Comment

HB788WG and TIP commented regarding the date of the table which lists GWPs which was incorporated in proposed §116.12(7) and §122.10(3). HB788WG commented that TCEQ should include in the final definition of CO₂e a reference to a specific version of EPA's GWP table at 40 CFR Part 98, Subpart A, Table A-1. The commenter suggested including the January 2, 2014, effective date of the referenced table in the rule language. HB788WG commented that Texas permit holders should be provided the predictability and certainty afforded by GWP values that are set in rule, and that will not change absent changes to the TAC and the Texas SIP. TIP commented that the EPA's revisions to the GWP table were effective January 1, 2014, and that TCEQ's rule should reflect the most up-to-date GWP values as of the date of adoption.

Response

No change was made to the rule in response to these comments. The commission agrees that the proposed definition of CO₂e will reflect the most up-to-date version of the GWP Table in 40 CFR Part 98, Subpart A, Table A-1. The state-federal part-

nership created by Congress in the FCAA, gives state and local governments the primary responsibility for air pollution control and prevention; and granted EPA responsibility to promulgate reasonable standards and regulations for the states to implement. Through the present and past rulemakings, TCEQ has accepted responsibility to implement FCAA permitting requirements in Texas. In several circumstances, the commission has chosen, by necessity, to incorporate certain EPA promulgated requirements and procedures, where a state action to effectuate future federal rule changes would be duplicative (or redundant) and cause delays in permitting.

When EPA updates the GWPs, there is stakeholder participation and adequate notice given so applicants will have certainty regarding the appropriate GWPs. The GWPs are set at the federal level, so they will apply if TCEQ conducts rulemaking or not. This is consistent with the TCEQ's implementation of emission factors derived by EPA.

Furthermore, the legislature directed TCEQ to permit GHGs "to the extent" these emissions require authorization under federal law. 40 CFR Part 98, Subpart A, Table A-1 is required to be used under federal PSD and Title V requirements for determining when tailored thresholds are triggered for new or modified major sources of GHG.

Comment

GPA, HB788WG, TIP, and TPA requested clarification regarding the commission's intent for GWPs that change in the future. HB788WG commented that TCEQ should provide certainty with regard to PSD applicability determinations based on potentially shifting GWP values in the preamble to the final rule. HB788WG and TIP requested TCEQ confirm the commission's intent regarding "retroactive" application of GWP values when calculating GHG PSD applicability for permit actions. HB788WG, TIP, and TPA requested clarification on TCEQ's concurrence with EPA's intent as stated in the November 29, 2013, issue of the *Federal Register* (78 FR 71915 - 71916), "PSD permitting obligations should not be affected for a source or modification that has either already obtained a PSD permit or begun actual construction at a time when it was legitimately considered a source that did not require a PSD permit." GPA, TIP, and TPA commented that TCEQ should prevent a change in the GWPs from having a retroactive effect on a source's preconstruction authorization or synthetic minor certification.

Response

No change was made to the rule in response to these comments. The commission clarifies that changes to the GWP values will not require any retroactive review for previously-issued preconstruction authorizations, and the commission concurs with the quote from EPA provided by the commenters. Once TCEQ becomes the permitting authority for GHG PSD, a source would obtain all preconstruction authorizations from a single permitting authority. Therefore, if a source is not subject to GHG PSD permitting according to §116.164 at the time the authorization for non-GHG emissions is issued, a subsequent change in the GWPs would not require GHG PSD permitting. The GHG PSD applicability in adopted §116.164(a) relies on an action taken by the owner or operator, such as applying for authorization for new construction or a modification of an existing source.

Applicability of the Title V program is based on the definition of major source in §122.10(14)(H). The Title V threshold is based on potential to emit, and is not dependent on construction or modification undertaken by an owner or operator. If the GWPs

change, the owner or operator must evaluate their potential to emit with the revised GWPs. Changes to GWPs could affect a source's certification below Title V thresholds under §116.611 and §122.122. Depending on the limits in the certification, a GWP change could result in the need to revise the certification. For example, if an owner or operator of a source certifies to a limit in tpy of CO₂e, and the GWP change would result in an exceedance of the certified limit, a revised certification may be needed. Sources with emissions of GHGs that exceed the major source threshold in §122.10(14)(H) would be required to apply for a Title V permit.

Comment

GPA and TPA commented that if a change in the GWP tables causes a source to become subject to the Title V permitting program, the source should have 12 months from the effective date of the GWP change to submit an application for a Title V permit.

Response

No change was made to the rule in response to these comments. The commission clarifies that a change in the GWPs is addressed in the requirements in §122.130(b)(2). "If the site becomes subject to the program as the result of an action by the executive director or the EPA, the owner or operator will submit an abbreviated application no later than 12 months after the action that subjects the site to the requirements of this chapter." Changes to GWPs would be the result of rulemaking by EPA. Therefore, if the GWP change causes a site to become subject to Title V permitting, an abbreviated application is required to be submitted within 12 months of the effective date of the EPA action. This is consistent with EPA's interpretation of Title V applicability triggered by changes to the GWP Table as published on page 71915 of the November 29, 2013, issue of the *Federal Register* (78 FR 71904 - 71917).

Comment

GPA and TIP commented that existing permit conditions with CO₂e limitations (which were based on prior GWP values) should continue to use the GWPs that were in effect when the permit was issued. GPA suggested that updating permit conditions should be considered an administrative change that should not require public notice and comment. TIP commented that some EPA-issued permits specify the GWPs to be used to determine compliance with the permit. GPA commented that existing permit conditions expressed in CO₂e emissions could be updated in periodic Title V renewals by a simple ratio of the new GWP to the prior-GWP.

Response

No change was made to the rule in response to these comments. The commission clarifies that, consistent with the current policy applied to changes in emission factors, updates to reflect new GWPs in emission limits expressed as CO₂e could be updated as a correction to a previously-issued GHG PSD permit, at the applicant's request. Corrections conducted because EPA changed GWP values would not be considered modifications because they are not a physical or operational change, and would not be subject to public notice requirements.

The Title V permit cannot be used as a mechanism to change any existing permit conditions or limitations in a GHG PSD (or any NSR) permit. However, changes to GHG PSD permits or applicable requirements may result in the need to revise the Title V permit.

Comment

Sierra Club and TCC commented that the exception for biogenic emissions proposed in §116.12(7)(B) should be removed from the rule language. Sierra Club commented that the exception would have little practical effect because of the July 21, 2014, expiration date. Sierra Club also commented that facilities using organic material should be subject to the same rules as other industries when it comes to GHG PSD permits. TCC and TIP commented that the District of Columbia Circuit Court struck down the federal biomass deferral rule on July 12, 2013, in *Center for Biological Diversity, et al. v. EPA*, No. 11-1101. (*Center for Biological Diversity v. EPA*, No. 11-1101 & consolidated cases (D.C. Cir. Jul. 12, 2013.)) TCC commented that TCEQ should either remove this clause from the rule, or provide that this portion will sunset if a final non-appealable judgment vacates EPA's biomass deferral rule.

TIP commented that unless that July 12, 2013, court decision is superseded, it appears that EPA may lack a legal basis to approve a rule that includes a deferral for biomass CO₂ emissions. TIP recommended that the proposal be amended to provide that the biomass deferral will sunset if a final, non-appealable judgment by a court of competent jurisdiction vacates the EPA's biomass deferral rule. Alternatively, TIP suggested the biomass deferral not be included as part of the SIP revisions. TXOGA commented that the exception for biogenic emissions should only apply to the extent required by federal regulation. TXOGA suggested that TCEQ provide an adequate opportunity for notice and comment before taking state action to promulgate such an exception if not federally required. Environment Texas commented that the rule should include a provision on how the emissions from biogenic sources will be determined after expiration date of July 21, 2014.

Zephyr commented that the language in §116.12(7)(B) forces the exclusion of biogenic derived GHGs, instead of simply allowing for their disuse. Zephyr commented that this would result in the lowering of historic baselines, penalizing applicants that have been making the effort to use renewable fuel sources. Zephyr suggested changing "shall" to "may" in §116.12(7)(B), and requested clarification that after July 21, 2014, the baseline actuals do not need to exclude these emissions. Zephyr also requested adding language to extend the deadline if EPA extends the date based on the promised study of bio fuels.

TxSWANA commented in support of the biogenic CO₂ exclusion. Additionally, TxSWANA commented that the TCEQ should consider adding rule language making it clear that, if EPA creates a permanent biogenic CO₂ exclusion, it would become permanent in Texas without the need for further rulemaking.

Response

The commission has modified §116.12(7)(B) and §122.10(3)(B) in response to these comments. The commission has removed the proposed biomass exclusion from the adopted definition of CO₂e. As several commenters stated, the United States Court of Appeals for the District of Columbia Circuit recently vacated the biomass deferral included in federal rule (*Center for Biological Diversity v. EPA*, No. 11-1101 and consolidated cases). The deferral language that was vacated is identical to the proposed exclusion in the definitions. The Circuit Court's ruling is abated pending a decision by the United States Supreme Court on the main GHGs rules (*Utility Air Regulatory Group v. EPA*, S. Ct. Nos. 12-1146, *et al.*), meaning the biomass deferral is not formally vacated and subject to appeal. EPA has not indicated that

it will appeal the Circuit Court's decision. However, in EPA's parallel processed proposal on the SIP rules, EPA has indicated it will take no action on §116.12(7)(B) in the February 18, 2014, issue of the *Federal Register* (79 FR 9123). Therefore, the deferral for biomass emissions in CO₂e calculations will not be in effect for GHG PSD permitting under the Texas SIP.

Regardless of whether EPA decides to appeal and regardless of EPA's proposal on the SIP approval of the adopted rules in this rulemaking, the deferral in §116.12(7)(B) is set to expire July 21, 2014. The commission expects that EPA will approve these GHG PSD program rules as adopted into the SIP and lift the FIP soon after the rules are adopted. The timing of the EPA's SIP and FIP actions may be approximately the same time as the biomass deferral expiration. TCEQ cannot issue GHG PSD permits until the FIP is lifted and therefore this exclusion will likely expire and be unavailable to permit applicants. Therefore, the commission has removed the biomass deferral language from Chapter 116 and Chapter 122.

Comment

Weaver and Zephyr requested clarification regarding what requirements for GHGs would need to be added to existing federal operating permits (general operating permits or site operating permits) if a source is below the GHG Title V threshold.

Response

No change was made to the rule in response to these comments. The commission clarifies that *currently* no GHG requirements would be added to existing federal operating permits for sites that are below the GHG Title V threshold in §122.10(14)(H).

Future rulemaking by EPA may create additional applicable requirements for GHGs at certain sites. The requirements under the 40 CFR Part 98 Mandatory GHG Reporting Rule are not considered applicable requirements under Title V (per page 53 of the "PSD and Title V Permitting Guidance for Greenhouse Gases" Document 457-EPA/B-11-001, March 2011).

30 TAC §122.122 Comments

Comment

Zephyr suggested adding the phrase "to limit the potential to emit" to the proposed rule language in §122.122(e)(3).

Response

No change has been made in response to this comment. Section 122.122(a) states that for the purposes of determining applicability, a certified registration may be used to limit the sources' potential to emit. Additionally, §122.122(e)(3)(A) and (B) include the phrase "emit or have the potential to emit GHGs."

Comment

GPA, Pioneer, TCC, TIP, TPA, and TXOGA suggested alternatives to the 90-day deadline to certify emissions in order to avoid Title V applicability that was proposed in §116.611(c)(3)(A) and §122.122(e)(3)(A). GPA, TIP, and TPA suggested a deadline of one year. Pioneer and TXOGA suggested a deadline of 180 days. TCC suggested a deadline of 120 days.

Response

The commission has changed the rule in response to these comments. In the proposal, the commission invited comment regarding the time limit in §122.122(e)(3) to file certified registrations for existing sites that do not have a federally enforceable emission rate for their emissions of GHGs, such as a PSD permit. The

commission proposed a deadline of 90 days based on previous rule language requiring sites that had established certified registrations prior to the 2002 amendments to submit those registrations to TCEQ 90 days after the amendments were adopted. The 2002 amendments were necessary to address deficiencies in the Texas Title V program as determined by EPA. Those amendments did not trigger Title V applicability for a new category of sources for the first time, as do the amendments for emissions of GHGs in this rulemaking.

In §122.130, sources of GHGs that trigger Title V for the first time have up to 12 months after EPA approval of these program rules to submit an abbreviated application to TCEQ. This is consistent with federal and state application due dates when an EPA or TCEQ action causes a site to become subject to Title V. Given that site owners or operators have up to 12 months to submit an abbreviated application if they are subject to Title V, it is reasonable to provide more time to certify that a site is not subject to the Title V permitting program. Changing the submittal deadline from 90 days to up to 12 months provides a reasonable time for owner or operators to quantify emissions of GHGs and is consistent with the time allowed for initial Title V applications to be submitted to TCEQ.

For consistency, the commission has changed §122.130(b)(3) from proposal to remove the reference to SIP approval of §122.122. Subsequent to proposal of this rulemaking, EPA Region 6 informed the commission that, in addition to submitting §122.122 as a revision to the SIP, amendments to Chapter 122, including the Potential to Emit section, must be submitted as a separate revision to Texas' Federal Operating Permits Program. Although EPA has proposed approval of revisions to the SIP, it has not done so for the Operating Permits Program revisions. Therefore, the commission anticipates EPA will propose action on the Chapter 122 amendments shortly after the commission adopts and submits these amended sections to EPA. Thus, EPA action on the Operating Permits Program revision will result in Title V permitting of GHG major sources and trigger the 12-month application clock.

Comment

Weaver commented the proposed rule would require owners and operators of sites that are minor sources of emissions of GHGs and are authorized by standard permits and permits by rule to keep records sufficient to demonstrate the amount of emissions of GHGs from the sources and make the records available when requested, but are not required to submit the records.

Response

No changes were made to the rule in response to this comment. The purpose of the recordkeeping requirement is that owners and operators with new construction, physical changes, or changes in operation that will emit GHGs can demonstrate that none of the conditions in §116.164(a), regarding the applicability of PSD requirements for emissions of GHGs, are met. The intent is not to require recordkeeping of all emissions of GHGs for purposes of reporting to TCEQ. The commission intends that records be available to demonstrate non-applicability of GHG PSD requirements for specific construction or modifications of facilities, and may be needed for future netting.

However, because Title V applicability is based on a source's potential to emit, the commission clarifies that owners or operators may choose to submit a certification in order to avoid Title V applicability, and the certification must include records or data to support the certification.

Comment

Sierra Club commented in general support of the provisions in Chapter 122 (with the exception of the biogenic exclusion in the definition of CO₂e emissions). Sierra Club was supportive of the provision to require those required to get a Title V permit because of emissions of GHGs, to submit an abbreviated application to the TCEQ within 12 months of approval of the TCEQ GHG permitting program by the EPA.

Response

The commission appreciates the support. The commission clarifies that §122.130(b)(3) requires that a Title V application (which can be an abbreviated application) must be submitted no later than 12 months after EPA's final action approving the Federal Operating Permits Program revisions to §§122.10, 122.122 and 122.130. This EPA approval action will result in major sources of GHGs being subject to Title V in Texas.

SUBCHAPTER A. DEFINITIONS

30 TAC §122.10

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also adopted under Texas Health and Safety Code (THSC), §382.011, concerning General Powers and Duties, which authorizes the commission to administer the requirements of the Texas Clean Air Act (TCAA), THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to operate a federal source and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.054, concerning Federal Operating Permit, which requires sources to obtain a federal operating permit; THSC, §382.0541, concerning Administration and Enforcement of Federal Operating Permit, which authorizes the commission to administer and enforce federal operating permits; THSC, §382.0543, concerning Review and Renewal of Federal Operating Permit, which authorizes the commission to review and renew federal operating permits; and THSC, §382.05102, which relates to the permitting authority of the commission for emissions of greenhouse gases. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendment is also adopted under

Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7661 - 7661e, which requires states to develop and submit permit programs to EPA that implement the requirements of the Title V program.

The adopted amendment implements House Bill 788, 83rd Legislature, 2013, TWC, §§5.102, 5.103, and 5.105; THSC, §§382.011, 382.017, 382.051, 382.0513, 382.0515, 382.054, 382.0541, 382.0543, 382.05102, 382.0515, and 382.0518; Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7661 - 7661e.

§122.10. General Definitions.

The definitions in the Texas Clean Air Act, Chapter 101 of this title (relating to General Air Quality Rules), and Chapter 3 of this title (relating to Definitions) apply to this chapter. In addition, the following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Air pollutant--Any of the following regulated air pollutants:

- (A) nitrogen oxides;
- (B) volatile organic compounds;
- (C) any pollutant for which a national ambient air quality standard has been promulgated;
- (D) any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), §111 (Standards of Performance for New Stationary Sources);
- (E) unless otherwise specified by the United States Environmental Protection Agency (EPA) by rule, any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI (Stratospheric Ozone Protection);

(F) any pollutant subject to a standard promulgated under FCAA, §112 (Hazardous Air Pollutants) or other requirements established under §112, including §112(g), (j), and (r), including any of the following:

(i) any pollutant subject to requirements under FCAA, §112(j). If the EPA fails to promulgate a standard by the date established under FCAA, §112(e), any pollutant for which a subject site would be major shall be considered to be regulated on the date 18 months after the applicable date established under FCAA, §112(e); and

(ii) any pollutant for which the requirements of FCAA, §112(g)(2) have been met, but only with respect to the individual site subject to FCAA, §112(g)(2) requirement; or

(G) Greenhouse gases (GHGs)--as defined in §101.1 of this title (relating to Definitions).

(2) Applicable requirement--All of the following requirements, including requirements that have been promulgated or approved by the United States Environmental Protection Agency (EPA) through rulemaking at the time of issuance but have future-effective compliance dates:

(A) all of the requirements of Chapter 111 of this title (relating to Control of Air Pollution From Visible Emissions and Particulate Matter) as they apply to the emission units at a site;

(B) all of the requirements of Chapter 112 of this title (relating to Control of Air Pollution from Sulfur Compounds) as they apply to the emission units at a site;

(C) all of the requirements of Chapter 113 of this title (relating to Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants), as they apply to the emission units at a site;

(D) all of the requirements of Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) as they apply to the emission units at a site;

(E) all of the requirements of Chapter 117 of this title (relating to Control of Air Pollution From Nitrogen Compounds) as they apply to the emission units at a site;

(F) the following requirements of Chapter 101 of this title (relating to General Air Quality Rules):

(i) Chapter 101, Subchapter A of this title (relating to General Rules), §101.1 of this title (relating to Definitions), insofar as the terms defined in this section are used to define the terms used in other applicable requirements;

(ii) Chapter 101, Subchapter A, §101.3 and §101.10 of this title (relating to Circumvention; and Emissions Inventory Requirements);

(iii) Chapter 101, Subchapter A, §101.8 and §101.9 of this title (relating to Sampling; and Sampling Ports) if the commission or the executive director has requested such action;

(iv) Chapter 101, Subchapter F of this title (relating to Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities), §§101.201, 101.211, 101.221, 101.222, and 101.223 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements; Operational Requirements; Demonstrations; and Actions to Reduce Excessive Emissions); and

(v) Chapter 101, Subchapter H of this title (relating to Emissions Banking and Trading) as it applies to the emission units at a site;

(G) any site-specific requirement of the state implementation plan;

(H) all of the requirements under Chapter 106, Subchapter A of this title (relating to Permits by Rule), or Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) and any term or condition of any pre-construction permit;

(I) all of the following federal requirements as they apply to the emission units at a site:

(i) any standard or other requirement under Federal Clean Air Act (FCAA), §111 (Standards of Performance for New Stationary Sources);

(ii) any standard or other requirement under FCAA, §112 (Hazardous Air Pollutants);

(iii) any standard or other requirement of the Acid Rain or Clean Air Interstate Rule Programs;

(iv) any requirements established under FCAA, §504(b) or §114(a)(3) (Monitoring and Analysis or Inspections, Monitoring, and Entry);

(v) any standard or other requirement governing solid waste incineration under FCAA, §129 (Solid Waste Combustion);

(vi) any standard or other requirement for consumer and commercial products under FCAA, §183(e) (Federal Ozone Measures);

(vii) any standard or other requirement under FCAA, §183(f) (Tank Vessel Standards);

(viii) any standard or other requirement under FCAA, §328 (Air Pollution from Outer Continental Shelf Activities);

(ix) any standard or other requirement under FCAA, Title VI (Stratospheric Ozone Protection), unless EPA has determined that the requirement need not be contained in a permit;

(x) any increment or visibility requirement under FCAA, Title I, Part C or any national ambient air quality standard, but only as it would apply to temporary sources permitted under FCAA, §504(e) (Temporary Sources); and

(xi) any FCAA, Title I, Part C (relating to Prevention of Significant Deterioration) permit issued by EPA; and

(J) the following are not applicable requirements under this chapter, except as noted in subparagraph (I)(x) of this paragraph:

(i) any state or federal ambient air quality standard;

(ii) any net ground level concentration limit;

(iii) any ambient atmospheric concentration limit;

(iv) any requirement for mobile sources;

(v) any asbestos demolition or renovation requirement under 40 Code of Federal Regulations (CFR) Part 61, Subpart M (National Emissions Standards for Asbestos);

(vi) any requirement under 40 CFR Part 60, Subpart AAA (Standards of Performance for New Residential Wood Heaters); and

(vii) any state only requirement (including §111.131 of this title (relating to Definitions), §111.133 of this title (relating to Testing Requirements), §111.135 of this title (relating to Control Requirements for Surfaces with Coatings Containing Lead), §111.137 of this title (relating to Control Requirements for Surfaces with Coatings Containing Less Than 1.0% Lead), and §111.139 of this title (relating to Exemptions).

(3) Carbon dioxide equivalent (CO₂e) emissions--shall represent an amount of greenhouse gases (GHGs) emitted, and shall be computed by multiplying the mass amount of emissions in tons per year (tpy) for the GHGs, as defined in §101.1 of this title (relating to Definitions), by the gas's associated global warming potential as published in 40 Code of Federal Regulations Part 98, Subpart A, Table A-1 - Global Warming Potentials, and summing the resultant values.

(4) Continuous compliance determination method--For purposes of Subchapter G of this chapter (relating to Periodic Monitoring and Compliance Assurance Monitoring), a method, specified by an applicable requirement, which satisfies the following criteria:

(A) the method is used to determine compliance with an emission limitation or standard on a continuous basis consistent with the averaging period established for the emission limitation or standard; and

(B) the method provides data either in units of the emission limitation or standard or correlated directly with the emission limitation or standard.

(5) Control device--For the purposes of compliance assurance monitoring applicability, specified in §122.604 of this title (relat-

ing to Compliance Assurance Monitoring Applicability), the control device definition specified in 40 Code of Federal Regulations Part 64, concerning Compliance Assurance Monitoring, applies.

(6) Deviation--Any indication of noncompliance with a term or condition of the permit as found using compliance method data from monitoring, recordkeeping, reporting, or testing required by the permit and any other credible evidence or information.

(7) Deviation limit--A designated value(s) or condition(s) which establishes the boundary for an indicator of performance. Operation outside of the boundary of the indicator of performance shall be considered a deviation.

(8) Draft permit--The version of a permit available for the 30-day comment period under public announcement or public notice and affected state review. The draft permit may be the same document as the proposed permit.

(9) Emission unit--A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a point of origin of air pollutants, including appurtenances.

(A) A point of origin of fugitive emissions from individual pieces of equipment, e.g., valves, flanges, pumps, and compressors, shall not be considered an individual emission unit. The fugitive emissions shall be collectively considered as an emission unit based on their relationship to the associated process.

(B) The term may also be used in this chapter to refer to a group of similar emission units.

(C) This term is not meant to alter or affect the definition of the term "unit" for purposes of the Acid Rain Program.

(10) Federal Clean Air Act, §502(b)(10) changes--Changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

(11) Final action--Issuance or denial of the permit by the executive director.

(12) General operating permit--A permit issued under Subchapter F of this chapter (relating to General Operating Permits), under which multiple similar stationary sources may be authorized to operate.

(13) Large pollutant-specific emission unit--An emission unit with the potential to emit, taking into account control devices, the applicable air pollutant in an amount equal to or greater than 100% of the amount, in tons per year, required for a source to be classified as a major source, as defined in this section.

(14) Major source--

(A) For pollutants other than radionuclides, any site that emits or has the potential to emit, in the aggregate the following quantities:

(i) ten tons per year (tpy) or more of any single hazardous air pollutant listed under Federal Clean Air Act (FCAA), §112(b) (Hazardous Air Pollutants);

(ii) 25 tpy or more of any combination of hazardous air pollutant listed under FCAA, §112(b); or

(iii) any quantity less than those identified in clause (i) or (ii) of this subparagraph established by the United States Environmental Protection Agency (EPA) through rulemaking.

(B) For radionuclides regulated under FCAA, §112, the term "major source" has the meaning specified by the EPA by rule.

(C) Any site which directly emits or has the potential to emit, 100 tpy or more of any air pollutant except for greenhouse gases (GHGs). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source, unless the stationary source belongs to one of the following categories of stationary sources:

(i) coal cleaning plants (with thermal dryers);

(ii) kraft pulp mills;

(iii) portland cement plants;

(iv) primary zinc smelters;

(v) iron and steel mills;

(vi) primary aluminum ore reduction plants;

(vii) primary copper smelters;

(viii) municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) hydrofluoric, sulfuric, or nitric acid plants;

(x) petroleum refineries;

(xi) lime plants;

(xii) phosphate rock processing plants;

(xiii) coke oven batteries;

(xiv) sulfur recovery plants;

(xv) carbon black plants (furnace process);

(xvi) primary lead smelters;

(xvii) fuel conversion plant;

(xviii) sintering plants;

(xix) secondary metal production plants;

(xx) chemical process plants;

(xxi) fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units (Btu) per hour heat input;

(xxii) petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) taconite ore processing plants;

(xxiv) glass fiber processing plants;

(xxv) charcoal production plants;

(xxvi) fossil fuel-fired steam electric plants of more than 250 million Btu per hour heat input; or

(xxvii) any stationary source category regulated under FCAA, §111 (Standards of Performance for New Stationary Sources) or §112 for which the EPA has made an affirmative determination under FCAA, §302(j) (Definitions).

(D) Any site, except those exempted under FCAA, §182(f) (NO_x Requirements), which, in whole or in part, is a major source under FCAA, Title I, Part D (Plan Requirements for Nonattainment Areas), including the following:

(i) any site with the potential to emit 100 tpy or more of volatile organic compounds (VOC) or nitrogen oxides (NO_x) in any ozone nonattainment area classified as "marginal or moderate";

(ii) any site with the potential to emit 50 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "serious";

(iii) any site with the potential to emit 25 tpy or more of VOC or NO_x in any ozone nonattainment area classified as "severe";

(iv) any site with the potential to emit ten tpy or more of VOC or NO_x in any ozone nonattainment area classified as "extreme";

(v) any site with the potential to emit 100 tpy or more of carbon monoxide (CO) in any CO nonattainment area classified as "moderate";

(vi) any site with the potential to emit 50 tpy or more of CO in any CO nonattainment area classified as "serious";

(vii) any site with the potential to emit 100 tpy or more of inhalable particulate matter (PM-10) in any PM-10 nonattainment area classified as "moderate";

(viii) any site with the potential to emit 70 tpy or more of PM-10 in any PM-10 nonattainment area classified as "serious"; and

(ix) any site with the potential to emit 100 tpy or more of lead in any lead nonattainment area.

(E) The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source under subparagraph (D) of this paragraph, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (C) of this paragraph.

(F) Any temporary source which is located at a site for less than six months shall not affect the determination of a major source for other stationary sources at a site under this chapter or require a revision to the existing permit at the site.

(G) Emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not the units are in a contiguous area or under common control, to determine whether the units or stations are major sources under subparagraph (A) of this paragraph.

(H) For GHGs, any site that emits or has the potential to emit 100 tpy or more of GHGs on a mass basis and 100,000 tpy carbon dioxide equivalent (CO₂e) emissions or more. The fugitive emissions of a stationary source shall not be considered in determining whether it is a major source, unless the stationary source belongs to one of the categories of stationary sources listed in subparagraph (C) of this paragraph.

(15) Notice and comment hearing--Any hearing held under this chapter. Hearings held under this chapter are for the purpose of receiving oral and written comments regarding draft permits.

(16) Permit or federal operating permit--

(A) any permit, or group of permits covering a site, that is issued, renewed, or revised under this chapter; or

(B) any general operating permit issued, renewed, or revised by the executive director under this chapter.

(17) Permit anniversary--The date that occurs every 12 months after the initial permit issuance, the initial granting of the authorization to operate, or renewal.

(18) Permit application--An application for an initial permit, permit revision, permit renewal, permit reopening, general operating permit, or any other similar application as may be required.

(19) Permit holder--A person who has been issued a permit or granted the authority by the executive director to operate under a general operating permit.

(20) Permit revision--Any administrative permit revision, minor permit revision, or significant permit revision that meets the related requirements of this chapter.

(21) Potential to emit--The maximum capacity of a stationary source to emit any air pollutant under its physical and operational design or configuration. Any certified registration established under §106.6 of this title (relating to Registration of Emissions), §116.611 of this title (relating to Registration to Use a Standard Permit), or §122.122 of this title (relating to Potential to Emit), or a permit by rule under Chapter 106 of this title (relating to Permits by Rule) or other new source review permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) restricting emissions or any physical or operational limitation on the capacity of a stationary source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is enforceable by the United States Environmental Protection Agency. This term does not alter or affect the use of this term for any other purposes under the Federal Clean Air Act (FCAA), or the term "capacity factor" as used in Acid Rain provisions of the FCAA or the Acid Rain rules.

(22) Preconstruction authorization--Any authorization to construct or modify an existing facility or facilities under Chapter 106 and Chapter 116 of this title (relating to Permits by Rule; and Control of Air Pollution by Permits for New Construction or Modification). In this chapter, references to preconstruction authorization will also include the following:

(A) any requirement established under Federal Clean Air Act (FCAA), §112(g) (Modifications); and

(B) any requirement established under FCAA, §112(j) (Equivalent Emission Limitation by Permit).

(23) Predictive emission monitoring system--A system that uses process and other parameters as inputs to a computer program or other data reduction system to produce values in terms of the applicable emission limitation or standard.

(24) Proposed permit--The version of a permit that the executive director forwards to the United States Environmental Protection Agency for a 45-day review period. The proposed permit may be the same document as the draft permit.

(25) Provisional terms and conditions--Temporary terms and conditions, established by the permit holder for an emission unit affected by a change at a site, or the promulgation or adoption of an applicable requirement or state-only requirement, under which the permit holder is authorized to operate prior to a revision or renewal of a permit or prior to the granting of a new authorization to operate.

(A) Provisional terms and conditions will only apply to changes not requiring prior approval by the executive director.

(B) Provisional terms and conditions shall not authorize the violation of any applicable requirement or state-only requirement.

(C) Provisional terms and conditions shall be consistent with and accurately incorporate the applicable requirements and state-only requirements.

(D) Provisional terms and conditions for applicable requirements and state-only requirements shall include the following:

(i) the specific regulatory citations in each applicable requirement or state-only requirement identifying the emission limitations and standards;

(ii) the monitoring, recordkeeping, reporting, and testing requirements associated with the emission limitations and standards identified under clause (i) of this subparagraph; and

(iii) where applicable, the specific regulatory citations identifying any requirements that no longer apply.

(26) **Renewal**--The process by which a permit or an authorization to operate under a general operating permit is renewed at the end of its term under §§122.241, 122.501, or 122.505 of this title (relating to Permit Renewals; General Operating Permits; or Renewal of the Authorization to Operate Under a General Operating Permit).

(27) **Reopening**--The process by which a permit is reopened for cause and terminated or revised under §122.231 of this title (relating to Permit Reopenings).

(28) **Site**--The total of all stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person (or persons under common control). A research and development operation and a collocated manufacturing facility shall be considered a single site if they each have the same two-digit Major Group Standard Industrial Classification (SIC) code (as described in the Standard Industrial Classification Manual, 1987) or the research and development operation is a support facility for the manufacturing facility.

(29) **State-only requirement**--Any requirement governing the emission of air pollutants from stationary sources that may be codified in the permit at the discretion of the executive director. State-only requirements shall not include any requirement required under the Federal Clean Air Act or under any applicable requirement.

(30) **Stationary source**--Any building, structure, facility, or installation that emits or may emit any air pollutant. Nonroad engines, as defined in 40 Code of Federal Regulations Part 89 (Control of Emissions from New and In-use Nonroad Engines), shall not be considered stationary sources for the purposes of this chapter.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-6087



SUBCHAPTER B. PERMIT REQUIREMENTS DIVISION 2. APPLICABILITY

30 TAC §122.122

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also adopted under Texas Health and Safety Code (THSC), §382.011, concerning General Powers and Duties, which authorizes the commission to administer the requirements of the Texas Clean Air Act (TCAA), THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to operate a federal source and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.054, concerning Federal Operating Permit, which requires sources to obtain a federal operating permit; THSC, §382.0541, concerning Administration and Enforcement of Federal Operating Permit, which authorizes the commission to administer and enforce federal operating permits; THSC, §382.0543, concerning Review and Renewal of Federal Operating Permit, which authorizes the commission to review and renew federal operating permits; and THSC, §382.05102, which relates to the permitting authority of the commission for emissions of GHGs. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules, and Texas Government Code §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendment is also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7661 - 7661e, which requires states to develop and submit permit programs to the United States Environmental Protection Agency that implement the requirements of the Title V program.

The adopted amendment implements House Bill 788, 83rd Legislature, 2013, TWC, §§5.102, 5.103, and 5.105; THSC, §§382.011, 382.017, 382.051, 382.0513, 382.0515, 382.054, 382.0541, 382.0543, 382.05102, 382.0515, and 382.0518; Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7661 - 7661e.

§122.122. *Potential to Emit.*

(a) For purposes of determining applicability of the Federal Operating Permit Program under this chapter, the owner or operator of stationary sources without any other federally-enforceable emission rate may limit their sources' potential to emit by maintaining a certified registration of emissions, which shall be federally-enforceable. Emission rates in new source review permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) and certified registrations provided for under Chapter 106 of this title (relating to Permits by Rule) or Chapter 116 of this title are also federally-enforceable emission rates.

(b) All representations in any registration of emissions under this section with regard to emissions, production or operational limits, monitoring, and reporting shall become conditions upon which the sta-

tionary source shall operate. It shall be unlawful for any person to vary from such representation unless the registration is first revised.

(c) The registration of emissions shall include documentation of the basis of emission rates and a certification, in accordance with §122.165 of this title (relating to Certification by a Responsible Official), that the maximum emission rates listed on the registration reflect the reasonably anticipated maximums for operation of the stationary source.

(d) In order to qualify for registrations of emissions under this section, the maximum emission rates listed in the registration must be less than those rates defined for a major source in §122.10 of this title (relating to General Definitions).

(e) The certified registrations of emissions shall be submitted to the executive director; to the appropriate commission regional office; and to all local air pollution control agencies having jurisdiction over the site.

(1) Certified registrations established prior to December 11, 2002, shall be submitted on or before February 3, 2003.

(2) Certified registrations established on or after December 11, 2002, shall be submitted no later than the date of operation.

(3) Certified registrations established for greenhouse gases (GHGs) (as defined in §101.1 of this title (relating to Definitions)) on or after the effective date of the United States Environmental Protection Agency's final action approving amendments to this section into the State Implementation Plan (SIP) shall be submitted:

(A) for existing sites that emit or have the potential to emit GHGs, no later than 12 months after the effective date of EPA's final action approving amendments to this section as a revision to the Federal Operating Permits Program; or

(B) for new sites that emit or have the potential to emit GHGs, no later than the date of operation.

(f) All certified registrations and records demonstrating compliance with a certified registration shall be maintained on-site and shall be provided, upon request, during regular business hours to representatives of the appropriate commission regional office and any local air pollution control agency having jurisdiction over the site. If however, the site normally operates unattended, certified registrations and records demonstrating compliance with the certified registration must be maintained at an office within Texas having day-to-day operational control of the site. Upon request, the commission shall make any such records of compliance available to the public in a timely manner.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 3. PERMIT APPLICATION

30 TAC §122.130

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also adopted under Texas Health and Safety Code (THSC), §382.011, concerning General Powers and Duties, which authorizes the commission to administer the requirements of the Texas Clean Air Act (TCAA), THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits to operate a federal source and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the TCAA; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions consistent with this chapter; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.054, concerning Federal Operating Permit, which requires sources to obtain a federal operating permit; THSC, §382.0541, concerning Administration and Enforcement of Federal Operating Permit, which authorizes the commission to administer and enforce federal operating permits; THSC, §382.0543, concerning Review and Renewal of Federal Operating Permit, which authorizes the commission to review and renew federal operating permits; and THSC, §382.05102, which relates to the permitting authority of the commission for emissions of GHGs. Additional relevant sections are Texas Government Code, §2006.004, concerning Requirements to Adopt Rules of Practice and Index Rules, Orders, Decisions, which requires state agencies to adopt procedural rules, and Texas Government Code §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. The amendment is also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7661 - 7661e, which requires states to develop and submit permit programs to the United States Environmental Protection Agency that implement the requirements of the Title V program.

The adopted amendment implements House Bill 788, 83rd Legislature, 2013, TWC, §§5.102, 5.103, and 5.105; THSC, §§382.011, 382.017, 382.051, 382.0513, 382.0515, 382.054, 382.0541, 382.0543, 382.05102, 382.0515, and 382.0518; Texas Government Code, §2001.004 and §2001.006; and FCAA, 42 USC, §§7661 - 7661e.

§122.130. Initial Application Due Dates.

(a) Owners or operators of any site subject to the requirements of this chapter on February 1, 1998, shall submit abbreviated initial applications by February 1, 1998. The executive director shall inform the applicant in writing of the deadline for submitting the remaining application information.

(b) Owners and operators of sites identified in §122.120 of this title (relating to Applicability) that become subject to the requirements of this chapter after February 1, 1998 are subject to the following requirements.

(1) If the site is a new site or a site that will become subject to the program as the result of a change at the site, the owner or oper-

ator shall not operate the change, or the new emission units, before an abbreviated application is submitted under this chapter. The executive director shall inform the applicant in writing of the deadline for submitting the remaining information.

(2) If the site becomes subject to the program as the result of an action by the executive director or the United States Environmental Protection Agency (EPA), the owner or operator will submit an abbreviated application no later than 12 months after the action that subjects the site to the requirements of this chapter.

(3) If the site becomes subject to the program as a result of rulemaking revision that adds greenhouse gas sources to the Federal Operating Permits Program, the owner or operator will submit an abbreviated application no later than 12 months after EPA's final action approving the Federal Operating Permits Program revision.

(c) Applications submitted under 40 Code of Federal Regulations (CFR) Part 71 (Federal Operating Permit Programs).

(1) If 40 CFR Part 71 is implemented in Texas by the EPA, applications will only be required to be submitted to the EPA.

(2) If all or part of 40 CFR Part 71 is delegated to the commission, information required by this chapter and consistent with the delegation will be required to be submitted to the commission.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Texas Commission on Environmental Quality

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For further information, please call: (512) 239-6087



TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 2. ENVIRONMENTAL REVIEW OF TRANSPORTATION PROJECTS

The Texas Department of Transportation (department) adopts amendments to §§2.1, 2.2, 2.5 - 2.8, 2.11, 2.12, 2.14, 2.41 - 2.44, 2.46 - 2.52, 2.81, 2.83 - 2.86, 2.131, and 2.134; the repeal of §2.82 and §§2.101 - 2.110; and new §§2.101 - 2.110, all relating to the Environmental Review of Transportation Projects. The amendments to §§2.1, 2.2, 2.5 - 2.8, 2.11, 2.12, 2.14, 2.42, 2.43, 2.46, 2.47, 2.51, 2.52, 2.81, 2.85, 2.86, and 2.131; the repeal of §2.82 and §§2.101 - 2.110; and new §§2.102, 2.104, 2.105, 2.107, 2.109, and 2.110, are adopted without changes to the proposed text as published in the December 6, 2013, issue of the *Texas Register* (38 TexReg 8788) and will not be republished. The amendments to §§2.41, 2.44, 2.48 - 2.50, 2.83, 2.84, and 2.134; and new §§2.101, 2.103, 2.106, and 2.108 are adopted with changes to the proposed text as published in the December 6, 2013, issue of the *Texas Register* (38 TexReg 8788).

EXPLANATION OF ADOPTED AMENDMENTS, REPEALS, AND NEW SECTIONS

In February of 2012, the department substantially revised its environmental review rules in response to Senate Bill 548, Senate Bill 1420, and House Bill 630, enacted by the 82nd Texas Legislature, and setting forth new requirements for the environmental review of highway projects. See the March 9, 2012, issue of the *Texas Register* (37 TexReg 1727). Since then, the department has identified the need to make various additional changes to the rules to permit additional flexibility in certain areas, add clarity, and further streamline and improve the environmental review process. The department also finds it necessary to revise its existing rules to support implementation of Senate Bill 466, which was passed by the 83rd Legislature, and which allows the department to accept assignment of responsibilities under the National Environmental Policy Act (NEPA) and other federal environmental laws from the Federal Highway Administration (FHWA). The department is also revising its environmental review rules to provide consistency with the federal transportation reauthorization bill, MAP-21; and remove references to the department's regions, which are being eliminated. The various changes made in this rulemaking are summarized below.

SUBCHAPTER A. GENERAL PROVISIONS

Amendments to §2.1, Purpose of Rules, add a citation to Transportation Code, §201.6035, recently enacted by the Texas Legislature. This is the statute that authorizes the department to accept the assignment of responsibilities under NEPA and other federal environmental laws from FHWA.

Amendments to §2.2, Environmental Policy, better align the environmental policy statement with the department's overall mission.

Amendments to §2.5, Definitions, eliminate the definitions of several terms that are not used in the amended rules. The amended rule includes a revised definition of "highway project" that is consistent with the definition of that term in Transportation Code, §201.751(3); a new definition for "department public hearing officer," which is a new term used in adopted Subchapter E; and a simplified definition of "state transportation project."

Amendments to §2.6, FHWA Transportation Projects, revise that section to account for FHWA's assignment of responsibilities under NEPA and other environmental laws to the department. The department and FHWA have executed a memorandum of understanding (MOU) by which FHWA has assigned to the department responsibility for making categorical exclusion (CE) determinations under 23 U.S.C. §326. Additionally, the department intends to apply for NEPA assignment for projects classified as environmental assessments and environmental impact statements under 23 U.S.C. §327. Amended §2.6 accounts for this assignment by specifying that the department may exercise approval authority for covered projects, if provided for by an MOU with FHWA. It further specifies that, under assignment, references to FHWA throughout the rules will be construed as referring to the department, that both project sponsor and department delegate must comply with the terms of an MOU with FHWA, and that federal law controls over the department's environmental rules with respect to FHWA transportation projects.

Amendments to §2.11, Employee Certification Process, remove the requirement of a "certification program manager," as the department believes it is not necessary to have an individual with such a designation. Employee certification will be overseen by the director of the Environmental Affairs Division. Other changes

remove an outdated provision relating to persons employed as of April 16, 2012, and simplify the recertification process.

Amendments simplify and condense §2.12, Project Coordination. References to "participating agency" are removed from §2.12 to avoid confusion with the federal definition of that term, which differs from the meaning of the term as it is used in §2.12. As revised, §2.12 does not contain all of the procedural requirements set forth in the existing rule, as the department believes that, given the variability among transportation projects, it is neither necessary nor appropriate to prescribe those requirements by rule.

SUBCHAPTER C. ENVIRONMENTAL REVIEW PROCESS FOR HIGHWAY PROJECTS

Amendments to §2.41, Applicability, change the section title to "Applicability and Voluntary Opt-In." The purpose of this revision is to draw attention to a local government project sponsor's ability to opt-in to the subchapter's applicability for projects for which some documentation was provided to the department delegate prior to April 16, 2012. Also, the amendments delete the existing exception for certain blanket categorical exclusions (BCEs) because, as explained below, the department is eliminating BCEs altogether.

The department made one technical correction to the proposed version of §2.41 as it appeared in the December 6, 2013, issue of *Texas Register* (38 TexReg 8788). Specifically, the department deleted "section, this" at the beginning of §2.41(a) because it was a typographical error.

Amendments to §2.42, Environmental Review Limited to Certain Projects, clarify that project sponsors may prepare an environmental review document or documentation of categorical exclusion for projects that are not listed in the State Transportation Improvement Program (STIP) or Unified Transportation Program (UTP), and are not required to be listed in the STIP or UTP under 43 TAC §16.103 and §16.105. The department believes that the legislature, in setting parameters on which projects are eligible for environmental review in Transportation Code, §201.753, did not intend to impose a requirement of STIP or UTP inclusion on projects that are otherwise not required to be in the STIP or UTP.

Amendments to §2.44, Project Scope, provide that the Environmental Affairs Division will establish the required content of a project scope, rather than setting forth the specific required content of the project scope in the rule itself. They also provide that the level of detail in the project scope should be commensurate with the nature of the highway project and the potential complexity and risks. The purpose of these revisions is to allow project sponsors and department delegates to fill-out project scopes at an appropriate level of detail, which may vary on a case-by-case basis, as opposed to requiring a one-size-fits-all approach.

Amended §2.44 also explicitly allows project scopes to be prepared electronically in the department's environmental database. Transitioning from paper project scopes to electronic project scopes offers several advantages, including the ability to view and track project scopes from any computer with access to the department's database.

Amended §2.44 also eliminates the prescriptive requirements on how and when the project sponsor and department delegate must collaborate on developing a project scope. After almost two years of operating under the current version of this rule, the department believes that these requirements are overly restrictive and binding on the collaborative process.

Finally, amended §2.44 eliminates the statement that the project scope must be prepared and agreed upon by the project sponsor and department delegate before an environmental review document is submitted. The department believes this is self-evident, without an explicit deadline in the rules.

The department is not adopting proposed §2.44(c) because it was virtually identical to the beginning of §2.44(a), and therefore was redundant. The subsection designations of §2.44 have been adjusted to reflect the deletion of proposed subsection (c).

Amendments to §2.48, Administrative Completeness Review, allow the project sponsor to submit an environmental review document with a written statement, rather than a signed cover letter, that the document is administratively complete. This revision will facilitate the submission of documents by email.

Amendments to §2.49, Technical Review, recognize that documentation of a categorical exclusion may be prepared in the form of an electronic checklist completed using the department's environmental database, in which case the technical review will begin when the project sponsor indicates that the checklist is ready for review. The amendments to §2.49 also explicitly require the project sponsor to ensure that all tasks and coordination required prior to making the environmental decision are complete when the documentation is submitted for technical review. The department believes this revision is needed to clearly remind project sponsors of their responsibilities. The proposed rule included "public involvement" in the group of activities that must take place prior to the initiation of technical review, but it is not included in the adopted rule because, for some projects, public involvement may occur concurrently with technical review.

Amendments to §2.50, Deadlines for Completing Certain Types of Technical Reviews; Suspension of Review Deadlines, remove the reference to a technical deadline for programmatic categorical exclusions (PCEs). The department is transitioning from operating under a programmatic agreement with FHWA, to making CE determinations for FHWA transportation projects on its own under the authority delegated by FHWA in accordance with 23 U.S.C. §326. After this transition is complete, the department does not intend to categorize any projects as PCEs.

Amendments to §2.50(b)(4) include a change related to the department's suspension of the technical review of an environmental review document or documentation of categorical exclusion that provides that, while there is no limit on the number of times technical review may be suspended, the department will use its best efforts to minimize the number and duration of suspension of technical review. This change simply codifies the department's current practice.

The department made one technical correction to proposed §2.50. Specifically, in the last sentence of §2.50(b)(4), the department revised "suspension" to "suspensions."

SUBCHAPTER D. REQUIREMENTS FOR CLASSES OF PROJECTS

Amendments to §2.81, Categorical Exclusions, more accurately define CEs. The amended section contains a new definition of CEs that properly describes a CE not as a particular project, but as a category of actions. The amendments also explicitly state that an environmental issues checklist prepared to document a CE may be prepared electronically in the department's environmental database. Transitioning from paper to electronic checklists offers several advantages, including the ability to view checklists from any computer with access to the department's

database. The changes also reinforce that a CE in the form of a checklist is not an environmental review document, and so, for example, it is not subject to an administrative completeness review under §2.48.

The amendments remove the requirements in §2.81(b)(3) to summarize environmental permits, issues, and commitments (EPICs) in an environmental issues checklist or environmental review document, and to include EPICs in plans, specifications, and estimates. Neither of these requirements is needed to conduct a meaningful review of the environmental impacts of a transportation project, and therefore they were misplaced in Chapter 2.

The amendments delete §2.81(c)(2)(C), which disqualifies a project from being a CE if it would have a "significant impact on properties protected under Parks and Wildlife Code, Chapter 26, Government Code, §442.016, or the Texas Antiquities Code (Natural Resources Code, Chapter 191)." The department does not believe this restriction is necessary or appropriate because §2.81(c)(1)(B) already disqualifies projects that "cause any significant environmental impacts to any natural, cultural, recreational, historic, or other resource." Additionally, the statutes cited in §2.81(c)(2)(C) each have their own requirements and prohibitions, with which the department must comply regardless of whether or not any given project is classified as a CE.

The amendments add a new subsection (d) to §2.81, to indicate that the project types listed by FHWA in its rule regarding CEs, 23 C.F.R. §771.117(c) and (d), normally will qualify as CEs under the department's rules, unless unusual circumstances make the project ineligible for designation as a CE under §2.81(c). The list of project types at 23 C.F.R. §771.117(c) and (d) was the basis for the list of BCEs and PCEs at existing 43 TAC §2.82(c) and (d). As explained below, the department is eliminating the BCE and PCE sub-classes of CEs. In light of this change, the department believes it is appropriate to add new §2.81(d), to make it clear that those project types listed at 23 C.F.R. §771.117(c) and (d) may continue to be processed as CEs, again, absent unusual circumstances. New §2.81(d) also clarifies that, under the department's rules, the list of projects at 23 C.F.R. §771.117(c) and (d) is not an exclusive list of projects that may be processed as CEs. Any project that is in a category of actions that has been found by the department to have no significant effect on the environment, individually or cumulatively, may be processed as a CE if it meets the other requirements of amended §2.81.

Finally, the changes remove the references to programmatic agreements in §2.81(e) because the department is transitioning from operating under a programmatic agreement with FHWA, to making CE determinations for FHWA transportation projects on its own under the authority delegated by FHWA in accordance with 23 U.S.C. §326.

Section 2.82, Blanket and Programmatic Categorical Exclusions, is repealed in its entirety. There are multiple reasons for this repeal. First, the department intends to no longer classify projects as PCEs now that it has accepted assignment of responsibility for making CE determinations for FHWA transportation projects under 23 U.S.C. §326. Under the CE assignment MOU executed by the department and FHWA, the department will no longer need to rely on its programmatic agreement with FHWA, and sub-classify certain projects as PCEs under that agreement, because it will have the authority to make CE determinations on its own.

Second, the department no longer believes that it is useful to sub-classify certain projects as BCEs. Under both the department's existing rules and the amended rules, documentation of CEs can be prepared in a checklist format. The department believes that, for the types of projects that are currently processed as BCEs under the current rules, completing a checklist will be a minimal administrative burden, especially if the checklist is completed within the department's electronic environmental database, which would be explicitly allowed under the amended rules. This will make BCE projects easier to track compared to the current approach, which requires no documentation, and will eliminate the need to divide categorically excluded projects into sub-classifications with different procedural requirements, which may cause confusion and delay.

Amendments to §2.83, Environmental Assessments, make several changes. First, the changes explicitly state that if changes as a result of public participation are minimal, the project sponsor may incorporate the results in the environmental assessment (EA) by appending errata sheets rather than revising the EA as a whole. This revision is intended to minimize the unnecessary production of paper documents.

Second, the changes provide that any separately prepared environmental reports supporting an EA's conclusions will not need to be included as appendices to the EA, as long as they are made available for public inspection upon request. This revision, like the previous one, is intended to minimize the unnecessary production of paper documents.

Third, whereas the existing rule requires the department delegate to direct the project sponsor to prepare an EIS if the need for one becomes apparent during the environmental study phase, the changes require such a direction if the need for an EIS becomes apparent at any time before the issuance of a finding of no significant impact (FONSI). This makes more sense, because it is possible that the need for an EIS might not become apparent until after the environmental studies are concluded.

Finally, the changes contain a revised explanation of a FONSI. The amended rule explains that a FONSI is not required to repeat the information contained in the EA and other environmental documents, but instead can incorporate that information by reference.

Amendments to §2.84, Environmental Impact Statements, allow the use of errata sheets to a draft environmental impact statement (DEIS) rather than requiring the preparation of a final environmental impact statement (FEIS) under specified circumstances. The changes further allow the FEIS and record of decision (ROD) to be prepared as a single document under specified circumstances. These revisions, which are intended to minimize the unnecessary production of paper documents, are based on Section 1319 of MAP-21.

Changes to §2.84 contain a revised definition of "preliminary design." The purpose of this revision is to conform the department's definition with that in FHWA's design-build rules, at 23 C.F.R. §636.103, which is the definition referenced by FHWA in its guidance on which activities may be undertaken prior to a NEPA decision.

Amendments to §2.85, Reevaluations, clarify that if the project sponsor and department delegate determine through consultation that a reevaluation is necessary, the project sponsor shall prepare a reevaluation.

SUBCHAPTER E. PUBLIC PARTICIPATION

The department believes that existing Subchapter E, §§2.101 - 2.110, is cumbersome and overly restrictive. Therefore, instead of individual revisions to Subchapter E, the department is repealing those sections in their entirety and replacing them with new sections.

The new sections carry forward many of the requirements found in the existing subchapter; however, the new subchapter is more concise, and is organized according to the different forms of public participation, rather than according to project classification.

The new sections contain fewer required newspaper notices than the existing rules. This is because the department believes that newspaper notices are not always the most effective or efficient means of notifying the public of an opportunity to participate in project development. In the new subchapter, omitted newspaper notices are replaced by a requirement for an additional outreach method. The department has developed guidelines establishing appropriate options for additional outreach methods, which may include various types of electronic communications, roadside changeable message signs, or radio or television advertisements. The department intends to allow project sponsors the flexibility to identify the most effective methods to reach the intended audience.

New §2.101, General Requirements, requires the department to publish guidelines regarding outreach methods for project sponsors to use in complying with the subchapter's requirements. The section requires the project sponsor to maintain a list of individuals and groups that it is required to notify of certain public participation opportunities. It also specifies that the subchapter establishes the minimum requirements for public participation. Project sponsors and department delegates may agree on additional public participation beyond that required by the rules for any given project. The section specifically provides that, for FHWA transportation projects, project sponsors must comply with Federal public participation requirements to the extent they differ from the requirements in the new subchapter. New §2.101 also requires the project sponsor and department delegate to determine when notice should be published in a language in addition to English to comply with Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency. Finally, the new section provides for joint public participation by the department and local governments and other entities, and clarifies that public participation activities may be hosted by entities other than the department as long as the requirements established in new Subchapter E are met.

New §2.102 establishes the requirements for issuing notices of intent (NOIs), which are required for an EIS or supplemental EIS.

New §2.103 sets forth the requirements for developing coordination plans, which are required for EISs. A coordination plan is a plan for coordinating public and agency participation in, and comment on, the environmental review process for a particular transportation project. Proposed §2.103(c)(1) referred to circulation of a "final" draft of the coordination plan for review by the relevant agencies and by the public. In the adopted rule, the department omitted the word, "final," because the coordination plan is subject to further revision after review by the agencies and the public.

New §2.104 defines the requirements for holding meetings with affected property owners (MAPO). MAPOs may be held for any kind of transportation project.

New §2.105 establishes the requirements for holding public meetings. Public meetings may be held for any kind of transportation project.

New §2.106 contains the requirements for affording an opportunity for a public hearing. An opportunity for a public hearing gives the public the chance to request that a public hearing be held on a given transportation project when no public hearing would otherwise be held. The section contains factors for determining whether to offer an opportunity for a public hearing on a given transportation project.

New §2.107 sets forth the requirements for holding a public hearing. The purpose of a public hearing is to present project alternatives and to encourage and solicit public comment. The section specifies the conditions under which a public hearing would be required.

New §2.108 defines the requirements for issuing a notice of availability, which is a way to alert the public that certain important documents are available for review and comment, and how to obtain copies of those documents.

The department determined not to adopt proposed §2.108(b)(2) and (c)(2), which would have required the project sponsor, after holding a public hearing, to send a notice of availability of a comment and response report to individuals and organizations that submitted comments addressed in the report. The department believes this requirement would have been unnecessary given the other notices of availability that are required by the rule.

New §2.109 establishes the requirements for allowing additional public participation for projects affected by significant changes following project approval. The section explains when additional public participation is required, and that when required, the additional public participation must be in the form of an opportunity for public hearing.

New §2.110 sets forth the requirements for issuing a notice of impending construction. This type of notice is intended to inform individuals affected by certain projects that construction will begin.

SUBCHAPTER F. REQUIREMENTS FOR SPECIFIC TYPES OF PROJECTS AND PROGRAMS

Amendments to §2.131, Special Right-of-Way Acquisition, clarify the department's requirements with respect to environmental review of early and advance acquisition of real property. The department believes that the existing rule is confusing with respect to the nature of the CE that must be performed prior to the department's acquisition of real property for a transportation project before the environmental review process for that project is complete. The changes require the environmental affairs division to establish standards for those CEs, and specify that, for FHWA transportation projects, federal laws, including FHWA's rules applicable to early and advance acquisitions, must be followed.

Amendments to §2.134, Coastal Management Program, replace the reference to "CE/BCE/PCE documentation" with a reference to "documentation of categorical exclusion," in recognition of the phasing-out of BCEs and PCEs. This edit is made throughout the amended rules.

In addition to the specific changes identified above, additional revisions throughout Chapter 2 correct cross-references, and improve the readability, accuracy, and clarity of the rules. These revisions include eliminating references to the department's "re-

gions," which will no longer be a separate subdivision within the department's organizational structure.

COMMENTS

The department received comments from FHWA, the Texas Commission on Environmental Quality (TCEQ), and the General Land Office.

GENERAL

Comment: FHWA commented that, in general, the rules lack adequate citations to potentially applicable federal statutes and rules.

Response: The purpose of the department's Chapter 2 rules is not to catalog all federal statutory and regulatory provisions potentially applicable to a transportation project. The department does not believe that rulemaking is the appropriate method for providing staff with guidance on where to find federal laws. Among other disadvantages, it would require a new rulemaking for every congressional act or federal agency rulemaking pertaining to environmental review. Even FHWA's own environmental review rules (23 C.F.R. Part 771) do not attempt to catalog potentially applicable federal laws. The department will continue to use written guidance to inform staff of federal requirements.

Comment: FHWA commented that there are a number instances in which the department's rules conflict with federal regulations.

Response: The primary purpose of the department's Chapter 2 rules is to implement Transportation Code, §203.604, requiring the department to have its own rules governing environmental review of projects when NEPA does not apply, and Transportation Code, Chapter 201, Subchapter I-1, which imposes certain procedural requirements on the department's environmental review of highway projects. Transportation Code, §203.604 contemplates that the department's requirements for environmental review may differ from federal requirements. Because the department's rules are consistent in many ways with federal environmental review rules, they apply to both state transportation projects and FHWA transportation projects. However, because there are differences between the department's and federal requirements, the department's rules, at §2.6(a), expressly provide that, for an FHWA transportation project, the federal requirements prevail in the event of a conflict.

SUBCHAPTER A. GENERAL PROVISIONS

Comment: FHWA commented that the 45-day deadline for agencies to provide comments under §2.12(d) conflicts with the 30-day comment period in 23 U.S.C. §139(g) applicable to FHWA transportation projects for which an EIS is prepared.

Response: Section 2.12(d) states the deadline is 45 days "unless the coordination is being done in satisfaction of another law or formal agreement providing for a different review period, in which event that review period applies." If coordination is being done to satisfy 23 U.S.C. §139(g), then the deadlines in that statute would apply.

SUBCHAPTER C. ENVIRONMENTAL REVIEW PROCESS FOR HIGHWAY PROJECTS

Comment: Regarding §2.44(d) (proposed §2.44(e)), which addresses FHWA's participation in a project scope for a transportation project, FHWA commented that, under 23 C.F.R. §771.111(a), it is always FHWA's responsibility to determine the probable class of action, and so FHWA should always be a participant in the project scope. FHWA further commented

that the rules should state that it is also FHWA's responsibility to review and approve any change in the project scope, and resulting effects on the class of action.

Response: The federal rule cited by FHWA, 23 C.F.R. §771.111(a), states that state departments of transportation should notify FHWA at the time that a project concept is identified, and that FHWA will advise on the class of action "when requested." This federal rule does not require FHWA to be a party to a project scope, which is a state requirement.

The department believes that whether to invite FHWA to participate in individual project scopes is best decided by the project sponsor and department delegate on a project-by-project basis. The department further believes that it may be premature to seek FHWA's approval of the proposed class of action in accordance with 23 C.F.R. §771.111(a) before the project sponsor and department delegate have developed the project scope. Section 2.44(d) expressly provides that, for an FHWA transportation project, "any matter agreed to by the project sponsor and the department delegate in the project scope, including the anticipated classification, may be subject to FHWA approval. . . ." If FHWA disagrees with any matter covered by the project scope, it can be amended. This would also apply to any subsequent revisions to a project scope.

Comment: FHWA expressed concern with the applicability of the fee structure under §2.46 to FHWA transportation projects if the department assumes FHWA's environmental review responsibilities. FHWA's concern appears to be based on an interpretation of the rule that would permit environmental clearance for projects that could not otherwise be environmentally cleared because they are not included in a fiscally constrained transportation improvement program (TIP) or a statewide transportation improvement program (STIP).

Response: Payment of an optional fee under §2.46 only allows a local government project sponsor to prepare, and the department delegate to review, an environmental review document or documentation of categorical exclusion for a project that is not otherwise eligible for environmental review under state law because it is not identified in the STIP or unified transportation program (UTP) or in a commission order. As the department explained when it proposed §2.46 in 2011, payment of a fee under this section does not avoid other consequences of a project not being identified in planning documents. See the December 2, 2011, issue of the *Texas Register* (36 TexReg 8174). The department will not forward to FHWA (or approve post-NEPA assignment) an environmental review document or documentation of categorical exclusion for an FHWA transportation project for which an optional fee is paid under §2.46, if there are applicable federal requirements that have not been satisfied.

Comment: FHWA commented that §2.48(d)(4) referred to "participating agencies," even though that phrase was removed from §2.12 to avoid confusion with the federal definition of that term.

Response: The department has removed the term, "participating," from §2.48 and §2.83.

Comment: FHWA commented that the language in §2.50(a)(1)(B), (3)(B), (4)(B), and (5)(B) does not flow well if Texas assumes FHWA's environmental review responsibilities.

Response: Each of the cited rule paragraphs refers to the department forwarding a document to FHWA, which will not occur post-NEPA assignment. However, §2.6(b)(3) provides that if the department assumes any of FHWA's responsibilities under a

memorandum of understanding, references to FHWA throughout Chapter 2 shall mean the department delegate for those responsibilities assumed by the department. Post-NEPA assignment, the cited rule paragraphs referring to the department delegate's submittal of documents to FHWA should be interpreted as referring to the department delegate's own approval of such documents.

Comment: FHWA commented that the legal ramifications for a failure to meet the deadlines established in §2.50 is unclear.

Response: Section 2.50 is part of the department's implementation of state law, specifically, Transportation Code, Chapter 201, Subchapter I-1. The consequence of failing to meet a deadline in §2.50 is that the department must identify the failure and explain any delay in a report to the Texas Legislature, as required by Transportation Code, §201.762.

SUBCHAPTER D. REQUIREMENTS FOR CLASSES OF PROJECTS

Comment: FHWA expressed concern that §2.81(d) does not contain an exclusive list of project types that may be classified as CEs. Specifically, FHWA stated that an open-ended approach to CEs would not be appropriate for FHWA transportation projects if the department has not received assignment of all NEPA responsibilities.

Response: The department does not believe an exclusive list of project types that may be classified as CEs is necessary. For example, FHWA's list of project types that may be classified as CEs at 23 C.F.R. §771.117(d) is a list of "examples," and therefore is also open-ended. Additionally, note that, while the department and FHWA have executed an MOU to assign responsibility for making CE determinations under 23 C.F.R. §326, it only covers activities listed in 23 C.F.R. §771.117(c) and (d). Therefore, the department's authority to make CE determinations under that MOU, which has an effective date of February 12, 2014, will be limited to FHWA's (c)-list and (d)-list.

Comment: Regarding the department's proposed change to §2.84(b)(1)(B), which would revise the rule to no longer require evaluation of "all" reasonable alternatives in an EIS, FHWA commented that a federal rule, 23 C.F.R. §771.123(c) requires "all" reasonable alternatives to be evaluated.

Response: To avoid the potential for confusion between state and federal requirements on this point, the department is not adopting its proposed revision to §2.84(b)(1)(B). However, the department notes that, as explained by FHWA's Office of the Chief Counsel in a September 22, 2010 document titled, "Alternatives Analyses White Paper," FHWA has interpreted 23 C.F.R. §771.123(c) to permit a focus on "a reasonable range of project alternatives," notwithstanding inclusion of the word "all" in the rule. The department will similarly interpret its rule to permit a focus on a reasonable range of project alternatives, rather than requiring literally all conceivable alignments, and permutations and variations thereof, to be evaluated in an EIS.

Comment: Regarding §2.84(c), FHWA commented that a federal statutory provision, 23 U.S.C. §139(e), requires the project sponsor to notify the Secretary of Transportation of the type of work, termini, length and general location of the proposed project and anticipated Federal approvals for the proposed project. FHWA's comment is that this requirement is not explicitly repeated in the department's rules. FHWA also made this comment in the context of the department's new Subchapter E, relating to Public Participation.

Response: See the department's above response that the purpose of the department's rules is not to catalog federal requirements. The requirement in 23 U.S.C. §139(e) applies on its own to FHWA transportation projects.

Comment: Regarding the department's proposed amendment of §2.84(c) to allow the attachment of errata sheets to a DEIS in lieu of an FEIS, FHWA commented that the rule should explain the next procedural steps when using the errata sheet approach.

Response: The procedural steps to be followed when using the errata sheet approach are set forth in §2.84(e)(1) - (6). In response to FHWA's comment, and to improve the rule's clarity, the department is including the following sentence at the end of §2.84(c)(2)(A): "When errata sheets are attached to the DEIS in lieu of a separately prepared FEIS, all other applicable requirements for completing the EIS set forth in subsection (e)(1) - (6) of this section apply."

Comment: FHWA commented that, under federal guidance, if there are significant new circumstances or information that bear on a proposed action, the new circumstances or information must be addressed in a supplement to the DEIS. FHWA made this comment in response to the department's proposed §2.84(c)(2)(B)(ii), which prohibits the preparation of a combined FEIS and draft ROD as a single document when there are significant new circumstances or information relevant to environmental concerns that bear on the proposed action or the impacts of the proposed action.

Response: The conditions warranting a supplement to a DEIS are covered by the department's rules at §2.86(b). The potential need for a supplement to a DEIS is also addressed in §2.84(c)(3).

Comment: FHWA recommended adding discussions on the preparation of the ROD throughout the regulation.

Response: It is not clear to which rule or rules this comment refers; however, the department believes that §2.84(e) adequately covers the preparation of a ROD for a project requiring an EIS.

Comment: Regarding the department's amendment of §2.84(e) to address the preparation of an FEIS and ROD as a single document, FHWA commented that a 30-day waiting period between the notice of availability of the FEIS and the signing of the ROD is not necessary if a combined FEIS/ROD is issued.

Response: The department declines to revise its state rule in response to this comment. To the extent federal law provides for a combined FEIS and ROD to be issued simultaneously, then the department may issue them simultaneously on FHWA transportation projects, as federal law controls for FHWA transportation projects.

Comment: Regarding §2.84(e)(3) and §2.102(b), FHWA commented that the requirement for publication of notices in the *Texas Register* does not eliminate the need for publication of notices in the *Federal Register* and publication dates in the *Federal Register* would be controlling for some of the comment periods.

Response: The department agrees that where *Federal Register* publication is required by federal law, the publication date in the *Federal Register* will be determinative with respect to deadlines under federal law.

SUBCHAPTER E. PUBLIC PARTICIPATION

Comment: FHWA commented that, under 23 C.F.R. §771.111(h)(1), each state department of transportation must have procedures approved by FHWA to carry out a public involvement/public hearing program pursuant to 23 U.S.C. §128 and §139 and rules promulgated by the Council on Environmental Quality (CEQ). FHWA pointed out that, while it had previously approved the department's public participation rules at existing Chapter 2, Subchapter E, it would not approve the department's proposed Subchapter E because, FHWA asserted, it lacked sufficient detail regarding federal requirements.

Response: After submitting this comment, FHWA approved under 23 C.F.R. §771.111(h)(1) a separate guidance document prepared by the department. The department believes that a guidance document, rather than state rules, is the more appropriate method for informing staff of how to comply with federal public involvement/public hearing requirements. However, in response to FHWA's comment, the department has revised §2.101(d) to include citations to 23 U.S.C. §128 and the CEQ's rules at 40 C.F.R. Part 1500.

Comment: TCEQ suggested amending §2.101(b) to require the list of parties interested in a given project to include the resource agencies with which the department has memoranda of understanding, namely TCEQ, the Texas Parks and Wildlife Department (TPWD), and the Texas Historical Commission (THC).

Response: The purpose of §2.101(b) is to require a list of entities that should be notified of public participation opportunities for a given project. The MOUs with TCEQ, TPWD and THC specify the procedures for coordination between the respective agencies and the department, which is different than public participation. The department does not believe it would be appropriate to notify the resource agencies of public participation opportunities for all projects because each of the agencies has already agreed on the criteria for project coordination in the respective MOUs (see e.g., §2.305, setting forth the criteria for coordinating projects with TCEQ).

Comment: FHWA commented that §2.103 lacks a discussion of the scoping process for development of purpose and need, alternatives and criteria for alternatives set forth in 23 U.S.C. §139(e).

Response: The department assumes that the comment intended to reference 23 U.S.C. §139(f), which, for an EIS, requires the lead agency to provide, as early as practicable during the environmental review process, an opportunity for involvement by the public in defining the purpose and need, and the range and alternatives for the project. The department's analogous rule, §2.103(a), explains that a "coordination plan is intended to involve . . . the public in the early stages of development of an EIS." The department's rule is less detailed than, but does not contradict 23 U.S.C. §139(f). Additionally, the department's rules, at §2.101(d), make clear that, for an FHWA transportation project, the project sponsor must also comply with 23 U.S.C. §139.

Comment: TCEQ suggested amending §2.103 to specifically require the coordination plan to provide for participation by TCEQ, TPWD and THC as required by the department's respective MOUs with those resource agencies.

Response: The department has incorporated the amendment suggested by TCEQ into §2.103(a).

Comment: FHWA commented that §2.106(b)(1)(E), requiring an opportunity for a public hearing for a project if it causes a significant social, economic, or environmental effect, does not make sense because such a project would require an EIS, and a public hearing is always held for a project requiring an EIS.

Response: The department has omitted proposed §2.106(b)(1)(E) from the adopted rule.

Comment: Regarding §2.106(b)(2), which stated that a project sponsor is not required to comply with §2.106 if it holds a public hearing for the project under another provision, FHWA commented that the rule should specify the other "provision" to which this rule refers.

Response: The department has revised §2.106(b)(2) to refer to §2.107 (relating to Public Hearing).

Comment: TCEQ suggested revising §2.106(c)(1) to require notices of opportunity for public hearing to be published "at least," rather than "approximately," 30 days prior to the deadline for submission of written requests for a hearing.

Response: The department has made the proposed revision.

Comment: Regarding §2.109(b), requiring an opportunity for public hearing for certain project types if, post-project approval, there are significant changes, FHWA commented that significant changes to an FHWA-approved project would require a supplement document and a new decision.

Response: Section 2.109 implements a state statute, Transportation Code, §203.222(b), concerning when post-approval project changes trigger additional public involvement. Whether a change warrants a reevaluation or supplemental EIS under the department's rules is addressed by other rule sections, namely §2.85 (relating to Reevaluations) and §2.86 (relating to Supplemental Environmental Impact Statements).

SUBCHAPTER F. REQUIREMENTS FOR SPECIFIC TYPES OF PROJECTS AND PROGRAMS

Comment: The General Land Office proposed a technical correction to §2.134 (relating to Coastal Management Program). Specifically, the General Land Office observed that, to be consistent with Natural Resources Code, §33.205, §2.134(b) should refer to "the commissioner of the General Land Office," rather than to the General Land Office, generally.

Response: The department has made the technical correction proposed by the General Land Office.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The department determined that this rulemaking relates to actions subject to the Texas Coastal Management Program (CMP) under the Coastal Coordination Act of 1991, as amended (Natural Resources Code, §§33.201 et seq.), because it concerns the department's rules on the environmental review of transportation projects. The department reviewed this action for consistency with the CMP goals and policies under the rules promulgated by the Coastal Coordination Council, which remain in effect until superseded by a rule of the General Land Office. The department has determined that the action is consistent with applicable CMP goals and policies.

A CMP goal applicable to the department's activities is that transportation projects shall comply with certain practices concerning the siting of a project to lessen the impacts on coastal natural resources (see 31 TAC §501.31). The department's Chapter 2

rules concern the method by which to evaluate the environmental impacts of a transportation project, and do not dictate the siting of a project. However, §2.134, Coastal Management Program, specifies that approval of a transportation project located in whole or in part within the coastal boundary is an action subject to the Texas Coastal Management Program, and that such a project may not be approved if it is found to be inconsistent with the goals and policies of the CMP. The department's rules are consistent with CMP goals and policies by specifically incorporating them in this manner. Another CMP goal applicable to the department's activities is that the use or taking of public land shall comply with Parks and Wildlife Code, Chapter 26 (see 31 TAC §501.29). The department's rules are consistent with this goal because §2.131(a), Special Right-of-Way Acquisition, implements the statutory requirements. Neither §2.131(a) nor §2.134 are substantively revised as part of this rulemaking.

A copy of this rulemaking was submitted to the General Land Office for its comments on the consistency of the proposed rulemaking with the CMP. The department also requested that the public give comment on whether the proposed rulemaking is consistent with the CMP. The department received no public comment concerning consistency with the CMP, and the General Land Office's only comment was the proposed technical correction to §2.134(b) discussed above.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §§2.1, 2.2, 2.5 - 2.8, 2.11, 2.12, 2.14

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which authorizes the commission to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.033, which authorizes the department to adopt rules concerning the environmental processing of a rail project; Transportation Code, §201.6035, which authorizes the department to accept responsibility assigned by FHWA for compliance with federal environmental laws; Transportation Code, §201.604, which requires the department to promulgate rules providing for its review of transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.); Transportation Code, §201.762(b), which requires the department to promulgate rules implementing Transportation Code, Chapter 201, Subchapter I-1, regarding environmental review of highway projects; Transportation Code, §222.006, which requires the department to promulgate rules establishing a process to certify department district environmental specialists to work on all documents related to state and federal environmental review processes; and Transportation Code, §203.022, which requires the department to promulgate rules concerning public participation during the environmental processing of certain projects.

CROSS REFERENCE TO STATUTE

Transportation Code, §§91.033, 91.034, 201.6035, 201.604, 201.606, 201.607, 201.610, 201.611, 201.617, 201.751 - 201.761, 201.762(b), 203.021, 203.022, and 222.006; Parks and Wildlife Code, §26.001 and §26.002; and Natural Resources Code, §183.057.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. ENVIRONMENTAL REVIEW PROCESS FOR HIGHWAY PROJECTS

43 TAC §§2.41 - 2.44, 2.46 - 2.52

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which authorizes the commission to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.033, which authorizes the department to adopt rules concerning the environmental processing of a rail project; Transportation Code, §201.6035, which authorizes the department to accept responsibility assigned by FHWA for compliance with federal environmental laws; Transportation Code, §201.604, which requires the department to promulgate rules providing for its review of transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.); Transportation Code, §201.762(b), which requires the department to promulgate rules implementing Transportation Code, Chapter 201, Subchapter I-1, regarding environmental review of highway projects; Transportation Code, §222.006, which requires the department to promulgate rules establishing a process to certify department district environmental specialists to work on all documents related to state and federal environmental review processes; and Transportation Code, §203.022, which requires the department to promulgate rules concerning public participation during the environmental processing of certain projects.

CROSS REFERENCE TO STATUTE

Transportation Code, §§91.033, 91.034, 201.6035, 201.604, 201.606, 201.607, 201.610, 201.611, 201.617, 201.751 - 201.761, 201.762(b), 203.021, 203.022, and 222.006; Parks and Wildlife Code, §26.001 and §26.002; and Natural Resources Code, §183.057.

§2.41. *Applicability and Voluntary Opt-In.*

(a) This subchapter applies in its entirety to all highway projects for which an environmental review document or documentation of categorical exclusion for the project has not been provided, in whole or in part, to the department delegate as of April 16, 2012.

(b) For highway projects for which an environmental review document or documentation of categorical exclusion has been provided, in whole or in part, to the department delegate as of April 16, 2012, this subchapter applies only if the project sponsor notifies the department delegate in writing that it elects to have the project processed under this subchapter, in which case the subchapter applies in its entirety.

§2.44. *Project Scope.*

(a) Project scope required. The project sponsor, in collaboration with the department delegate, will prepare a detailed project scope that describes the preparation of the environmental review document or documentation of categorical exclusion and performance of related

tasks. A district or division that has dual roles as both project sponsor and department delegate satisfies this requirement by placing the project scope in the project file. For purposes of this section, a project sponsor includes a local government that proposes to serve as a project sponsor and intends to seek the department's approval of such a designation under §2.47 of this subchapter (relating to Approval of Local Government as Project Sponsor).

(b) Form. The project scope must be prepared using standardized information requirements approved by the Environmental Affairs Division. The Environmental Affairs Division will establish the required content for development of a project scope. A project scope may be prepared electronically in the department's environmental database. The level of detail for any issue on the scope should be commensurate with the nature of the highway project and the potential complexity and risk of the issue.

(c) Optional agreement between local government project sponsor and department. Notwithstanding any provision of this subchapter, the project scope may include the department delegate's agreement to complete a task that §2.43 of this subchapter (relating to Project Sponsor Responsibilities) otherwise directs is the responsibility of the project sponsor. Any such agreement must clearly identify the task that the department delegate has agreed to complete.

(d) Participation by FHWA. For a highway project for which an environmental decision requires FHWA approval, the FHWA may also be a party to the project scope. The project sponsor and department delegate will determine whether to invite FHWA to be a party to the project scope as soon as possible, but in no event later than the initial meeting between the project sponsor and the department delegate. Any matter agreed to by the project sponsor and the department delegate in the project scope, including the anticipated classification, may be subject to FHWA approval for an FHWA transportation project.

(e) Deadline for issuing classification letter. For projects for which a local government proposes to be the project sponsor, the department delegate will issue to the local government on or before the 30th day after the date that the local government submits its proposed project scope to the department delegate, a letter indicating the anticipated classification of the project based on the information provided by the local government. If the department delegate indicates its approval of the project scope by signing it on or before the 30th day after the date that the local government submits its proposed project scope to the department delegate, a separate classification letter is not required.

(f) Receipt of optional fee. If the project sponsor is a local government that proposes to pay an optional fee under §2.46 of this subchapter (relating to Optional Payment of Fee by Local Government), the fee must be received by the department before the department delegate may indicate its approval of the project scope by signing it.

(g) Amendment of project scope. The project sponsor shall promptly notify the department delegate of any change in the description of the project. If, after completion of the project scope, there is a material change in the description of the project, or any other change that materially affects how the project sponsor will satisfy the requirements of this chapter, the project scope must be amended accordingly. An amendment must be agreed to in writing by the project sponsor and the department delegate.

§2.48. Administrative Completeness Review.

(a) Administrative completeness required. All environmental review documents must be determined to be administratively complete by the department delegate before it begins a technical review. This section does not apply to categorically excluded projects for which an environmental issues checklist is prepared because, for these projects, there is no environmental review document.

(b) Initiation of review. To initiate administrative completeness review of an environmental review document, the project sponsor will submit the document to the department delegate with a written statement that the document is administratively complete, ready for technical review, and compliant with all applicable requirements.

(c) Project sponsor's deadline to submit certain types of documents.

(1) Applicability. This subsection applies to EAs, and FEISs, but does not apply if the project sponsor is a local government that has paid a fee under §2.46 of this subchapter (relating to Optional Payment of Fee by Local Government).

(2) Deadline. The project sponsor will submit to the department delegate for administrative completeness review any environmental review document subject to this subsection at least two years before the date planned for publishing notice to let the construction contract for the project, as indicated in whichever of the following documents was most recently approved:

- (A) the financially constrained portion of:
 - (i) the approved state transportation improvement program; or
 - (ii) the approved unified transportation program; or
- (B) a commission order identifying the project as being eligible for environmental review.

(3) Date planned for publishing letting notice. If the date planned for publishing letting notice described in paragraph (2) of this subsection is identified in the applicable document only by the fiscal year, for the purposes of this subsection the date is September 1 of the previous year. If it is identified only by the calendar year, for the purposes of this subsection the date is January 1 of that year. If it is identified only by month and year, for the purposes of this section it is the first day of that month.

(4) No waiting period for letting contract. This subsection does not require that the project sponsor wait any amount of time after the department delegate renders an environmental decision under §2.49 of this subchapter (relating to Technical Review) before letting the construction contract for the project.

(d) Requirements for administrative completeness. The department delegate will not determine an environmental review document to be administratively complete unless it determines that:

- (1) the description of the project is the same as shown in the project scope prepared under §2.44 of this subchapter (relating to Project Scope) including any amendments of the project scope;
- (2) the document contains a discussion of each issue required to be addressed in the document by the project scope;
- (3) all surveys and studies required by the project scope have been completed and are documented in the environmental review document, and any environmental reports prepared have been submitted to the department delegate;
- (4) all coordination with agencies required by the project scope to be completed before approval of the environmental review document has been completed, and both agencies' comments and the project sponsor's responses to those comments are documented in the environmental review document;
- (5) any other tasks required by the project scope before submission of the environmental review document have been completed and documented; and

(6) any other tasks required by the project scope to be undertaken after approval of the environmental review document are appropriately identified in writing.

(e) Deadline for determination. Not later than the 20th day after the date the department delegate receives the project sponsor's environmental review document for administrative completeness review, the department delegate will:

(1) issue a letter confirming that the document is administratively complete and ready for technical review; or

(2) decline to issue a letter confirming that the document is administratively complete and ready for technical review, and instead send a written response to the project sponsor specifying in reasonable detail the basis for the department delegate's conclusions, including a listing of any required information determined by the department delegate to be missing from the document.

(f) Cooperation by department delegate. If the department delegate declines to issue a letter confirming that an environmental review document is administratively complete under subsection (e) of this section, the department delegate will undertake all reasonable efforts to cooperate with the project sponsor in a timely manner to ensure that the environmental review document is administratively complete.

(g) Re-submittal. The project sponsor may revise and re-submit any environmental review document determined by the department delegate to not be administratively complete. The department delegate will, in accordance with subsection (e) of this section, issue a determination letter on the re-submitted document not later than the 20th day after the date the department delegate receives it. There is no limit on the number of times an environmental review document may be revised and re-submitted under this subsection.

§2.49. *Technical Review.*

(a) Environmental issues checklist. For categorically excluded projects for which an environmental issues checklist is prepared, the department delegate will begin a technical review of the documentation of categorical exclusion when it is received from the project sponsor, or in the case of an electronic checklist, when the project sponsor indicates that the checklist is ready for review. The project sponsor shall ensure that all tasks and coordination required prior to making the environmental decision are complete when the documentation or electronic checklist is submitted for technical review.

(b) Environmental review document. The department delegate will begin a technical review of an environmental review document when the department delegate determines that it is administratively complete under §2.48 of this subchapter (relating to Administrative Completeness Review).

(c) Purpose. The purpose of a technical review is for the department delegate to confirm that:

(1) for a categorically excluded project for which an environmental issues checklist is prepared, the documentation provided by the project sponsor shows that the project qualifies as a categorically excluded project, as applicable; or

(2) for all other projects, the environmental review document prepared by the project sponsor is:

(A) an evaluation of all required subject areas;

(B) written in a professional and understandable manner;

(C) based on sound reasoning and accepted scientific and engineering principles; and

(D) legally sufficient, including satisfying the requirements of Subchapter D of this chapter (relating to Requirements for Classes of Projects).

(d) Disapproval. The department delegate may conclude that the environmental review document or documentation of categorical exclusion cannot be approved because it does not meet the requirements of this section. The department delegate will provide the project sponsor with a written explanation for its disapproval of an environmental review document or documentation of categorical exclusion.

§2.50. *Deadlines for Completing Certain Types of Technical Reviews; Suspension of Review Deadlines.*

(a) Deadlines. This subsection sets out the deadlines that apply to the department delegate's technical review.

(1) CEs. For a highway project classified as a CE, the department delegate will render an environmental decision not later than the 90th day after it receives the environmental issues checklist, or, for CEs for which an environmental review document is prepared, not later than the 90th day after it determines that the environmental review document is administratively complete under §2.48 of this subchapter (relating to Administrative Completeness Review). For purposes of this paragraph, the department delegate renders an environmental decision by:

(A) approving documentation showing the project meets applicable CE criteria under §2.81 of this chapter (relating to Categorical Exclusions) or declining in writing to do so; or

(B) for an FHWA transportation project, by forwarding such documentation to FHWA with an appropriate recommendation.

(2) EAs. This paragraph provides the deadlines for a highway project that requires the preparation of an EA.

(A) Comment deadline. The department delegate will provide to the project sponsor any department comments on the EA not later than the 90th day after the day that the department delegate determines that the EA is administratively complete under §2.48 of this subchapter.

(B) Environmental decision deadline. The department delegate will render an environmental decision not later than the 60th day after the later of:

(i) the date that the department delegate receives from the project sponsor a revised EA responsive to and in satisfaction of comments provided by the department delegate under subparagraph (A) of this paragraph; or

(ii) the date the public participation process concludes, which if a public hearing is held, is the date that the project sponsor submits to the department delegate the documentation of public hearing required by §2.107 of this chapter (relating to Public Hearing).

(3) Rendering an environmental decision on an EA. For the purposes of paragraph (2)(B) of this subsection, the department delegate renders an environmental decision by:

(A) issuing a written FONSI, as provided by §2.83 of this chapter (relating to Environmental Assessments) or declining in writing to do so; or

(B) for an FHWA transportation project, forwarding the EA and other documentation to FHWA with an appropriate recommendation.

(4) EISs. For a highway project that requires an EIS, the department delegate will render an environmental decision not later

than the 120th day after the date the department delegate determines that the project sponsor's draft of the final EIS is administratively complete under §2.48 of this subchapter. For purposes of this paragraph, the department delegate renders an environmental decision by:

(A) signing and dating the FEIS cover page as provided for by §2.84 of this chapter (relating to Environmental Impact Statements) or declining in writing to do so; or

(B) for an FHWA transportation project, forwarding the FEIS to FHWA with an appropriate recommendation.

(5) Reevaluations. For a highway project that requires a reevaluation, the department delegate will render an environmental decision not later than the 120th day after the date the department delegate determines that the reevaluation document is administratively complete under §2.48 of this subchapter. For the purposes of this paragraph, the department delegate renders an environmental decision by:

(A) signing and dating the reevaluation or declining in writing to do so; or

(B) for an FHWA transportation project, forwarding the reevaluation to FHWA with an appropriate recommendation.

(b) Suspension of technical review deadlines.

(1) Amendments, corrections, and revisions.

(A) If, at any time during its technical review, the department delegate identifies deficiencies, errors, or needed revisions in an environmental review document or documentation of categorical exclusion, the department delegate will notify, in writing, the project sponsor that it is suspending its technical review, and identify any needed amendments, corrections, and revisions.

(B) The department delegate will provide to the project sponsor any comments, if possible, in a single set of comments unless the project sponsor and department delegate agree to process comments in batches, which may result in multiple suspensions of the technical review deadline under this subsection.

(C) The project sponsor may make any corrections or revisions to the environmental review document or documentation of categorical exclusion identified by the department delegate, and re-submit the revised documentation in whole or in part, as appropriate, for continuation of technical review.

(D) The department delegate's compliance with the deadlines set forth in subsection (a) of this section is suspended from the time the department delegate provides written notice under subparagraph (A) of this paragraph until the time the project sponsor re-submits the environmental review document or documentation of categorical exclusion, in whole or in part, in accordance with subparagraph (C) of this paragraph.

(2) Additional work regarding highway project.

(A) If, at any time during technical review, the project becomes the subject of additional work, including a design change or identification and resolution of new significant issues, the project sponsor will notify the department delegate in writing.

(B) If the department delegate determines that a design change is material, compliance with the deadlines set forth in subsection (a) of this section is suspended from the time the department delegate provides written notice of its determination to the project sponsor until the project sponsor gives written notice to the department delegate that the additional work is completed and, if appropriate, submits a revised environmental review document or documentation of categorical

exclusion, in whole or in part, reflecting the outcome of the additional work.

(C) If as a result of additional work the classification of the project changes, technical review under this section is terminated, and the project sponsor may submit the new environmental review document or documentation of categorical exclusion to the department delegate under §2.48 of this subchapter.

(3) Issues raised by the department's legal counsel. If, at any time during technical review, the department delegate provides written notice to the project sponsor of an issue concerning compliance with applicable law identified by the department's legal counsel, compliance with the deadlines set forth in subsection (a) of this section is suspended from the time the department delegate provides that notice until the time that the project sponsor provides a satisfactory written response to the department delegate and, if appropriate, submits a revised environmental review document or documentation of categorical exclusion, in whole or in part, reflecting any warranted changes.

(4) Number of suspensions. There is no limit on the number of times technical review of an environmental review document or documentation of categorical exclusion may be suspended as provided by this subsection. The department will use its best efforts to minimize the number and duration of suspensions of technical reviews.

(5) Suspension by agreement. The project sponsor and department delegate may suspend compliance with the deadlines set forth in subsection (a) of this section at any time by written agreement, in which case the deadlines are suspended until the project sponsor and department delegate lift the suspension and resume technical review by written agreement.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. REQUIREMENTS FOR CLASSES OF PROJECTS

43 TAC §2.81

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which authorizes the commission to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.033, which authorizes the department to adopt rules concerning the environmental processing of a rail project; Transportation Code, §201.6035, which authorizes the department to accept responsibility assigned by FHWA for compliance with federal environmental laws; Transportation Code, §201.604, which requires the department to promulgate rules providing for its review of transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.); Transportation Code,

§201.762(b), which requires the department to promulgate rules implementing Transportation Code, Chapter 201, Subchapter I-1, regarding environmental review of highway projects; Transportation Code, §222.006, which requires the department to promulgate rules establishing a process to certify department district environmental specialists to work on all documents related to state and federal environmental review processes; and Transportation Code, §203.022, which requires the department to promulgate rules concerning public participation during the environmental processing of certain projects.

CROSS REFERENCE TO STATUTE

Transportation Code, §§91.033, 91.034, 201.6035, 201.604, 201.606, 201.607, 201.610, 201.611, 201.617, 201.751 - 201.761, 201.762(b), 203.021, 203.022, and 222.006; Parks and Wildlife Code, §26.001 and §26.002; and Natural Resources Code, §183.057.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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43 TAC §2.82

STATUTORY AUTHORITY

The repeal is adopted under Transportation Code, §201.101, which authorizes the commission to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.033, which authorizes the department to adopt rules concerning the environmental processing of a rail project; Transportation Code, §201.6035, which authorizes the department to accept responsibility assigned by FHWA for compliance with federal environmental laws; Transportation Code, §201.604, which requires the department to promulgate rules providing for its review of transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.); Transportation Code, §201.762(b), which requires the department to promulgate rules implementing Transportation Code, Chapter 201, Subchapter I-1, regarding environmental review of highway projects; Transportation Code, §222.006, which requires the department to promulgate rules establishing a process to certify department district environmental specialists to work on all documents related to state and federal environmental review processes; and Transportation Code, §203.022, which requires the department to promulgate rules concerning public participation during the environmental processing of certain projects.

CROSS REFERENCE TO STATUTE

Transportation Code, §§91.033, 91.034, 201.6035, 201.604, 201.606, 201.607, 201.610, 201.611, 201.617, 201.751 - 201.761, 201.762(b), 203.021, 203.022, and §222.006; Parks

and Wildlife Code, §26.001 and §26.002; and Natural Resources Code, §183.057.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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43 TAC §§2.83 - 2.86

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which authorizes the commission to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.033, which authorizes the department to adopt rules concerning the environmental processing of a rail project; Transportation Code, §201.6035, which authorizes the department to accept responsibility assigned by FHWA for compliance with federal environmental laws; Transportation Code, §201.604, which requires the department to promulgate rules providing for its review of transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.); Transportation Code, §201.762(b), which requires the department to promulgate rules implementing Transportation Code, Chapter 201, Subchapter I-1, regarding environmental review of highway projects; Transportation Code, §222.006, which requires the department to promulgate rules establishing a process to certify department district environmental specialists to work on all documents related to state and federal environmental review processes; and Transportation Code, §203.022, which requires the department to promulgate rules concerning public participation during the environmental processing of certain projects.

CROSS REFERENCE TO STATUTE

Transportation Code, §§91.033, 91.034, 201.6035, 201.604, 201.606, 201.607, 201.610, 201.611, 201.617, 201.751 - 201.761, 201.762(b), 203.021, 203.022, and 222.006; Parks and Wildlife Code, §26.001 and §26.002; and Natural Resources Code, §183.057.

§2.83. *Environmental Assessments.*

(a) Applicability.

(1) This section applies to a transportation project that the department delegate has not classified as a categorical exclusion and that does not clearly require the preparation of an EIS, or if the department delegate believes an EA would assist in determining the need for an EIS.

(2) This section applies to a transportation project that is a state transportation project or an FHWA transportation project, except that subsection (i) of this section applies only if the project is an FHWA transportation project.

(b) Purpose and content.

(1) An EA describes the purpose and need for the project, any alternatives considered, any mitigation measures that are to be incorporated into the project, and the extent of environmental impact, including direct, indirect, and cumulative impacts. The project sponsor will investigate environmental impacts and prepare an EA to determine the nature and extent of environmental impacts, and to provide full disclosure of project impacts to the public.

(2) If, taking into account any mitigation measures or commitments documented in the EA, the EA shows that the environmental impacts are not significant, the EA will conclude with a FONSI. If, taking into account any mitigation measures or commitments documented in the EA, the EA shows that the impacts are significant, the EA will conclude that an EIS is required.

(c) Coordination. The project sponsor will comply with §2.12 of this chapter (relating to Project Coordination), and will include in the EA the results of coordination and a summary of the contacts with agencies and the comments received.

(d) Public participation. The project sponsor will conduct appropriate public participation in accordance with Subchapter E of this chapter (relating to Public Participation) and will include in the EA the results of public participation and the comments received. If changes resulting from public participation are minimal, the project sponsor may incorporate the results into the EA by appending errata sheets, rather than revising the EA as a whole.

(e) Organization of EA. To the maximum extent possible, an EA should summarize and incorporate by reference any separately prepared environmental reports supporting the EA's conclusions. If these reports are not included as appendices, the reports must be available for public inspection on request.

(f) Circulation of draft EA. The project sponsor may not disclose a draft of an EA before public disclosure of the EA is approved by the department delegate or, for an FHWA transportation project, by FHWA. The project sponsor will comply with §2.108 of this chapter (relating to Notice of Availability).

(g) Change in determination of impact. If the department delegate, taking into account any mitigation measures or commitments documented in the EA, determines at any point prior to the issuance of a FONSI that the project may have a significant impact on social, economic, or environmental concerns, the department delegate will direct the project sponsor to prepare an EIS.

(h) Preparation of FONSI.

(1) Finding of no significant impact (FONSI) means a document that is issued by the department delegate that briefly presents the reasons why, taking into account any mitigation measures or commitments documented in the EA, the transportation project will not have a significant effect on the human environment and, therefore, for which an environmental impact statement will not be prepared. To describe the impacts of the project, and to identify any mitigation measures or commitments that factor into the determination that impacts are not significant, a FONSI will reference the EA and any other environmental documents related to the FONSI rather than repeating the information contained in those documents within the body of the FONSI.

(2) The department delegate will review the EA, any proposed mitigation measures, the results of project coordination, and if a public hearing was held, the summary and analysis. The department delegate, if appropriate, will present the decision in a written FONSI.

(3) The project sponsor will give notice of availability of a FONSI in accordance with §2.108 of this chapter.

(i) FHWA transportation project. For an FHWA transportation project, in addition to the requirements of subsections (a) - (h) of this section, the department delegate and project sponsor must comply with any federal laws, including FHWA's rules, applicable to the processing of the project as an EA. If federal law, including FHWA's rules, conflicts with this chapter, federal law controls to the extent of the conflict. At the conclusion of the technical review, the department delegate will forward the environmental review document and any other relevant documentation to FHWA with an appropriate recommendation.

§2.84. *Environmental Impact Statements.*

(a) Applicability.

(1) This section applies to a transportation project if there are likely to be significant environmental impacts. The project sponsor will prepare an EIS that is a detailed public disclosure document that evaluates the impacts of the project.

(2) This section applies to a transportation project that is a state transportation project or an FHWA transportation project, except that subsection (f) of this section applies only if the project is an FHWA transportation project.

(b) Content.

(1) An EIS must include:

(A) a discussion of the purpose and need for the project;

(B) an evaluation of all reasonable alternatives satisfying the purpose and need, their associated social, economic, and environmental impacts, an evaluation of alternatives eliminated from detailed study, and a determination of the preferred alternative;

(C) a summary of studies conducted to determine the nature and extent of environmental impacts;

(D) a description of the environmental impact of the project, any unavoidable adverse environmental impacts and associated measures to minimize harm, and any irreversible and irretrievable commitments of resources involved if the project is implemented;

(E) a description of the direct, indirect, and cumulative effects of the project; and

(F) a discussion of compliance with all applicable laws or reasonable assurances that the requirements can be met, and a description of the mitigation measures that are to be incorporated into the project.

(2) Coordination. The project sponsor will comply with §2.12 of this chapter (relating to Project Coordination), and will include in the EIS the results of coordination conducted before final approval of the EIS and a summary of the contacts with agencies and the comments received.

(3) Public participation. The project sponsor will conduct appropriate public participation in accordance with Subchapter E of this chapter (relating to Public Participation) and will include in the EIS the results of public participation and the comments received.

(4) Organization. To the maximum extent possible, an EIS should summarize, incorporate by reference and include as appendices any separately prepared environmental reports supporting the EIS's conclusions, rather than repeat the detailed information from environmental reports in the body of the EIS.

(c) Processing the EIS.

(1) The project sponsor will in the following order:

(A) publish a notice of intent under §2.102 of this chapter (relating to Notice of Intent (NOI)) and develop a coordination plan under §2.103 of this chapter (relating to Coordination Plan for EIS);

(B) conduct public participation and coordination in the manner and at the times prescribed by law;

(C) prepare the draft EIS (DEIS);

(D) publish the notice of availability of the DEIS;

(E) conduct the public hearing;

(F) prepare the final EIS (FEIS);

(G) publish the notice of availability of the FEIS; and

(H) prepare a draft record of decision (ROD).

(2) Accelerated Decision-making.

(A) If public comments are minor, and changes are limited to factual corrections or explanations of why comments do not warrant additional agency response, the project sponsor may prepare errata sheets and attach them to the DEIS, rather than preparing the FEIS. When errata sheets are attached to the DEIS in lieu of a separately prepared FEIS, all other applicable requirements for completing the EIS set forth in subsection (e)(1) - (6) of this section apply.

(B) The project sponsor may prepare the FEIS and draft ROD as a single document unless:

(i) the FEIS makes substantial changes to the proposed project that are relevant to environmental or safety concerns; or

(ii) there are significant new circumstances or information relevant to environmental concerns that bear on the proposed action or the impacts of the proposed action.

(3) The project sponsor will prepare a supplemental DEIS, a supplemental FEIS, or both if required by §2.86 of this subchapter (relating to Supplemental Environmental Impact Statements).

(d) Preparation of DEIS.

(1) The project sponsor will prepare a DEIS that meets the requirements of subsection (b) of this section. A preferred alternative may be designated, if appropriate. The preferred alternative may be developed to a higher level of detail than other alternatives. The higher level detail must be limited to work necessary for preliminary design, as described by paragraph (5) of this subsection. The department delegate will review, and will approve the development of the preferred alternative to a higher level of detail if appropriate, and only if that development does not prevent the department from making an impartial decision as to whether to accept another alternative under consideration in the environmental review process.

(2) The DEIS is subject to the department delegate's approval before it is made available to the public as a department document. For highway projects processed under Subchapter C of this chapter (relating to Environmental Review Process for Highway Projects), the DEIS is approved for public review on the department delegate's completing the technical review of the DEIS under §2.49 of this chapter (relating to Technical Review).

(3) After the department delegate approves the DEIS, the project sponsor will circulate the DEIS and give notice of its availability in accordance with §2.108 of this chapter (relating to Notice of Availability).

(4) After the DEIS is circulated, public hearing held, and comments reviewed, the project sponsor will prepare an FEIS, or a supplemental DEIS if required.

(5) For the purposes of paragraph (1) of this subsection, preliminary design defines the general project location and design concepts. It includes, but is not limited to, preliminary engineering and other activities and analyses, such as environmental investigations, topographic surveys, metes and bounds surveys, geotechnical investigations, hydrologic analysis, hydraulic analysis, utility engineering, traffic studies, financial plans, revenue estimates, hazardous materials assessments, general estimates of the types and quantities of materials, and other work needed to establish parameters for the final design.

(e) Preparation of FEIS.

(1) The project sponsor will prepare an FEIS that meets the requirements of subsection (b) of this section and will prepare a public hearing record under §2.107 of this chapter (relating to Public Hearing). The FEIS may consist of the DEIS and attached errata sheets, if appropriate.

(2) After the department delegate approves the FEIS, the project sponsor will circulate the FEIS and publish notice of its availability in accordance with §2.108 of this chapter.

(3) The department delegate will complete and sign a record of decision (ROD) not earlier than the 30th day after the date of the publication of the availability of the FEIS notice in the *Texas Register*. The ROD will present the basis for the decision, summarize the department's responses to comments received, and summarize any mitigation measures and commitments. If the FEIS and ROD are a single document, the cover page must have separate signature blocks for the FEIS and the ROD. The department delegate will indicate approval of the ROD by signing the cover page not earlier than the 30th day after the date of the availability of the FEIS notice is published in the *Texas Register*.

(4) The department delegate will publish notice of the availability of the ROD in accordance with §2.108 of this chapter.

(5) Until the required ROD is signed, no further approvals may be given except for administrative activities taken to secure further project funding.

(6) If after a ROD is issued for a project the department approves an alternative that was not identified as the preferred alternative, the department delegate will prepare a revised ROD and will publish notice of the availability of the revised ROD in accordance with §2.108 of this chapter.

(f) FHWA transportation project. For an FHWA transportation project, in addition to subsections (a) - (e) of this section, the department delegate and project sponsor must comply with any federal laws, including FHWA's rules, applicable to the processing of the project as an EIS. If federal law, including FHWA's rules, conflicts with this chapter, federal law controls to the extent of the conflict. At the conclusion of technical review, the department delegate will forward the environmental review document and any other relevant documentation to FHWA with an appropriate recommendation.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. PUBLIC PARTICIPATION

43 TAC §§2.101 - 2.110

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §201.101, which authorizes the commission to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.033, which authorizes the department to adopt rules concerning the environmental processing of a rail project; Transportation Code, §201.6035, which authorizes the department to accept responsibility assigned by FHWA for compliance with federal environmental laws; Transportation Code, §201.604, which requires the department to promulgate rules providing for its review of transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.); Transportation Code, §201.762(b), which requires the department to promulgate rules implementing Transportation Code, Chapter 201, Subchapter I-1, regarding environmental review of highway projects; Transportation Code, §222.006, which requires the department to promulgate rules establishing a process to certify department district environmental specialists to work on all documents related to state and federal environmental review processes; and Transportation Code, §203.022, which requires the department to promulgate rules concerning public participation during the environmental processing of certain projects.

CROSS REFERENCE TO STATUTE

Transportation Code, §§91.033, 91.034, 201.6035, 201.604, 201.606, 201.607, 201.610, 201.611, 201.617, 201.751 - 201.761, 201.762(b), 203.021, 203.022, and 222.006; Parks and Wildlife Code, §26.001 and §26.002; and Natural Resources Code, §183.057.

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43 TAC §§2.101 - 2.110

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which authorizes the commission to establish rules for the conduct of the work of the department, and more specifically,

Transportation Code, §91.033, which authorizes the department to adopt rules concerning the environmental processing of a rail project; Transportation Code, §201.6035, which authorizes the department to accept responsibility assigned by FHWA for compliance with federal environmental laws; Transportation Code, §201.604, which requires the department to promulgate rules providing for its review of transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.); Transportation Code, §201.762(b), which requires the department to promulgate rules implementing Transportation Code, Chapter 201, Subchapter I-1, regarding environmental review of highway projects; Transportation Code, §222.006, which requires the department to promulgate rules establishing a process to certify department district environmental specialists to work on all documents related to state and federal environmental review processes; and Transportation Code, §203.022, which requires the department to promulgate rules concerning public participation during the environmental processing of certain projects.

CROSS REFERENCE TO STATUTE

Transportation Code, §§91.033, 91.034, 201.6035, 201.604, 201.606, 201.607, 201.610, 201.611, 201.617, 201.751 - 201.761, 201.762(b), 203.021, 203.022, and 222.006; Parks and Wildlife Code, §26.001 and §26.002; and Natural Resources Code, §183.057.

§2.101. General Requirements.

(a) Guidelines. The department will publish guidelines that identify a selection of outreach methods that project sponsors may choose in collaboration with the department delegate to inform the public and maximize participation in the public involvement process. Outreach methods may include posting information on a website, publishing an additional notice in the newspaper, or use of changeable message signs.

(b) Notification to interested parties. Each project sponsor shall maintain a list of elected public officials, individuals, and affected interest groups that have expressed an interest in a transportation project. The project sponsor will provide notification to these individuals and groups of any public participation opportunities related to the project, apart from a Meeting with Affected Property Owners.

(c) Minimum Requirements. This subchapter establishes the minimum requirements for public participation for a project.

(d) FHWA Transportation Projects. For an FHWA transportation project, in addition to the public participation requirements set forth in this subchapter, the project sponsor will comply with any additional public participation or coordination requirements that may apply under Federal law, such as the requirements at 23 U.S.C. §139, 23 U.S.C §128 and 40 C.F.R. Part 1500. To the extent there is a conflict between this subchapter and an applicable Federal law, the Federal law will prevail.

(e) Limited English Proficiency. The project sponsor, in consultation with the department delegate, will determine whether any notice required by this chapter must be published in a language, in addition to English, to comply with Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency (LEP).

(f) Joint Public Participation. The department may collaborate with local governments, metropolitan planning organizations, or other transportation entities to conduct joint public participation activities. Public participation hosted by other entities may satisfy department public participation requirements provided the requirements established in this subchapter are met.

§2.103. *Coordination Plan for EIS.*

(a) Purpose. A coordination plan is a plan for coordinating public and agency participation in and comment on the environmental review process when an EIS is required. A coordination plan is intended to involve the agencies with an interest in the project and the public in the early stages of development of an EIS, and is distinct from the process for preparation of the project scope prepared by a project sponsor and department delegate under §2.44 of this chapter (relating to Project Scope). A coordination plan must include, at a minimum, participation by any agency for which participation is required under a memorandum of understanding with the department, including the memoranda of understanding under Subchapters G, H, and I of this chapter (relating to Memorandum of Understanding with the Texas Parks and Wildlife Department, Memorandum of Understanding with the Texas Historical Commission, and Memorandum of Understanding with the Texas Commission on Environmental Quality).

(b) Coordination Plan Required. The project sponsor, in collaboration with the department delegate, will prepare a coordination plan after publication of the NOI for an EIS or supplemental EIS, in accordance with guidelines and procedures established by the department.

(c) Notice Requirements.

(1) The project sponsor will circulate the draft of the coordination plan to the agencies identified in the coordination plan and will make it available to the public at a public meeting. The project sponsor will allow not less than 30 days for comment on the draft coordination plan and schedule.

(2) A deadline for comment by agencies and the public may be extended for good cause. The good cause must be documented in the project file.

(3) The project sponsor will give a copy of the approved coordination plan and any approved schedule for completion of the environmental review process to the agencies identified in the coordination plan and will make it available to the public.

§2.106. *Opportunity for Public Hearing.*

(a) Purpose. An opportunity for a public hearing permits the public to request a public hearing for a project when the project sponsor is not otherwise obligated to hold a public hearing.

(b) When to afford an opportunity for public hearing.

(1) The project sponsor will afford an opportunity for a public hearing for a project if:

(A) the project requires the acquisition of significant amounts of right-of-way;

(B) the project substantially changes the layout or function of connecting roadways or of the facility being improved;

(C) the project adds through-lane capacity, not including auxiliary lanes or other lanes less than one mile in length;

(D) the project has a substantial adverse impact on abutting real property;

(E) the results of environmental studies support a FONSI; or

(F) the project sponsor or department delegate determines it is in the public interest.

(2) A project sponsor is not required to comply with this section if the project sponsor holds a public hearing for the project under §2.107 of this subchapter (relating to Public Hearing).

(c) Notice Requirements.

(1) The project sponsor will publish, at a minimum, one notice of the opportunity to request a public hearing in a local newspaper having general circulation. The notice shall be published at least 30 days prior to the deadline for submission of written requests for holding a public hearing. If there is no local newspaper in the area affected by the project, the project sponsor will publish notice in a newspaper having general circulation in the area affected by the project.

(2) In addition, the project sponsor will select a minimum of one additional outreach method to inform the public of an opportunity to request a public hearing.

(3) The project sponsor will mail notice of the opportunity to request a public hearing to landowners abutting the roadway within the proposed project limits, as identified by tax rolls or other reliable land ownership records, and to affected local governments and public officials.

(d) Procedural Requirements.

(1) The project sponsor will provide notice of the opportunity after location and design studies are developed and the environmental review document or documentation of categorical exclusion is approved for public disclosure by the department delegate.

(2) A public hearing is not required under this section if, at the end of the time set for affording an opportunity to request a public hearing, no requests have been received or the project sponsor has addressed all concerns of the persons requesting the public hearing.

(e) Documentation Requirements. If, after providing an opportunity for a public hearing under this section, the project sponsor does not hold a public hearing, the project sponsor will submit to the department delegate an original certification of the public participation process signed by the department public hearing officer containing a statement that the requirements of this section have been met.

§2.108. *Notice of Availability.*

(a) Purpose. A notice of availability is published to inform the public of when certain important documents are available for review, and how to obtain copies of those documents.

(b) When to publish notice. A notice of availability is required for:

(1) an EA;

(2) a FONSI;

(3) a DEIS;

(4) a FEIS; or

(5) a ROD.

(c) Notice requirements.

(1) The project sponsor will send copies of all notices of availability to the appropriate metropolitan planning organization and agencies with an interest in the project. If the agency will receive a full copy of the document, it is not necessary to also send a notice of availability.

(2) The project sponsor, in collaboration with the department delegate, will publish a notice of availability regarding a FONSI, DEIS, FEIS or ROD on the department website.

(3) The department delegate also must publish a notice of availability regarding a DEIS, FEIS or ROD in the *Texas Register*.

(4) If the FEIS and ROD will be a single document, the notice of availability regarding the FEIS should indicate that fact. A separate notice of availability is still required after the ROD is signed. The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. REQUIREMENTS FOR SPECIFIC TYPES OF PROJECTS AND PROGRAMS

43 TAC §2.131, §2.134

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which authorizes the commission to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.033, which authorizes the department to adopt rules concerning the environmental processing of a rail project; Transportation Code, §201.6035, which authorizes the department to accept responsibility assigned by FHWA for compliance with federal environmental laws; Transportation Code, §201.604, which requires the department to promulgate rules providing for its review of transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.); Transportation Code, §201.762(b), which requires the department to promulgate rules implementing Transportation Code, Chapter 201, Subchapter I-1, regarding environmental review of highway projects; Transportation Code, §222.006, which requires the department to promulgate rules establishing a process to certify department district environmental specialists to work on all documents related to state and federal environmental review processes; and Transportation Code, §203.022, which requires the department to promulgate rules concerning public participation during the environmental processing of certain projects.

CROSS REFERENCE TO STATUTE

Transportation Code, §§91.033, 91.034, 201.6035, 201.604, 201.606, 201.607, 201.610, 201.611, 201.617, 201.751 - 201.761, 201.762(b), 203.021, 203.022, and 222.006; Parks and Wildlife Code, §26.001 and §26.002; and Natural Resources Code, §183.057.

§2.134. *Coastal Management Program.*

(a) Scope. The approval of transportation projects and programs located in whole or in part within the coastal boundary, as defined in 31 TAC §503.1 (relating to Coastal Management Program Boundary), are actions subject to the Texas Coastal Management Program (CMP), 31 TAC Part 16. A project or program will be approved unless it is found to be inconsistent with the goals and policies of the

CMP, as described in 31 TAC Chapter 501 (relating to the Coastal Management Program). For the purposes of this section, "transportation projects and programs" includes the projects and programs for which an environmental review document or documentation of categorical exclusion is prepared under this chapter and Gulf Intracoastal Waterway projects for which the commission authorizes right-of-way acquisition and beneficial use projects.

(b) Thresholds. In accordance with 31 TAC §505.26 (relating to Approval of Thresholds for Referral), the department's threshold for referral of actions to the commissioner of the General Land Office is the approval of transportation projects and programs requiring an environmental impact statement. The threshold for actions concerning the Gulf Intracoastal Waterway is the approval by the commission for acquisitions of rights of way for dredged material disposal and for beneficial use projects, unless:

(1) the federal agency's consistency determination for the federal activity or the federal development project included the dredged material disposal plan or the beneficial use project, and the consistency is affirmed in accordance with 31 TAC Chapter 506 (relating to Council Procedures for Federal Consistency with Coastal Management Program Goals and Priorities);

(2) the Coastal Coordination Council or General Land Office previously issued a consistency agreement under 31 TAC Chapter 506 for the federal activity or the federal development project that included the disposal plan or the beneficial use project; or

(3) the disposal or placement of dredged material in existing dredge disposal sites or within existing beneficial use projects meets the provisions of 31 TAC Chapter 506.

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CHAPTER 5. FINANCE

The Texas Department of Transportation (department) adopts amendments to §5.11 and §5.43, and the repeal of §5.44, concerning collection of certain debts and payment of fees for department goods and services. The amendments to §5.11 and §5.43, and the repeal of §5.44 are adopted without changes to the proposed text as published in the January 3, 2014, issue of the *Texas Register* (39 TexReg 58) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

On return of a payment device, such as a check or draft, to the holder following dishonor of the payment device by a payor, Business and Commerce Code, §3.506, authorizes the holder, the holder's assignee, agent, or representative, or any other person retained by the holder to seek collection of the face value of the dishonored payment device to charge the drawer or endorser a maximum processing fee of \$30.

Amendments to §5.11, Charges for Dishonored Checks, remove the language that provides the specific amount of the processing fee and instead refers to the amount authorized by Business and Commerce Code, §3.506. As a result of this change, the amendment of §5.11 will not be required for any future changes in the statute regarding the processing fee.

Transportation Code, §201.208, authorizes the commission to adopt rules regarding the method of payment of a fee for any goods sold or services provided by the department or for the administration of any department program. Pursuant to that authority, the commission has adopted §§5.41 - 5.44.

Amendments to §5.43, Methods of Payment, remove the minimum and maximum credit card transaction acceptance amounts in subsection (b); remove the specific amount of the transaction charge for the use of a credit card in subsection (c); and delete subsection (d) relating to payment for *Texas Highways* magazine. These changes will have a positive public impact and encourage the use of this payment method reducing agency payment processing time and risk associated with the handling of other physical negotiable instruments.

Section 5.44, Exceptions, is repealed because the exceptions provided by that section to the application of 43 TAC Chapter 5, Subchapter D are no longer necessary.

COMMENTS

No comments on the proposed amendments and repeal were received.

SUBCHAPTER B. COLLECTION OF DEBTS

43 TAC §5.11

STATUTORY AUTHORITY

The amendment is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.208, which authorizes the commission to adopt rules regarding the method of payment of a fee for any goods sold or services provided by the department or for the administration of any department program.

CROSS REFERENCE TO STATUTE

Business and Commerce Code, §3.506; Penal Code, §32.41(c); and Transportation Code, §201.208.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. PAYMENT OF FEES FOR DEPARTMENT GOODS AND SERVICES

43 TAC §5.43

STATUTORY AUTHORITY

The amendment is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.208, which authorizes the commission to adopt rules regarding the method of payment of a fee for any goods sold or services provided by the department or for the administration of any department program.

CROSS REFERENCE TO STATUTE

Business and Commerce Code, §3.506; Penal Code, §32.41(c); and Transportation Code, §201.208.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 27, 2014.

TRD-201401356

Joanne Wright

Deputy General Counsel

Texas Department of Transportation

Effective date: April 16, 2014

Proposal publication date: January 3, 2014

For further information, please call: (512) 463-8683



43 TAC §5.44

STATUTORY AUTHORITY

The repeal is adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.208, which authorizes the commission to adopt rules regarding the method of payment of a fee for any goods sold or services provided by the department or for the administration of any department program.

CROSS REFERENCE TO STATUTE

Business and Commerce Code, §3.506; Penal Code, §32.41(c); and Transportation Code, §201.208.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 27, 2014.

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Joanne Wright

Deputy General Counsel

Texas Department of Transportation

Effective date: April 16, 2014

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For further information, please call: (512) 463-8683



CHAPTER 12. PUBLIC DONATION AND PARTICIPATION PROGRAM

SUBCHAPTER A. PUBLIC PARTICIPATION PROGRAMS

43 TAC §12.5, §12.7

The Texas Department of Transportation (department) adopts amendments to §12.5 and §12.7, relating to landscaping participation programs for improving the state highway system. The amendments to §12.5 and §12.7 are adopted without changes to the proposed text as published in the January 3, 2014, issue of the *Texas Register* (39 TexReg 60) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

House Bill (HB) 3422 enacted by the 83rd Legislature, Regular Session, 2013, requires the department to establish a program under which the department may accept donations of landscape materials for state highways from any source. The department currently has two programs, the Landscape Cost Sharing Program and the Landscape Partnership Program, that allow for landscape donations from local governments, businesses, and civic organizations. To implement HB 3422 the department is amending the existing landscape program rules to allow individuals and organizations to participate in both programs. The department also is updating its rules regarding signs that may be erected at a landscape project site and traffic safety plans provided during installation and work on a project.

Amendments to §12.5, Landscape Cost Sharing Program, address the eligibility for participation in the program. The existing rules allow private businesses, civic organizations, and local governments to participate in the program. HB 3422 requires the department to accept landscape donations from "any source." To implement that requirement, the amendments add individuals as potential participants and extend participation from civic organizations to all organizations.

Amendments to §12.5(b)(3) and (g)(2) standardize the requirements for signs that may be erected at a project site to recognize donors' participation in the program. The existing rules are silent regarding which party is to install and maintain signs along the highway right of way. These amendments update the section to clarify that the department will install and maintain signs, at the donor's expense, in order to increase safety by minimizing activities done on highway right of way by parties that may not have the requisite capabilities or expertise. The amendments to subsection (b)(3) clarify that all signs must comply with the Texas Manual on Uniform Traffic Control Devices (TMUTCD); this change assures uniformity and consistency of all signs installed under this program.

Amendments to §12.5(f)(2)(G) provide that the department will be responsible for the traffic safety plan by providing barricades, signs, and traffic handling devices when needed during installation or work on the project. Providing these safety features with department staff minimizes the activities done on highway right of way by parties that may not have the requisite capabilities or expertise to fully provide these services.

In addition, amendments to §12.5(f)(2)(G) allow the department to make an exception for a local government to erect and maintain a sign, and to provide barricades, signs, and traffic handling devices. Unlike other types of participants in the landscape program, a local government may be experienced in performing traffic safety plans and may have the ability and resources to manufacture and install signs that comply with TMUTCD. Use of the exception gives a local government the opportunity to use its staff

to perform traffic functions instead of paying the department for those services.

Changes made to §12.5(f)(2)(H) in 2011, inadvertently dropped words at the end of that subparagraph. The amendments add "thing reasonably regarded as economic gain or advantage" after "other" to make the sentence grammatically correct.

Amendments to §12.5(g)(2) clarify that the erection or replacement of a program sign is conditioned on the local government's or donor's payment of the cost of manufacturing and erecting the sign. The amendments also provide that sign costs will not be counted as a participant's required contribution.

Amendments to §12.7, Landscape Partnership Program, make changes consistent with the changes to §12.5 in regards to participation, signs, and traffic safety plans. Individuals and organizations are added as eligible participants to comply with HB 3422. The amendments require the sign to comply with TMUTCD and provide that the department will install the sign only after payment by the donor of the cost of manufacturing and erecting the sign. The amendments also state that the traffic safety plan including barricades, signs, and traffic handling devices will be provided by the department. However, the amendments include the same exception that was added to §12.5 providing that the department may allow a local government to be responsible for the signs and the traffic safety plan. The programs are similar and maintaining consistency where possible helps the department in overseeing the programs.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically Transportation Code §392.003, which authorizes the Texas Transportation Commission to adopt rules to establish a program under which the department may accept landscape donations.

CROSS REFERENCE TO STATUTE

Transportation Code, §392.003.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 27, 2014.

TRD-201401358

Joanne Wright

Deputy General Counsel

Texas Department of Transportation

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For further information, please call: (512) 463-8683



CHAPTER 21. RIGHT OF WAY SUBCHAPTER B. UTILITY ADJUSTMENT, RELOCATION, OR REMOVAL

43 TAC §21.23

The Texas Department of Transportation (department) adopts amendments to §21.23, relating to the cost of relocating utility facilities for toll projects. The amendments to §21.23 are adopted without changes to the proposed text as published in the January 3, 2014, issue of the *Texas Register* (39 TexReg 65) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

House Bill 2585, 83rd Legislature, Regular Session, 2013, amended Transportation Code, §203.092(a-1), (a-2), and (a-3), that deals with shared responsibility for the cost of relocating utility facilities on certain toll projects required by the improvement, construction, or expansion of those toll projects. The statutory amendments removed the September 1, 2013, expiration date and made the cost sharing provisions permanent. These rule amendments conform the department's rules to those statutory changes.

Amendments to §21.23, State Participation in Toll-Related Relocations, delete the expiration date of September 1, 2013 provided in §21.23(d)(2). The department and utility owner will continue to share equally in the cost of a relocation of a utility facility that is required by the improvement, construction, or expansion of certain toll projects.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §203.095, which authorizes the commission to adopt rules to implement Chapter 203, Subchapter E, Relocation of Utility Facilities.

CROSS REFERENCE TO STATUTE

Transportation Code, §203.092.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 27, 2014.

TRD-201401359

Joanne Wright

Deputy General Counsel

Texas Department of Transportation

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Proposal publication date: January 3, 2014

For further information, please call: (512) 463-8683



CHAPTER 28. OVERSIZE AND OVERWEIGHT VEHICLES AND LOADS

SUBCHAPTER C. PORT OF BROWNSVILLE PERMITS

43 TAC §§28.20 - 28.22

The Texas Department of Transportation (department) adopts amendments to §§28.20 - 28.22, concerning Port of Brownsville

Permits. The amendments to §§28.20 - 28.22 are adopted without changes to the proposed text as published in the January 3, 2014, issue of the *Texas Register* (39 TexReg 66) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, §623.219(a), requires the Texas Transportation Commission (commission) to designate the most direct route from specified international bridges to the Port of Brownsville to be used for permits issued by the Port of Brownsville. House Bill 3125, 83rd Legislature, Regular Session, 2013, added authority for the movement of oversize and overweight vehicles from the Free Trade International Bridge to the Port of Brownsville under permits issued by the Port of Brownsville. The amendments implement the changes made by House Bill 3125.

Amendments to §28.20 add language to allow the Port of Brownsville to issue permits for the operation of overweight vehicles from the Free Trade International Bridge to the entrance of the Port of Brownsville using Farm-to-Market Road 509, United States Highways 77 and 83, Farm-to-Market Road 511, State Highway 550, and East Loop (State Highway 32) as authorized by House Bill 3125. This will provide the Port of Brownsville with the ability to extend its permitting process to other businesses that are within the port area.

Amendments to §28.21(b) add the new permitted route to the list of roads for which the department may require the Port of Brownsville to obtain a surety bond to ensure that maintenance of the new routes would be covered under the surety bond if needed.

Amendments to §28.21(h)(1) add language to accommodate the new additional route in §28.20 to ensure the permit fees are used for maintenance on these additional roadways.

Amendments to §28.21(h)(2)(E) are made so that the Port of Brownsville may issue a permit and collect a fee for overweight vehicles traveling from the Free Trade International Bridge to the entrance of the Port of Brownsville using Farm-to-Market 509, United States Highways 77 and 83, Farm-to-Market Road 511, State Highway 550, and East Loop (State Highway 32); or a location within the Port of Brownsville, traveling on Farm-to-Market 509, United States Highways 77 and 83, Farm-to-Market Road 511, State Highway 550, and East Loop (State Highway 32) to the Free Trade International Bridge as authorized under House Bill 3125.

Amendments to §28.21(i) add language to include the new roadways in the maintenance contract between the Port of Brownsville and the department. This ensures maintenance of the new route in the same manner as the current routes.

Amendments to §28.22(a)(8) add language to accommodate the new route added in §28.20. The changes to this section authorize the appropriate route information to be included on the permit application.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §623.002, which

provides the commission with the authority to establish rules necessary to implement Transportation Code, Chapter 623; Transportation Code, §623.212, which allows the commission to authorize the authority to issue permits for the movement of oversized or overweight vehicles; and Transportation Code, §623.219(a), which requires the Texas Transportation Commission (commission) to designate the most direct route from specified international bridges to the Port of Brownsville.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 623, Subchapter K.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 27, 2014.

TRD-201401360

Joanne Wright

Deputy General Counsel

Texas Department of Transportation

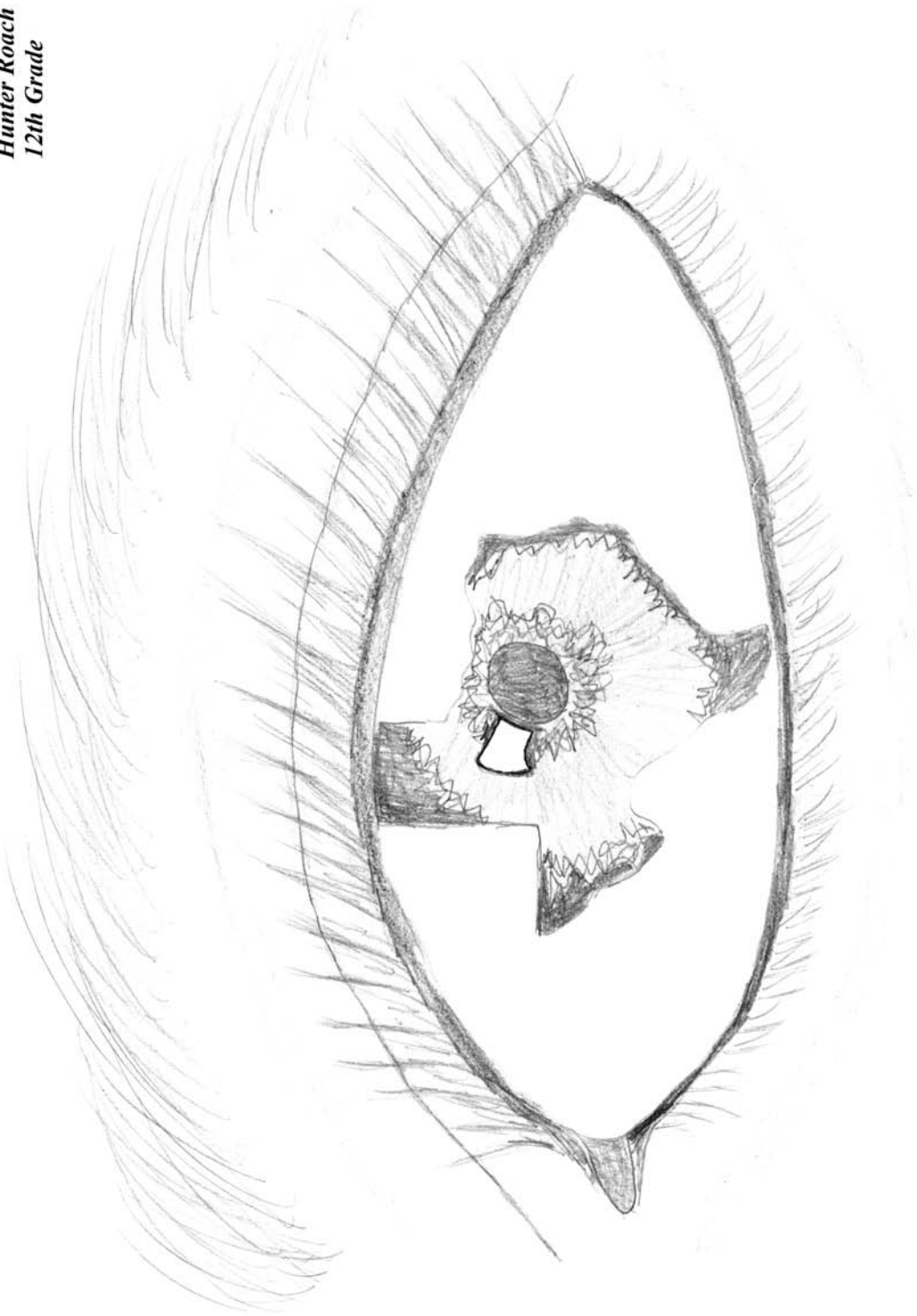
Effective date: April 16, 2014

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For further information, please call: (512) 463-8683



*Hunter Roach
12th Grade*



REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review*; (2)

notices of *intention to review*, which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (<http://www.sos.state.tx.us/texreg>). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative Code* on the web site (<http://www.sos.state.tx.us/tac>).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Department of Insurance, Division of Workers' Compensation

Title 28, Part 2

The Texas Department of Insurance, Division of Workers' Compensation (Division) will review all sections within the following chapters of Title 28, Part 2 of the Texas Administrative Code, in accordance with §2001.039 of the Texas Government Code:

Chapter 110. Required Notices of Coverage

Chapter 120. Compensation Procedure--Employers

Chapter 122. Compensation Procedure--Claimants

Chapter 126. General Provisions Applicable to All Benefits

Chapter 128. Benefits--Calculation of Average Weekly Wage

Chapter 136. Benefits--Vocational Rehabilitation

Chapter 160. Reports of Injury and Occupational Disease--General Provisions

Chapter 166. Accident Prevention Services

The Division will consider whether the reasons for initially adopting these rules continue to exist and whether these rules should be repealed, readopted, or readopted with amendments.

Any repeals or necessary amendments identified during the review of these rules will be proposed and published in the *Texas Register* in accordance with Chapter 2001 of the Texas Government Code.

If you wish to comment on whether these rules should be repealed, readopted, or readopted with amendments, you must do so in writing no later than May 12, 2014. Comments received after that date will not be considered.

Comments should clearly specify the particular section of the rules to which they apply and include proposed alternative language as appropriate. General comments should be designated as such.

Comments may be submitted by email at RuleReviewComments@tdi.texas.gov or by mailing or delivering your comments to Maria Jimenez, Office of Workers' Compensation Counsel, MS-4D, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

TRD-201401460

Dirk Johnson

General Counsel

Texas Department of Insurance, Division of Workers' Compensation

Filed: April 1, 2014



Destinee Jones
11th Grade



TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 16 TAC §24.21(1)(3)

$$TGC = cgc + [(pr)(cgc)(r)/(1.0-r)]$$

where:

TGC = Temporary gallonage charge

cgc = current gallonage charge

r = water use reduction expressed as a decimal fraction (the pumping restriction)

pr = percentage of revenues to be recovered expressed as a decimal fraction (i.e.,

50% = 0.5)

Appendix A

**NOTICE OF REQUIREMENT TO COMPLY WITH THE
SUBDIVISION SERVICE EXTENSION POLICY OF {name
of water supply corporation/special utility district}**

Pursuant to Texas Water Code, §13.2502, _____
Water Supply Corporation/Special Utility District hereby gives
notice that any person who subdivides land by dividing any lot,
tract, or parcel of land, within the service area of
_____ Water Supply Corporation/Special Utility
District, Certificate of Convenience and Necessity No.
_____, in _____ County, into two or
more lots or sites for the purpose of sale or development, whether
immediate or future, including re-subdivision of land for which a
plat has been filed and recorded or requests more than two water or
sewer service connections on a single contiguous tract of land must
comply with {title of subdivision service extension policy stated in
the tariff/policy} (the "Subdivision Policy") contained in
_____ Water Supply Corporation's
tariff/Special Utility District's policy.

_____ Water Supply Corporation/Special Utility
District is not required to extend retail water or sewer utility
service to a service applicant in a subdivision where the developer
of the subdivision has failed to comply with the Subdivision
Policy.

Applicable elements of the Subdivision Policy include:

Evaluation by _____ Water Supply
Corporation/Special Utility District of the impact a proposed
subdivision service extension will make on _____
Water Supply Corporation's/ Special Utility District's water
supply/sewer service system and payment of the costs for this
evaluation;

Payment of reasonable costs or fees by the developer for providing
water supply/sewer service capacity;

**Payment of fees for reserving water supply/sewer service
capacity;**

Forfeiture of reserved water supply/sewer service capacity for failure to pay applicable fees;

Payment of costs of any improvements to _____ Water Supply Corporation's/Special Utility District's system that are necessary to provide the water/sewer service;

Construction according to design approved by _____ Water Supply Corporation/Special Utility District and dedication by the developer of water/sewer facilities within the subdivision following inspection.

_____ Water Supply Corporation's/Special Utility District's tariff and a map showing _____ Water Supply Corporation's/Special Utility District's service area may be reviewed at _____ Water Supply Corporation's/ Special Utility District's offices, at {address of the water supply corporation/special utility district}; the tariff/policy and service area map also are filed of record at the Public Utility Commission of Texas.

**TABLE I
MAJOR SOURCE/MAJOR MODIFICATION EMISSION
THRESHOLDS**

POLLUTANT designation ¹	MAJOR SOURCE tons/year	SIGNIFICANT LEVEL ² tons/year	OFFSET RATIO minimum
OZONE (VOC, NO_x)³			
I marginal	100	40	1.10 to 1
II moderate	100	40	1.15 to 1
III serious	50	25	1.20 to 1
IV severe	25	25	1.30 to 1
CO			
I moderate	100	100	1.00 to 1 ⁴
II serious	50	50	1.00 to 1 ⁴
SO ₂	100	40	1.00 to 1 ⁴
PM₁₀			
I moderate	100	15	1.00 to 1 ⁴
II serious	70	15	1.00 to 1 ⁴
NO _x ⁵	100	40	1.00 to 1 ⁴
Lead	100	0.6	1.00 to 1 ⁴

¹ Texas nonattainment area designations as defined in §101.1 of this title (relating to Definitions).

² The significant level is applicable only to existing major sources and shall be evaluated after netting, unless the applicant chooses to apply nonattainment new source review (NNSR) directly to the project. The appropriate netting triggers for existing major sources of NO_x and VOC are specified in §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas) and for other pollutants are equal to the significant level listed in this table.

³ VOC and NO_x are precursors to ozone formation and should be quantified individually to determine whether a source is subject to NNSR under §116.150 of this title.

⁴ The offset ratio is specified to be greater than 1.00 to 1.

VOC = volatile organic compounds

NO_x = oxides of nitrogen

NO₂ = nitrogen dioxide

CO = carbon monoxide

SO₂ = sulfur dioxide

PM₁₀ = particulate matter with an aerodynamic diameter less than or equal to ten microns

⁵ Applies to the National Ambient Air Quality Standard for NO₂.

Figure: 30 TAC §312.82(a)(3)(A)(i)

$$D > \frac{131,700,000}{10^{0.1400t}}$$

D = time in days
t = temperature in degrees Celsius

Figure: 30 TAC §312.82(a)(3)(A)(iv)

$$D > \frac{50,070,000}{10^{0.1400t}}$$

D = time in days
t = temperature in degrees Celsius

Figure: 31 TAC §15.2(40)

A local government is not authorized to issue a permit or certificate authorizing construction or operation of the industrial facilities listed in this appendix within critical dune areas or seaward of a dune protection line, as provided in §15.4(c)(5) of this title (relating to Dune Protection Standards), with the exception of activities in Part 1, Division D, Major Group 20, Industry Group 209, Industry Numbers 2091 and 2092, as provided in the definition of "industrial facilities" in §15.2 of this title (relating to Definitions). This appendix is taken from the Standard Industrial Classification Manual as adopted by the Executive Office of the President, Office of Management and Budget (1987 ed.).

DIVISION D. MANUFACTURING

Major Group 20.	Food and kindred products, except Industry Numbers 2091 and 2092
Major Group 21.	Tobacco products
Major Group 22.	Textile mill products
Major Group 23.	Apparel and other finished products made from fabrics and similar materials
Major Group 24.	Lumber and wood products, except furniture
Major Group 25.	Furniture and fixtures
Major Group 26.	Paper and allied products
Major Group 27.	Printing, publishing, and allied industries
Major Group 28.	Chemicals and allied products
Major Group 29.	Petroleum refining and related industries
Major Group 30.	Rubber and miscellaneous plastics products
Major Group 31.	Leather and leather products
Major Group 32.	Stone, clay, glass, and concrete products
Major Group 33.	Primary metal industries
Major Group 34.	Fabricated metal products, except machinery and transportation equipment
Major Group 35.	Industrial and commercial machinery and computer equipment
Major Group 36.	Electronic and other electrical equipment and components, except computer equipment
Major Group 37.	Transportation equipment
Major Group 38.	Measuring, analyzing, and controlling instruments; photographic, medical and optical goods; watches and clocks
Major Group 39.	Miscellaneous manufacturing industries

DIVISION E. TRANSPORTATION, COMMUNICATIONS, ELECTRIC, GAS, AND SANITARY SERVICES

Major Group 49.	Sanitary services (sewerage systems, refuse systems, sanitary services not elsewhere classified)
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MISCELLANEOUS FOOD PREPARATIONS AND KINDRED PRODUCTS

Industrial facilities listed in Industry Number 2091 are not considered "industrial facilities" as defined in §15.2 of this title (relating to Definitions).

2091	Canned and Cured Fish and Seafoods
------	------------------------------------

Establishments primarily engaged in cooking and canning fish, shrimp, oysters, clams, crabs, and other seafoods, including soups; and those engaged in smoking, salting, drying, or otherwise curing fish and other seafoods for the trade. Establishments primarily engaged in shucking and packing fresh oysters in nonsealed containers, or in freezing or preparing fresh fish, are classified in Industry 2092.

- Canned fish, crustacea, and mollusks
- Caviar, canned
- Chowder, fish and seafood: canned
- Clam bouillon, broth, chowder, juice: bottled or canned
- Codfish: smoked, salted, dried and pickled
- Crab meat, canned and cured
- Finnan haddie (smoked haddock)
- Fish and seafood cakes: canned
- Fish egg bait, canned
- Fish: cured, dried, pickled, salted, and smoked
- Herring: smoked, salted, dried, and pickled
- Mackerel: smoked, salted, dried, and pickled
- Oysters, canned and cured
- Salmon: smoked, salted, dried, canned, and pickled
- Sardines, canned
- Seafood products, canned and cured
- Shellfish, canned and cured
- Shrimp, canned and cured
- Soups, fish and seafood: canned
- Stews, fish and seafood: canned
- Tuna fish, canned

MISCELLANEOUS FOOD PREPARATIONS AND KINDRED PRODUCTS

Industrial facilities listed in Industry Number 2092 are not considered "industrial facilities" as defined in §15.2 of this title (relating to Definitions).

2092	Prepared Fresh or Frozen Fish and Seafoods
------	--

Establishments primarily engaged in preparing fresh and raw or cooked frozen fish and other seafoods and seafood preparations, such as soups, stews, chowders, fishcakes, crabcakes, and shrimpcakes. Prepared fresh fish are eviscerated or processed by removal of heads, fins, or scales. This industry also includes establishments primarily engaged in the shucking and packing of fresh oysters in nonsealed containers.

- Chowders, fish and seafood: frozen
- Crabcakes, frozen
- Crabmeat picking
- Crabmeat, fresh: packed in nonsealed containers
- Fish and seafood cakes, frozen
- Fish fillets
- Fish sticks
- Fish: fresh and frozen, prepared
- Oysters, fresh: shucking and packing in nonsealed containers
- Seafoods, fresh and frozen
- Shellfish, fresh and frozen
- Shellfish, fresh: shucked, picked, or packed
- Shrimp, fresh and frozen
- Soups, fish and seafood: frozen
- Stews, fish and seafood: frozen

IN

ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Department of Aging and Disability Services

Correction of Error

The Department of Aging and Disability Services adopted new 40 TAC §19.345, concerning small house and household facilities, in the March 28, 2014, issue of the *Texas Register* (39 TexReg 2313). The new section was adopted with changes and republished on pages 2315 and 2316. The word "in" was inadvertently omitted from §19.345(g)(3)(B) on page 2316. The corrected subparagraph reads as follows:

"(B) the toilet requirements in §19.334(a)(8) of this subchapter must be met, except a bathroom must serve no more than one resident room and must include a lavatory, toilet, and a shower or bathing unit;"

TRD-201401416



Office of the Attorney General

Notice of Settlement of a Texas Water Code Enforcement Action

The State of Texas gives notice of the following proposed resolution of an environmental enforcement action under the Texas Water Code. Before the State may enter into a voluntary settlement agreement, pursuant to §7.110 of the Texas Water Code the State shall permit the public to comment in writing. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreement if the comments disclose facts or considerations indicating that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the law.

Case Title: *In the Matter of the Site Known as the San Angelo Electric Service Company Proposed State Superfund Site*; Docket No. 2006-0880-SPF; Before the Texas Commission on Environmental Quality.

Background: This case involves the remediation of the San Angelo Electric Service Company (SESCO) Site in San Angelo, Tom Green County, Texas (the Site). On September 22, 2006, the Texas Commission on Environmental Quality (TCEQ) issued the referenced administrative order (the Order), finding that there had been an actual or threatened release of hazardous substances and solid waste from the Site that may present an imminent and substantial endangerment to the public health and safety or the environment. The primary chemicals of concern (COCs) are polychlorinated biphenyls (PCBs) associated with petroleum hydrocarbons occurring in both soil and groundwater. Additional COCs include volatile organic compounds, semi-volatile organic compounds and metals. A Proposed Remedial Action Document has been prepared. See 38 TexReg 3118 (2013).

Nature of the Settlement: The case will be settled, as to six parties and associated companies, by termination of the Order and referral of the Site to the TCEQ's Voluntary Cleanup Program (VCP).

Proposed Settlement: The proposed settlement provides for the recovery of past response costs, cleanup of the Site in accordance with an approved Response Action Plan, and payment of VCP costs.

The Office of the Attorney General will accept written comments relating to the proposed settlement for thirty (30) days from the date of

publication of this notice. The proposed settlement may be examined at the Office of the Attorney General, 300 W. 15th Street, 10th Floor, Austin, Texas, and copies may be obtained in person or by mail for the cost of copying. Requests for copies of the settlement, and written comments on the same, should be directed to Thomas H. Edwards, Assistant Attorney General, Office of the Attorney General (MC-066), P.O. Box 12548, Austin, Texas 78711-2548; telephone (512) 463-2012, fax (512) 320-0052.

TRD-201401447

Katherine Cary

General Counsel

Office of the Attorney General

Filed: April 1, 2014



Central Texas Regional Mobility Authority

Notice of Availability of Request for Qualifications for Bergstrom Expressway (183 South)

The Central Texas Regional Mobility Authority ("Mobility Authority"), a political subdivision, is soliciting statements of interest and qualifications from entities interested in pursuing the development of the Bergstrom Expressway (183 South) Project ("the Project"), through a design/build contract ("D/B Contract"). The Project is generally described as an 8-mile project located in Travis County along the existing US 183 corridor between US 290 and SH 71. The proposed roadway will typically have six tolled main lanes and six non-tolled travel lanes (three in each direction) with the tolling of the main lanes terminating just south of Thompson Lane. Tolling will only occur for added capacity, and at a minimum the same amount of non-tolled capacity that currently exists will be maintained within the corridor. The entity selected for the Project, if any, will be responsible for the planning, design, construction and other identified requirements for development of the Project through a D/B Contract.

The request for qualifications ("RFQ") will be available on or about April 14, 2014. Copies may be obtained from the Mobility Authority website at www.ctrma.org, or by contacting the Mobility Authority at (512) 996-9778 (attn: Wesley M. Burford, P.E.). Periodic updates, addenda, and clarifications will be posted on the Mobility Authority website, and interested parties are responsible for monitoring the website accordingly. There will be a pre-proposal conference for interested parties at a specific date, time, and location as specified in the RFQ. Attendance at the pre-proposal conference is not a condition of submitting a response to the RFQ. Absent modification through subsequently issued addenda, final responses to the RFQ must be received in the offices of the Mobility Authority by or before 4:00 p.m. C.S.T. May 16, 2014, to be eligible for consideration.

It is the policy of the Mobility Authority to encourage the participation of minorities and women in all facets of its activities. The commitment of the proposing entity to utilization of DBEs will be considered in the RFQ evaluation process. Each proposing entity will be evaluated based on the criteria and process set forth in the RFQ.

TRD-201401468

Andy Martin
General Counsel
Central Texas Regional Mobility Authority
Filed: April 2, 2014

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Comptroller of Public Accounts

Notice of Request for Proposals

Pursuant to Chapter 403 of the Texas Government Code; §39.0821 of the Texas Education Code; and Chapter 2254, Subchapter B of the Texas Government Code, the Texas Comptroller of Public Accounts ("Comptroller") announces the issuance of Request for Proposals No. 208a ("RFP") from qualified, independent consultants to assist Comptroller in preparation of the Financial Allocation Study for Texas ("FAST"). If approved by Comptroller, Contractor will be expected to begin performance of the contract, if any, on or about May 23, 2014.

Contact: The RFP will be available electronically on the Electronic State Business Daily ("ESBD") at: <http://esbd.cpa.state.tx.us> on Friday, April 11, 2014, after 10:00 a.m. CT. Parties interested in a hard copy of the RFP should contact Jason Frizzell, Assistant General Counsel, Contracts, Texas Comptroller of Public Accounts, 111 E. 17th St., Room 201, Austin, Texas 78774 ("Issuing Office"), telephone number: (512) 305-8673.

Questions: All written questions must be received at the above-referenced address not later than 2:00 p.m. CT on Monday, April 21, 2014. Questions received after this time and date will not be considered. Prospective respondents are encouraged to fax or e-mail Questions to (512) 463-3669 or contracts@cpa.state.tx.us to ensure timely receipt. On or about Wednesday, April 25, 2014, Comptroller expects to post responses to questions as an addendum to the ESBD notice on the issuance of the RFP.

Closing Date: Proposals must be delivered to the Issuing Office no later than 2:00 p.m. CT, on Friday, May 9, 2014. Proposals received in the Issuing Office after this time and date will not be considered. Respondents shall be solely responsible for ensuring the timely receipt of their proposals in the Issuing Office.

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. Comptroller will make the final decision on award(s). Comptroller reserves the right to accept or reject any or all proposals submitted. Comptroller is not obligated to execute a contract on the basis of this notice or the distribution of any RFP. Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - April 11, 2014, after 10:00 a.m. CT; Questions Due - April 21, 2014, 2:00 p.m. CT; Official Responses to Questions posted - April 25, 2014, or as soon thereafter as practical; Proposals Due - May 9, 2014, 2:00 p.m. CT; Contract Execution - May 23, 2014, or as soon thereafter as practical; Commencement of Work - May 23, 2014, or as soon thereafter as practical. Any changes to this solicitation will be posted on the ESBD as a RFP Addendum. It is the responsibility of interested parties to periodically check the ESBD for updates to the RFP prior to submitting a Proposal.

TRD-201401464
Jason C. Frizzell
Assistant General Counsel
Comptroller of Public Accounts
Filed: April 2, 2014

Notice of Request for Proposals

Pursuant to Chapter 403; Chapter 404, Subchapter G; Chapter 2254, Subchapter A; and Chapter 2256 of the Texas Government Code and Chapter 15, §433 of the Texas Water Code, the Texas Comptroller of Public Accounts ("Comptroller"), as sole officer, director, and shareholder of Texas Treasury Safekeeping Trust Company ("TTSTC"), announces the issuance of Request for Proposals No. 207p ("RFP") from qualified, independent firms and individuals to provide professional certified public accountant services to TTSTC for the purpose of providing financial audits and compliance attestation services ("Audits") with respect to (i) TTSTC, (ii) Tobacco Settlement Permanent Trust Account ("Tobacco Fund"), (iii) TexPool, (iv) TexPool Prime, and (v) State Water Implementation Fund for Texas ("SWIFT"). The selected contractor or contractors ("Contractor"), if any, will provide the requested services to TTSTC to complete the Audits. TTSTC reserves the right to award one or more contracts under this RFP. If approved by TTSTC, Contractor will be expected to begin performance of the contract, if any, on or about August 1, 2014.

Contact: The RFP will be available electronically on the Electronic State Business Daily ("ESBD") at: <http://esbd.cpa.state.tx.us> on Friday, April 11, 2014, after 10:00 a.m. CT. Parties interested in a hard copy of the RFP should contact Jenny Burleson, Assistant General Counsel, Contracts, Texas Comptroller of Public Accounts, 111 E. 17th St., Room 201, Austin, Texas 78774 ("Issuing Office"), telephone number: (512) 305-8673.

Questions: All written questions must be received at the above-referenced address not later than 2:00 p.m. CT on Wednesday, April 30, 2014. Questions received after this time and date will not be considered. Prospective respondents are encouraged to fax or e-mail Questions to (512) 463-3669 or contracts@cpa.state.tx.us to ensure timely receipt. On or about Friday, May 9, 2014, Comptroller expects to post responses to questions as an addendum to the ESBD notice on the issuance of the RFP.

Closing Date: Proposals must be delivered to the Issuing Office no later than 2:00 p.m. CT, on Friday, May 23, 2014. Proposals received in the Issuing Office after this time and date will not be considered. Respondents shall be solely responsible for ensuring the timely receipt of their proposals in the Issuing Office.

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. Comptroller and Chief Executive Officer of TTSTC will make the final decision on award(s). TTSTC reserves the right to accept or reject any or all proposals submitted. TTSTC is not obligated to execute a contract on the basis of this notice or the distribution of any RFP. Neither Comptroller nor TTSTC shall pay for any costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - April 11, 2014, after 10:00 a.m. CT; Questions Due - April 30, 2014, 2:00 p.m. CT; Official Responses to Questions posted - May 9, 2014, or as soon thereafter as practical; Proposals Due - May 23, 2014, 2:00 p.m. CT; Contract Execution - August 1, 2014, or as soon thereafter as practical; Commencement of Work - August 1, 2014, or as soon thereafter as practical. Any changes to this solicitation will be posted on the ESBD as a RFP Addendum. It is the responsibility of interested parties to periodically check the ESBD for updates to the RFP prior to submitting a Proposal.

TRD-201401465
Jenny Burleson
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: April 2, 2014

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Notice of Request for Qualifications

Pursuant to Subchapter A, Chapter 111, §111.0045 of the Texas Tax Code, the Texas Comptroller of Public Accounts ("Comptroller") announces its Request for Qualifications No. 2071 ("RFQ") from qualified independent persons or firms to perform tax compliance examination services that meet the requirements of §111.0045 of the Texas Tax Code, administrative rules as codified at 34 Texas Administrative Code §3.3, procedures established by Comptroller under that statute, and other applicable law. For clarification, such services do not include any attestation services or rendition of an opinion of any nature by any such contractors. Under this RFQ, Comptroller reserves the right to select and contract with one or more persons or firms to conduct these examinations on an as-needed basis. The successful respondent will be expected to begin performance of the contract on or after September 1, 2014.

Contact: The RFQ will be available electronically on the Electronic State Business Daily ("ESBD") at: <http://esbd.cpa.state.tx.us> on Friday, April 11, 2014, after 10:00 a.m., CT. Parties interested in a hard copy of the RFQ should contact Jenny Burleson, Assistant General Counsel, Contracts, Texas Comptroller of Public Accounts, 111 E. 17th St., Room 201, Austin, Texas 78774 ("Issuing Office"), telephone number: (512) 305-8673.

Questions: All written questions must be received at the above-referenced address not later than 2:00 p.m. CT on Friday, April 25, 2014. Questions received after this time and date will not be considered. Prospective respondents are encouraged to fax or e-mail questions to (512) 463-3669 or contracts@cpa.state.tx.us to ensure timely receipt. On or about Friday, May 2, 2014, Comptroller expects to post responses to questions as an addendum to the ESBD notice on the issuance of the RFQ.

Closing Date: Statement of Qualifications must be delivered to the Issuing Office no later than 2:00 p.m. CT, on Friday, May 23, 2014. Statement of Qualifications received in the Issuing Office after this time and date will not be considered. Respondents shall be solely responsible for ensuring the timely receipt of Statement of Qualifications in the Issuing Office.

Evaluation Criteria: The Statement of Qualifications will be evaluated under the evaluation criteria outlined in the RFQ. Comptroller reserves the right to accept or reject any or all Statements of Qualifications submitted. Comptroller is not obligated to execute a contract on the basis of this notice or the distribution of any RFQ. Comptroller shall not pay for any costs incurred by any entity in responding to this notice or the RFQ.

The anticipated schedule of events is as follows: Issuance of RFQ - April 11, 2014, after 10:00 a.m. CT; Questions Due - April 25, 2014, 2:00 p.m. CT; Official Responses to Questions posted - May 2, 2014, or as soon thereafter as practical; Statement of Qualifications Due - May 23, 2014, 2:00 p.m. CT; Contract Execution - August 15, 2014, or as soon thereafter as practical; and Commencement of Work - on or after September 1, 2014. Any changes to this solicitation will be posted on the ESBD as a RFQ Addendum. It is the responsibility of interested parties to periodically check the ESBD for updates to the RFQ prior to submitting a Statement of Qualifications.

TRD-201401462

Jenny Burleson

Assistant General Counsel, Contracts

Comptroller of Public Accounts

Filed: April 2, 2014

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Financial Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 04/07/14 - 04/13/14 is 18% for Consumer¹/Agricultural/Commercial² credit through \$250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 04/07/14 - 04/13/14 is 18% for Commercial over \$250,000.

The monthly ceiling as prescribed by §303.005 and §303.009³ for the period of 04/01/14 - 04/30/14 is 18% for Consumer/Agricultural/Commercial credit through \$250,000.

The monthly ceiling as prescribed by §303.005 and §303.009 for the period of 04/01/14 - 04/30/14 is 18% for Commercial over \$250,000.

¹ Credit for personal, family or household use.

² Credit for business, commercial, investment or other similar purpose.

³ For variable rate commercial transactions only.

TRD-201401445

Leslie L. Pettijohn

Commissioner

Office of Consumer Credit Commissioner

Filed: April 1, 2014

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ, agency or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **May 12, 2014**. TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on May 12, 2014**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the com-

ment procedure at the listed phone numbers; however, TWC, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: 1915 ENTERPRISES, LP; DOCKET NUMBER: 2013-2013-MSW-E; IDENTIFIER: RN106798630; LOCATION: Cleburne, Johnson County; TYPE OF FACILITY: an unauthorized municipal solid waste (MSW) site; RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of MSW; PENALTY: \$7,500; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Ahluwalia Investments, Incorporated dba Buy and Ride 2; DOCKET NUMBER: 2013-2213-PST-E; IDENTIFIER: RN102360716; LOCATION: Irving, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.10(b), by failing to maintain underground storage tank (UST) records and make them immediately available for inspection upon request by agency personnel; 30 TAC §334.49(c)(4) and TWC, §26.3475(d), by failing to test the cathodic protection system for performance and operability at a frequency of at least once every three years; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the USTs for releases at a frequency of at least once per month; 30 TAC §334.45(c)(3)(A), by failing to securely anchor all emergency shutoff valves at the bases of the dispensers; 30 TAC §115.246(b)(2) and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for review upon request by agency personnel; and 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training in the operation and maintenance of the Stage II vapor recovery system, and each current employee receives in-house Stage II vapor recovery training regarding the purpose and correct operation of the Stage II vapor recovery system; PENALTY: \$12,419; ENFORCEMENT COORDINATOR: James Baldwin, (512) 239-1337; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: AMK Properties L L C dba Amigos Fuel Center; DOCKET NUMBER: 2013-2117-PWS-E; IDENTIFIER: RN105187181; LOCATION: Moore, Frio County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.122(c)(2)(A), by failing to provide public notice of the failure to conduct repeat coliform monitoring and routine coliform monitoring; 30 TAC §290.109(c)(2)(F) and §290.122(c)(2)(A), by failing to collect at least five routine distribution samples the month following a total coliform-positive result and failing to provide public notice and for not conducting increased coliform monitoring; 30 TAC §290.109(c)(2)(A)(i) and Texas Health and Safety Code, §341.033(d), by failing to collect routine distribution water samples for coliform analysis; and 30 TAC §290.109(c)(4)(B) and §290.122(c)(2)(A), by failing to collect raw groundwater source *Escherichia coli* (*E. coli*) samples from all active sources within 24 hours of being notified of a distribution total coliform-positive result and failing to provide public notice of the failure to collect a raw groundwater source (*E. coli*) samples from each active source within 24 hours of being notified of a distribution total coliform-positive result; PENALTY: \$2,036; ENFORCEMENT COORDINATOR: Jessica Schildwachter, (512) 239-2617; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(4) COMPANY: Aqua Utilities, Incorporated; DOCKET NUMBER: 2013-2123-PWS-E; IDENTIFIER: RN102671880; LOCATION: Nueces County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.115(f)(1) and Texas Health and Safety Code,

§341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter for total trihalomethanes, based on the locational running annual average; PENALTY: \$366; ENFORCEMENT COORDINATOR: Jim Fisher, (512) 239-2537; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(5) COMPANY: Car Wash Etc, Incorporated; DOCKET NUMBER: 2012-2555-PST-E; IDENTIFIER: 101434900; LOCATION: Cypress, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2), by failing to monitor piping in a underground storage tank system in a manner which would detect a release from any portion of the piping system; PENALTY: \$2,625; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: City of Chillicothe; DOCKET NUMBER: 2014-0271-PWS-E; IDENTIFIER: RN101389542; LOCATION: Chillicothe, Hardeman County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the Maximum Contaminant Level of 0.080 milligrams per liter for total trihalomethanes, based on the running annual average; PENALTY: \$345; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(7) COMPANY: City of Del Rio; DOCKET NUMBER: 2013-2103-MLM-E; IDENTIFIER: RN102143294; LOCATION: Del Rio, Val Verde County; TYPE OF FACILITY: Type I Municipal Solid Waste (MSW) landfill; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to maintain authorization to discharge storm water associated with industrial activities under the Texas Pollution Discharge Elimination System Multi-Sector General Permit Number TXR050000; and 30 TAC §330.129 and MSW Disposal Permit Number 207A, Site Operating Plan Section 9.1, by failing to display current inspection tags on all fire extinguishers; PENALTY: \$36,850; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(8) COMPANY: City of Follett; DOCKET NUMBER: 2013-1880-PWS-E; IDENTIFIER: RN101409514; LOCATION: Follett, Lipscomb County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3) and TCEQ Agreed Order Docket Number 2012-0172-PWS-E, Ordering Provision Numbers 2.a.i. and 2.c., by failing to submit a Disinfectant Level Quarterly Operating Reports to the executive director each quarter by the tenth day of the month following the end of the quarter; PENALTY: \$274; ENFORCEMENT COORDINATOR: Sam Keller, (512) 239-2678; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(9) COMPANY: City of Hearne; DOCKET NUMBER: 2013-1582-MWD-E; IDENTIFIER: RN102835162; LOCATION: Hearne, Robertson County; TYPE OF FACILITY: wastewater treatment facility; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0010046002 Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limits; PENALTY: \$40,500; Supplemental Environmental Project offset amount of \$32,400 applied to Texas Association of Resource Conservation and Development Areas, Incorporated; ENFORCEMENT COORDINATOR: Jorge Ibarra, P.E., (817) 588-5890; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(10) COMPANY: Enrique Guajardo dba Quick Mart; DOCKET NUMBER: 2014-0111-PST-E; IDENTIFIER: RN100809995; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and Texas Health and Safety Code, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months; PENALTY: \$5,411; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(11) COMPANY: Gilmer Independent School District; DOCKET NUMBER: 2013-0952-PST-E; IDENTIFIER: RN103024899; LOCATION: Gilmer, Upshur County; TYPE OF FACILITY: fleet refueling facility; RULE VIOLATED: 30 TAC §334.50(b)(1)(A), and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month; and 30 TAC §334.50(b)(2)(B) and TWC, §26.3475(b), by failing to provide release detection for the suction piping associated with the USTs; PENALTY: \$3,375; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(12) COMPANY: J&S Water Company, L.L.C. dba Five Oaks Facility; DOCKET NUMBER: 2013-2205-MSW-E; IDENTIFIER: RN102361862; LOCATION: Spring, Harris County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §330.7(a), by failing to obtain a permit or other authorization from the TCEQ prior to engaging in any activity of storage, processing, removal, or disposal of municipal solid waste; PENALTY: \$4,950; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: John Alihemati dba Station 66; DOCKET NUMBER: 2013-2112-PST-E; IDENTIFIER: RN103937389; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and Texas Health and Safety Code (THSC), §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months; and 30 TAC §115.245(3) and THSC, §382.085(b), by failing to maintain the Stage II Vapor Recovery System in proper operating condition; PENALTY: \$6,862; ENFORCEMENT COORDINATOR: James Baldwin, (512) 239-1337; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(14) COMPANY: Jose O. Beltran and Maria A. Beltran dba 1017 Café; DOCKET NUMBER: 2014-0095-PWS-E; IDENTIFIER: RN102679461; LOCATION: San Isidro, Starr County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(e), by failing to provide the results of quarterly nitrate sampling to the executive director; 30 TAC §290.122(a)(3)(C), by failing to provide public notification regarding the failure to comply with the acute maximum contaminant level for nitrate for the third quarter of 2013; and 30 TAC §290.51(a)(6) and TWC, §5.702, by failing to pay Public Health Service fees; PENALTY: \$270; ENFORCEMENT COORDINATOR: Sam Keller, (512) 239-2678; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(15) COMPANY: K & D MARINE, LLC dba Dustin Gulf Seafood; DOCKET NUMBER: 2013-2031-MLM-E; IDENTIFIER: RN104919832; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: fish and seafood unloading facility; RULE VIOLATED: 30 TAC §335.4 and TWC, §26.121, by failing to prevent the unauthorized disposal of industrial solid waste; 30 TAC §324.6 and 40 Code of Federal Regulations (CFR) §279.22(d), by failing to

prevent, abate, and perform cleanup of used oil spills; and 30 TAC §324.6 and 40 CFR §279.22(c), by failing to label used oil containers with the words "Used Oil"; PENALTY: \$12,337; ENFORCEMENT COORDINATOR: Thomas Greimel, (512) 239-5690; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(16) COMPANY: KAUSER ENERGY INCORPORATED dba Kaiser Food Mart; DOCKET NUMBER: 2014-0045-PST-E; IDENTIFIER: RN101473668; LOCATION: Dallas, Denton County; TYPE OF FACILITY: operates a convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and Texas Health and Safety Code, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months; PENALTY: \$4,092; ENFORCEMENT COORDINATOR: Allyson Plantz, (512) 239-4593; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(17) COMPANY: Lucky's Redi-Mix Co. LLC; DOCKET NUMBER: 2013-2076-WQ-E; IDENTIFIER: RN106136427; LOCATION: Benbrook, Tarrant County; TYPE OF FACILITY: concrete batch plant; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge storm water runoff associated with industrial activities under Texas Pollutant Discharge Elimination System General Permit Number TXR050000; PENALTY: \$2,625; ENFORCEMENT COORDINATOR: Jorge Ibarra, P.E., (817) 588-5890; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(18) COMPANY: Marta Enterprises Incorporated dba Gulfway Quick Mart; DOCKET NUMBER: 2012-2260-PST-E; IDENTIFIER: 101793032; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(a)(1)(A), by failing to provide release detection; PENALTY: \$2,625; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(19) COMPANY: Melvin McGill Enterprises, Incorporated dba Cochran General Store; DOCKET NUMBER: 2012-2556-PST-E; IDENTIFIER: 101748440; LOCATION: Bellville, Austin County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1), by failing to provide corrosion protection; PENALTY: \$2,625; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(20) COMPANY: Monarch Utilities I L.P.; DOCKET NUMBER: 2014-0067-PWS-E; IDENTIFIER: RN102987856; LOCATION: Polk County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.117(c)(2) and (i)(1), by failing to collect semiannual lead and copper tap samples at the required ten sample sites, have the samples analyzed at an approved laboratory, and provide the results to the executive director by the tenth day of the month following the end of the monitoring period; and 30 TAC §290.113(f)(4) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter for total trihalomethanes, based on the running annual average; PENALTY: \$3,403; ENFORCEMENT COORDINATOR: Jim Fisher, (512) 239-2537; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(21) COMPANY: Naushin Enterprises Incorporated dba Lockhart Grocery; DOCKET NUMBER: 2012-2558-PST-E; IDENTIFIER: 101491462; LOCATION: Lockhart, Caldwell County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE

VIOLATED: 30 TAC §334.49(a)(1), by failing to provide corrosion protection; PENALTY: \$2,625; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 12100 Park 35 Circle, Building A, Austin, Texas 78753, (512) 339-2929.

(22) COMPANY: Oxy Vinyls LP dba Deer Park PVC; DOCKET NUMBER: 2012-2261-PST-E; IDENTIFIER: 100225879; LOCATION: Deer Park, Harris County; TYPE OF FACILITY: industrial/chemical manufacturing plant; RULE VIOLATED: 30 TAC §334.50(d)(1)(B), by failing to implement inventory control methods; PENALTY: \$2,625; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(23) COMPANY: PINKIE'S, INCORPORATED, Carol Fritz, Kenneth Wayne Fritz, and David L. Fritz dba Pinkie's Mini Mart 51 and dba Pinkie's Mini Mart 53; DOCKET NUMBER: 2013-2119-PWS-E; IDENTIFIER: RN102678240 (Pinkie's Mini Mart 51) and RN101450328 (Pinkie's Mini Mart 53); LOCATION: Lubbock County; TYPE OF FACILITY: public water supplies; RULE VIOLATED: 30 TAC §290.106(f)(2) and Texas Health and Safety Code (THSC), §341.031(a), by failing to comply with the acute maximum contaminant level (MCL) of 10 milligrams per liter (mg/L) for nitrate at Pinkie's Mini Mart 51 facility; and 30 TAC §290.106(f)(2) and THSC, §341.031(a), by failing to comply with the acute MCL of 10 mg/L for nitrate at Pinkie's Mini Mart 53 facility; PENALTY: \$2,808; ENFORCEMENT COORDINATOR: Lisa Westbrook, (512) 239-1160; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7092.

(24) COMPANY: Rains Independent School District; DOCKET NUMBER: 2013-1414-PST-E; IDENTIFIER: RN101880904; LOCATION: Emory, Rains County; TYPE OF FACILITY: fleet refueling facility; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide corrosion protection for the underground storage tank system; PENALTY: \$3,938; ENFORCEMENT COORDINATOR: Jorge Ibarra, P.E., (817) 588-5890; REGIONAL OFFICE: 2916 Teague Drive Tyler, Texas 75701-3734, (903) 535-5100.

(25) COMPANY: SHINTECH INCORPORATED; DOCKET NUMBER: 2014-0089-PWS-E; IDENTIFIER: RN100213198; LOCATION: Freeport, Brazoria County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter for total trihalomethanes, based on the running annual average; PENALTY: \$253; ENFORCEMENT COORDINATOR: Allyson Plantz, (512) 239-4593; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(26) COMPANY: Stepping Stone Ministry, Incorporated; DOCKET NUMBER: 2013-2140-PWS-E; IDENTIFIER: RN106505100; LOCATION: Midland, Midland County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(f)(2) and Texas Health and Safety Code, §341.031(a), by failing to comply with the acute maximum contaminant level of 10 milligrams per liter for nitrate; PENALTY: \$660; ENFORCEMENT COORDINATOR: Katy Montgomery, (210) 403-4016; REGIONAL OFFICE: 9900 West IH-20, Suite 100, Midland, Texas 79706, (432) 570-1359.

(27) COMPANY: Temple Star Food Mart Incorporated dba Temple Star Food Mart; DOCKET NUMBER: 2012-2557-PST-E; IDENTIFIER: 101859841; LOCATION: Temple, Bell County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(1)(a), by failing to monitor underground storage tanks for release at least once per month; PENALTY: \$2,625; ENFORCEMENT COORDINATOR: Margarita Dennis,

(817) 588-5892; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(28) COMPANY: Town of Westlake; DOCKET NUMBER: 2013-2122-WQ-E; IDENTIFIER: RN107003600; LOCATION: Westlake, Denton County; TYPE OF FACILITY: wastewater collection system; RULE VIOLATED: TWC, §26.121(a)(1), by failing to prevent an unauthorized discharge of wastewater from the collection system into or adjacent to water in the state; PENALTY: \$30,000; Supplemental Environmental Project offset amount of \$30,000 applied to the City of Haltom City; ENFORCEMENT COORDINATOR: Christopher Bost, (512) 239-4575; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(29) COMPANY: TRENT WATER WORKS, INCORPORATED; DOCKET NUMBER: 2014-0087-PWS-E; IDENTIFIER: RN101202752; LOCATION: Freeport, Brazoria County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.43(c)(8) and §290.46(m), by failing to ensure that all clearwells, ground storage tanks, standpipes, and elevated tanks are painted, disinfected, and maintained in strict accordance with current American Water Works Association standards; PENALTY: \$127; ENFORCEMENT COORDINATOR: Lisa Westbrook, (512) 239-1160; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-201401446

Kathleen C. Decker

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: April 1, 2014



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

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **May 12, 2014**. TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on May 12, 2014**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, TWC, §7.075

provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: A&J BUSINESS PARTNERS, LLC d/b/a A&J FOOD MART; DOCKET NUMBER: 2013-1714-PST-E; TCEQ ID NUMBER: RN101553865; LOCATION: 711 West Pioneer Parkway, Arlington, Tarrant County; TYPE OF FACILITY: underground storage tank (UST) system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: \$3,750; STAFF ATTORNEY: Meaghan M. Bailey, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: BJ&H 615 North Palestine, LLC d/b/a Shoppers Stop 1; DOCKET NUMBER: 2013-1235-PST-E; TCEQ ID NUMBER: RN102278603; LOCATION: 615 North Palestine Street, Athens, Henderson County; TYPE OF FACILITY: underground storage tank (UST) system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.72, by failing to report a suspected release to the executive director within 24 hours of discovery; and 30 TAC §334.74, by failing to investigate a suspected release within 30 days of discovery; PENALTY: \$12,600; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(3) COMPANY: DALSO SOLVENTS & CHEMICALS, INC.; DOCKET NUMBER: 2013-1181-DCL-E; TCEQ ID NUMBER: RN101555993; LOCATION: 2613 National Place, Garland, Dallas County; TYPE OF FACILITY: dry cleaning solvent distributing and transporting business; RULES VIOLATED: 30 TAC §337.4(b), by failing to prevent the sale, delivery, or distribution of any dry cleaning solvent to a facility that does not have a valid, current dry cleaning registration certificate; and 30 TAC §337.15(c), by failing to collect, report, and remit TCEQ dry cleaning solvent fees after selling dry cleaning solvent; PENALTY: \$4,550; STAFF ATTORNEY: Jennifer Cook, Litigation Division, MC 175, (512) 239-1873; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: DON A. STEWART, INC. d/b/a Bastrop Self Service, d/b/a Bastrop Chevron, and d/b/a Garfield Chevron; DOCKET NUMBER: 2012-2363-PST-E; TCEQ ID NUMBER: RN102272689; RN102267713; and RN104392543; LOCATION: 513 State Highway 71 West, Bastrop, Bastrop County (Bastrop Self Service, facility 1); 516 State Highway 71 West, Bastrop, Bastrop County (Bastrop Chevron, facility 2); and 2850 Highway 71, Cedar Creek, Bastrop County (Garfield Chevron, facility 3); TYPE OF FACILITY: underground storage tank (UST) systems and convenience stores with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.72, by failing to report a suspected release to the TCEQ within 24 hours of discovery at facilities 1 and 2; 30 TAC §334.74(3), by failing to file a release determination report with the commission within 45 days after a suspected release has occurred at facilities 1 and 2; and TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) at facility 3; PENALTY: \$20,825; STAFF ATTORNEY: David A. Terry, Litigation Division, MC 175, (512) 239-0619; REGIONAL OFFICE: Austin Regional

Office, Post Office Box 13087, MC R-11, Austin, Texas 78711, (512) 339-2929.

(5) COMPANY: El Paso Electric Company; DOCKET NUMBER: 2013-1826-PST-E; TCEQ ID NUMBER: RN100601996; LOCATION: 100 North Stanton Street, El Paso, El Paso County; TYPE OF FACILITY: underground storage tank (UST) system which supplies a power generator; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; and 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the UST; PENALTY: \$3,459; STAFF ATTORNEY: Jeffrey Huhn, Litigation Division, MC R-13, (210) 403-4023; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(6) COMPANY: KUNWAR INCORPORATED d/b/a Bear Creek Food Mart; DOCKET NUMBER: 2012-1577-PST-E; TCEQ ID NUMBER: RN101571990; LOCATION: 101 Bear Creek Parkway, Suite A, Keller, Tarrant County; TYPE OF FACILITY: underground storage tank (UST) system and convenience store with retail sales of gasoline; RULES VIOLATED: Texas Health and Safety Code (THSC), §382.085(b) and 30 TAC §115.248(1), by failing to provide the Stage II in-house employee training to each current employee that would provide awareness of the purpose and correct operation of the Stage II equipment and keep a log; THSC, §382.085(b) and 30 TAC §115.245(6), by failing to submit the Stage II vapor recovery system test results to the appropriate regional office or the local air pollution control program with jurisdiction within 10 working days of the completion of the tests; 30 TAC §334.8(c)(4)(B) and (5)(B)(ii), by failing to obtain a UST delivery certificate by submitting a properly completed UST registration and self-certification form within 30 days prior to the expiration of the delivery certificate; and TWC, §26.3467(a) and 30 TAC §334.8(c)(5)(A)(i), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; PENALTY: \$5,125; STAFF ATTORNEY: Jeffrey Huhn, Litigation Division, MC R-13, (210) 403-4023; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: Lone Star Petroleum, LP d/b/a Hayes Food Mart; DOCKET NUMBER: 2013-1131-PST-E; TCEQ ID NUMBER: RN102050549; LOCATION: 830 North New Braunfels Avenue, San Antonio, Bexar County; TYPE OF FACILITY: underground storage tank (UST) system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: \$2,813; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(8) COMPANY: SLA Business, Inc. d/b/a Express Mart; DOCKET NUMBER: 2013-0576-PST-E; TCEQ ID NUMBER: RN101889533; LOCATION: 5319 Blue Mount Road, Fort Worth, Tarrant County; TYPE OF FACILITY: underground storage tank (UST) system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for release at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: \$3,375; STAFF ATTORNEY: Joel Cordero, Litigation Division,

MC 175, (512) 239-0672; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: TEXAS GIANT KIM'S INC. d/b/a Stateline Citgo; DOCKET NUMBER: 2013-0980-PST-E; TCEQ ID NUMBER: RN102372737; LOCATION: 5023 North State Line Avenue, Texarkana, Bowie County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(C) and (5)(A), by failing to obtain a UST delivery certificate by submitting a properly complete UST registration and self-certification form; TWC, §26.3475(a) and 30 TAC §334.50(b)(2), by failing to provide release detection for the pressurized piping associated with the UST system; TWC, §26.3467(a) and 30 TAC §334.8(c)(5)(A)(i), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; PENALTY: \$5,855; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(10) COMPANY: Z & H ENTERPRISES INC. d/b/a 5 Corners Food Mart; DOCKET NUMBER: 2013-0210-PST-E; TCEQ ID NUMBER: RN101907798; LOCATION: 3517 South Gevers Street, San Antonio, Bexar County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide corrosion protection for the UST system; and 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide release detection for the pressurized piping associated with the UST system; and 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; PENALTY: \$8,879; STAFF ATTORNEY: Jeffrey Huhn, Litigation Division, MC R-13, (210) 403-4023; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

TRD-201401450

Kathleen C. Decker

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: April 1, 2014



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

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **May 12, 2014**. The commission will consider any writ-

ten comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on May 12, 2014**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: Barbara Miller d/b/a Turner Water Service; DOCKET NUMBER: 2013-1360-UTL-E; TCEQ ID NUMBER: RN101243129; LOCATION: 531 Marilyn Street, Fresno, Fort Bend County; TYPE OF FACILITY: public water system; RULES VIOLATED: TWC, §13.1395(b)(2) and 30 TAC §290.39(o) and §291.162(a) and (j), by failing to submit to the executive director for approval by the required deadline, an adoptable emergency preparedness plan that demonstrates the facility's ability to provide emergency operations; PENALTY: \$7,400; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: Lake Whitney Resorts, LLC; DOCKET NUMBER: 2013-1224-MWD-E; TCEQ ID NUMBER: RN105503379; LOCATION: 0.75 mile west of the intersection of Sun Country Road and Farm-to-Market Road 933, on the north side of Sun Country Road, Whitney, Hill County; TYPE OF FACILITY: on-site cluster septic system; RULES VIOLATED: TWC, §26.121(a)(1) and 30 TAC §305.125(4), by failing to prevent the unauthorized discharge of wastewater into or adjacent to water in the state; PENALTY: \$15,750; STAFF ATTORNEY: Ryan Rutledge, Litigation Division, MC 175, (512) 239-0630; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(3) COMPANY: Paula Reagan d/b/a Lucky Roadhouse BBQ; DOCKET NUMBER: 2013-1393-PWS-E; TCEQ ID NUMBER: RN106096514; LOCATION: 9520 Harmonson Road, Justin, Denton County; TYPE OF FACILITY: restaurant with a public water system; RULES VIOLATED: 30 TAC §290.42(b)(1) and (e)(3) and §290.110(a), by failing to provide disinfection facilities for the groundwater supply to ensure microbiological control and distribution protection; Texas Health and Safety Code, §341.0315(c) and 30 TAC §290.45(d)(2)(A)(ii), by failing to provide a minimum pressure tank capacity of 220 gallons; 30 TAC §290.46(n)(3), by failing to maintain copies of well completion data such as well material setting data, geological log, sealing information (pressure cementing and surface protection), disinfection information, microbiological sample results, and a chemical analysis report of a representative sample of water from the well kept on file as long as the well remains in service; 30 TAC §290.41(c)(1)(D), by failing to ensure that livestock in pastures are not allowed within 50 feet of a water supply well that remains in service;

30 TAC §290.42(i), by failing to maintain a thorough and up-to-date plant operations manual for operator review and reference; 30 TAC §290.41(c)(3)(N), by failing to provide for the accumulation of water production data; 30 TAC §290.46(f)(2) and (3)(E)(I), by failing to make water works operation and maintenance records available for review by commission personnel during an investigation; and TWC, §5.702 and 30 TAC §290.51(a)(6), by failing to pay all annual Public Health Service fees for Fiscal Years 2012 and 2013, including any associated late fees and penalties, for TCEQ Financial Administration Account Number 90610267; PENALTY: \$7,307; STAFF ATTORNEY: Ryan Rutledge, Litigation Division, MC 175, (512) 239-0630; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: Richard J. Duda; DOCKET NUMBER: 2013-1472-PWS-E; TCEQ ID NUMBER: RN105362529; LOCATION: the intersection of Farm-to-Market Road 986 and Four Post Lane, Kaufman County; TYPE OF FACILITY: public water system; RULES VIOLATED: Texas Health and Safety Code, §341.033(d); 30 TAC §290.109(c)(2)(A)(ii) and §290.122(c)(2)(A) and (f) and TCEQ Default Order Docket Number 2010-1023-PWS-E, Ordering Provisions Numbers 3.a.i. and 3.a.ii., by failing to collect routine distribution water samples for coliform analysis, and by failing to provide public notification of the failure to sample; 30 TAC §290.106(c) and (e), by failing to collect annual nitrates samples and provide the results to the executive director; 30 TAC §§290.106(c) and (e), 290.107(c) and (e), 290.108(c) and (e), and 290.113(c) and (e), by failing to collect triennial asbestos, minerals, radionuclides, disinfection byproducts, and synthetic organic chemical contaminants samples and provide the results to the executive director; 30 TAC §290.117(c)(2) and (i)(1), by failing to collect lead and copper samples and provide the results to the executive director; and TWC, §5.702 and 30 TAC §290.51(a)(6), by failing to pay Public Health Service fees, including late fees, for TCEQ Financial Administration Account Number 91290050; PENALTY: \$12,428; STAFF ATTORNEY: Ryan Rutledge, Litigation Division, MC 175, (512) 239-0630; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201401451

Kathleen C. Decker

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: April 1, 2014



Notice of Opportunity to Comment on Shutdown/Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Shutdown/Default Orders (S/DOs). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overflow prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes a Shutdown Order after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overflow prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. The commission proposes a Default Order when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed

technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. In accordance with TWC, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **May 12, 2014**. The commission will consider any written comments received and the commission may withdraw or withhold approval of an S/DO if a comment discloses facts or considerations that indicate that consent to the proposed S/DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed S/DO is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed S/DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the S/DO shall be sent to the attorney designated for the S/DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on May 12, 2014**. Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the S/DOs and/or the comment procedure at the listed phone numbers; however, comments on the S/DOs shall be submitted to the commission in **writing**.

(1) COMPANY: ABRAHAM SONS INC.; DOCKET NUMBER: 2013-1784-PST-E; TCEQ ID NUMBER: RN101731305; LOCATION: 1203 South Alamo Street, San Antonio, Bexar County; TYPE OF FACILITY: UST system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(a) and (c)(1) and 30 TAC §334.50(b)(1)(A) and (2), by failing to monitor the USTs for releases at frequency of at least once every month (not to exceed 35 days between each monitoring) and by failing to provide release detection for the pressurized piping associated with the UST system; TWC, §26.3475(d) and 30 TAC §334.49(a)(1), by failing to provide corrosion protection for the UST system; PENALTY: \$7,630 STAFF ATTORNEY: Ryan Rutledge, Litigation Division, MC 175, (512) 239-0630; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: DALLAS TRADING ENTERPRISES, INC. d/b/a Kuick Check; DOCKET NUMBER: 2013-0404-PST-E; TCEQ ID NUMBER: RN101435360; LOCATION: 201 West Morgan, Meridian, Bosque County; TYPE OF FACILITY: UST system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(a) and (c)(1) and 30 TAC §334.50(b)(1)(A) and (2), by failing to monitor the USTs for releases at frequency of at least once every month (not to exceed 35 days between each monitoring) and by failing to provide release detection for the pressurized piping associated with the UST system; 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; PENALTY: \$5,129; STAFF ATTORNEY: Ryan Rutledge, Litigation Division, MC 175, (512) 239-0630; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(3) COMPANY: Darlene Chappell d/b/a Big Red Barn; DOCKET NUMBER: 2013-1336-PST-E; TCEQ ID NUMBER: RN102063575; LOCATION: 781 Reagan Street, Barnhart, Irion County; TYPE OF FACILITY: UST system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(d) and 30 TAC

§334.49(c)(2)(C), and TCEQ Agreed Orders (AO) Docket Number 2009-1594-PST-E, Ordering Provision 2.a.i., by failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components are operating properly; 30 TAC §334.50(d)(9)(A)(iii), and TCEQ AO Docket Number 2009-1954-PST-E, Ordering Provision Number 2.a.ii., by failing to perform release detection for the UST system; 30 TAC §334.8(c)(5)(C) and TCEQ AO Docket Number 2009-1594-PST-E, Ordering Provision 2.a.iii., by failing to ensure that a legible tag, label, or marking with the tank number is permanently applied upon or affixed to either the top of the fill tube or to a non-removable point in the immediate area of the fill tube according to the UST registration and self-certification form; and 30 TAC §334.10(b)(1)(B) and TCEQ AO Docket Number 2009-1954-PST-E, Ordering Provision Number 2.a.iv., by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; PENALTY: \$86,015; STAFF ATTORNEY: Steven M. Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(4) COMPANY: KING FUELS, INC. d/b/a Pin Oak Shell; DOCKET NUMBER: 2013-1577-PST-E; TCEQ ID NUMBER: RN101880078; LOCATION: 1350 Pin Oak Road, Katy, Fort Bend County; TYPE OF FACILITY: UST system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: \$7,500; STAFF ATTORNEY: Ryan Rutledge, Litigation Division, MC 175, (512) 239-0630; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-201401449

Kathleen C. Decker

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: April 1, 2014



Notice of Public Hearing on Proposed Amendments to 30 Texas Administrative Code Chapters 11 and 14

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed amendments to 30 Texas Administrative Code (TAC) Chapter 11, Contracts, §11.102, and 30 TAC Chapter 14, Grants, §14.9, under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would implement House Bill (HB) 586, 83rd Legislature, 2013, Regular Session, to reflect the exemption of sovereign immunity for state-related breach of contract for engineering, architectural, or construction services, or for material related to those professional services as authorized under Texas Civil Practice and Remedies Code, Chapter 114 or the Texas Government Code. The proposed rulemaking would also implement HB 1487, 83rd Legislature, 2013, Regular Session, to reflect the new requirement to make grant awards in excess of \$25,000 available to the public on the agency's generally accessible Internet website and to state the purpose for which the grant was awarded.

The commission will hold a public hearing on this proposal in Austin on May 6, 2014, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested

persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2013-051-011-AS. The comment period closes May 12, 2014. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Greg Yturralde, Chief Financial Officer, at (512) 239-2446.

TRD-201401407

David Timberger

Director, General Law Division

Texas Commission on Environmental Quality

Filed: March 28, 2014



Notice of Public Hearing on Proposed Amendments to 30 Texas Administrative Code Chapter 312

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapter 312, Sludge Use, Disposal, and Transportation, §§312.4, 312.8, 312.10 - 312.13, 312.41, 312.42, 312.44, 312.45, 312.47, 312.50, 312.65, and 312.81 - 312.83, under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking will address nuisance odors and unauthorized discharges of bulk sewage sludge by establishing new "core requirements" applicable to all classes of sewage sludge, establishing a new classification structure with corresponding requirements based upon treatment processes, and clarifying the executive director's authority to include additional requirements as needed to address nuisance odors.

The commission will hold a public hearing on this proposal in Austin on May 6, 2014, at 2:00 p.m. in Building E, Room E201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Derek Baxter, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restric-

tions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2014-010-116-AI. The comment period closes May 12, 2014. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Brian Sierant, Office of Water, (512) 239-1375.

TRD-201401401

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Filed: March 28, 2014



Notice of Public Hearing on Proposed Revisions to 30 Texas Administrative Code Chapter 114 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapter 114, Control of Air Pollution from Motor Vehicles, amended §§114.301, 114.306, 114.307, 114.309, and repealed §114.304, and corresponding revisions to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency (EPA) concerning SIPs.

The proposed rulemaking would remove the prohibition on the increased use of methyl-tertiary-butyl-ether (MTBE) in gasoline to conform to the low Reid vapor pressure (RVP) gasoline requirements; remove the registration requirements for gasoline producers and importers that supply low RVP gasoline to the affected counties; remove the annual reporting and certification requirements on the use of MTBE in low RVP gasoline; and make other non-substantive clarifying changes as needed for accuracy and consistency between Chapter 114 and the El Paso Low RVP Gasoline requirements in Chapter 15.

The commission will hold a public hearing on this proposal in Austin on May 8, 2014, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2014-002-114-AI. The comment period closes May 12, 2014. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html.

For further information, please contact Morris Brown, Air Quality Division, (512) 239-1438.

TRD-201401370

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Filed: March 28, 2014



Notice of Public Hearings on Proposed Revisions to 30 Texas Administrative Code Chapter 115 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct public hearings to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapter 115, Control of Air Pollution from Volatile Organic Compounds, §§115.10, 115.221, 115.222, 115.224 - 115.227, and 115.229, and corresponding revisions to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency (EPA) concerning SIPs.

The proposed rulemaking would revise Chapter 115, Subchapter C, Division 2, concerning the requirements for Stage I vapor recovery testing. The proposed rulemaking would specify Stage I testing requirements for gasoline dispensing facilities located in the 12 ozone nonattainment and 4 ozone maintenance counties that will be affected by the decommissioning of the Stage II vapor recovery equipment rule revision and in the 95 counties that are subject to the state Stage I rule but not Stage II requirements. The proposed Stage I rule revision would establish testing requirements that are more consistent with federal Stage I testing requirements in 40 Code of Federal Regulations Part 63, Subpart CCCCC.

The commission will hold public hearings on this proposal in Austin at 2:00 p.m. on May 1, 2014, at the commission's central office located at 12100 Park 35 Circle, Building E, Room 201S; in Fort Worth at 2:00 p.m. on April 29, 2014, at the TCEQ Region 4 Office, 2309 Gravel Road; and in Houston at 2:00 p.m. on May 6, 2014, at the TCEQ Region 12 Office, Conference Room 3C-3F, 5425 Polk Street. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2013-022-115-AI. The comment period closes May 12, 2014. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Sarah Davis, Air Quality Planning Section, (512) 239-4939.



Notice of Water Quality Applications

The following notices were issued on March 21, 2014 through March 28, 2014.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

LUMINANT GENERATION COMPANY LLC which operates the Lake Creek Steam Electric Station, has applied for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0000954000, which authorizes the discharge of once-through cooling water and previously monitored effluents (cooling tower blowdown, low volume wastes, and metal cleaning wastes) at a daily average flow not to exceed 294,000,000 gallons per day via Outfall 001; low volume wastes and stormwater runoff from yard drains and diked oil storage areas on a flow-variable basis via Outfall 002; and low volume wastes from water treatment via Outfall 003 on an intermittent and flow-variable basis. The facility is located at 4278 West Lake Creek Road, on the west shore of Lake Creek Lake along Farm-to-Market Road 1860, approximately four miles southwest of the City of Riesel, McLennan County, Texas 76682.

MARC ROGER MEEKER has applied for a renewal of TPDES Permit No. WQ0013601001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 8,500 gallons per day. The facility is located on Highway 75, approximately 0.7 mile north of the intersection of Highway 75 and Shepard Hill Road in Montgomery County, Texas 77378.

BELL COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO 1 has applied for a renewal of TPDES Permit No. WQ0010351001 which authorizes the discharge of treated filter backwash effluent from a water treatment plant at a daily average flow not to exceed 900,000 gallons per day. The facility is located at 5200 Water Works Drive, Belton, in Bell County, Texas, three miles west-northwest of Lake Belton Dam, north of Farm-to-Market Road 439 and approximately one mile north of Westcliff Park in Bell County, Texas 76543.

TOSHIBA INTERNATIONAL CORPORATION, which operates Toshiba International, a facility which manufactures electric motors, inverters, and other electrical products, has applied for a renewal of TPDES Permit No. WQ0003153000, which authorizes the discharge of treated sanitary wastewater and parts washwater at a daily average flow not to exceed 50,000 gallons per day via Outfall 001, and recirculated non-contact cooling water and once-through cooling water at a daily average flow not to exceed 50,000 gallons per day via Outfall 002. The facility is located at 13131 West Little York Road, Houston, Harris County, Texas 77041.

DUBLIN LIVESTOCK AUCTION LLC has applied for a Major Amendment of TPDES Permit No. WQ0004136000, for a Concentrated Animal Feeding Operation (CAFO), to authorize the applicant to expand an existing Livestock Auction Barn from 1,800 head to a

maximum capacity of 2,000 head, reconfigure land management unit (LMU) to remove former LMU #2, add open lots and remove three wells. The facility is located on the south side of State Highway 6 approximately four and two tenths (4.2) miles east of the intersection of Farm-to-Market Road 219 and State Highway 6 in Erath County, Texas.

K 3 RESOURCES LP has applied for a renewal of TCEQ Permit No. WQ0004446000, which authorizes the land application of sewage sludge for beneficial use on 45.51 acres. This permit will not authorize a discharge of pollutants into waters in the State. The sludge land application site is located approximately 0.9 mile south of the intersection of State Highway 362, and State Highway 529, on the west side of State Highway 362 in Waller County, Texas 77423.

K 3 RESOURCES LP has applied for a renewal of TCEQ Permit No. WQ0004447000, which authorizes the land application of sewage sludge for beneficial use. The current permit authorizes land application of sewage sludge for beneficial use on 89.78 acres. This permit will not authorize a discharge of pollutants into waters in the State. The sludge land application site is located at the west side of Farm-to-Market Road 362, approximately 1.3 miles south of the intersection of Farm-to-Market Road 362 and Farm-to-Market Road 529, in Waller County, Texas 77423.

K 3 RESOURCES has applied for a renewal of TCEQ Permit No. WQ0004448000, which authorizes the land application of sewage sludge for beneficial use. The current permit authorizes land application of sewage sludge for beneficial use on 73.83 acres. This permit will not authorize a discharge of pollutants into waters in the State. The sewage sludge land application site is located on the west side of Adams Flat Road, approximately 0.7 mile south-southwest of the intersection of Adams Flat Road and Farm-to-Market Road 359, in Waller County, Texas 77423.

CITY OF ASPERMONT has applied for a renewal of TCEQ Permit No. WQ0010141001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day via surface irrigation of 46 acres of non-public access pastureland. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 0.75 mile west of the intersection of Vivian Avenue and North Second Street, north of the City of Aspermont in Stonewall County, Texas 79502.

CITY OF TAHOKA has applied for a renewal of TCEQ Permit No. WQ0010298002, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 360,000 gallons per day via surface irrigation of 209 acres of non-public access agricultural land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility is located approximately two miles south of Highway 380 and 0.25 mile east of Highway 87. The effluent disposal site is located approximately 1,200 feet south of the plant site, between Highway 87 and the Atchison Topeka and Santa Fe Railroad, approximately 2.23 miles south of Highway 380 in Lynn County, Texas 79373.

CITY OF ABERNATHY has applied for a renewal of TCEQ Permit No. WQ0010774001 which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 380,000 gallons per day via surface irrigation of 180 acres of non-public access agricultural land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 1.5 miles north and 0.2 mile east of the intersection of Interstate Highway 27 and Farm-to-Market Road 2060 in Hale County, Texas 79311.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE has applied for a renewal of TPDES Permit No. WQ0010878001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 540,000 gallons per day. The facility is located at 11034 South Highway 36, outside the northwest corner of the security compound of the Clemens Unit, in Brazoria County, Texas 77422.

CITY OF NEW WAVERLY has applied for a renewal of TPDES Permit No. WQ0011020001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 88,000 gallons per day. The facility is located at 550 Cedar Lane, on the west bank of the Chicken Creek, approximately 1,600 feet south of the intersection of the Chicken Creek to State Highway 150 in Walker County, Texas 77358.

HARBORLIGHT MARINA AND RESORT has applied for a new permit TPDES Permit No. WQ0011432002, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 12,000 gallons per day. The application also includes a request for a variance to the buffer zone requirements in 30 Texas Administrative Code §309.13(e). This facility was previously authorized under TPDES Permit No. WQ0011432001, which expired April 1, 2013. The facility is located on the east side of Farm-to-Market Road 3121, approximately 2.5 miles north of the intersection of Farm-to-Market Road 3121 and US Highway 83 in Sabine County, Texas 75948.

ALTO FRIO BAPTIST ENCAMPMENT INC has applied for a renewal of TCEQ Permit No. WQ0011683001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day via surface irrigation of 2 acres of public access pasture land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located at 1385 Farm-to-Market Road 1120, Leakey in Real County, Texas 78873.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 149 has applied for a renewal of TPDES Permit No. WQ0011836001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 645,000 gallons per day. The facility is located at 16427 Sky Blue Lane, approximately 0.85 mile west and 0.15 mile north of the intersection of State Highway 6 and Spencer Road in Harris County, Texas 77095.

LEE COUNTY FRESH WATER SUPPLY DISTRICT NO 1 has applied for a renewal of TPDES Permit No. WQ0012007001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 42,000 gallons per day. The facility is located approximately 0.5 mile northeast of the City of Dime Box and 3,000 feet east-northeast of the intersection of Farm-to-Market Road 141 and the Southern Pacific Railroad in Lee County, Texas 77853.

CONROE INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. WQ0012205001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 15,000 gallons per day. The facility is located at 17601 Farm-to-Market Road 1314, Conroe, approximately 2,000 feet northwest of the intersection of Farm-to-Market Road 1314 and Calhoun Road in Montgomery County, Texas 77302.

UNITED STATES DEPARTMENT OF THE AIR FORCE has applied for a renewal of TPDES Permit No. WQ0012651001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 490,000 gallons per day. The facility is located on the southwest section of Laughlin Air Force Base, approximately 2.3 miles northeast of the intersection of U.S. Highway 277 and Spur 317, east of the City of Del Rio in Val Verde County, Texas 78843.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 285 has applied for a renewal of TPDES Permit No. WQ0012928001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day. The facility is located at 175 Wickhamford Way, approximately 500 feet north of the intersection of Wickhamford Way and Crosshaven Drive, approximately 3/4 mile west of Carpenters Bayou in Harris County, Texas 77015.

AQUA TEXAS INC a water and wastewater utility service provider, has applied for a renewal of TPDES Permit No. WQ0013022001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 88,000 gallons per day. The facility is located at 4704 Blue Water Circle, on the north shore of Lake Granbury, approximately 2 miles from the Lake Granbury Dam and south of Hood County Road No. 309 in Hood County, Texas 76049.

MARTIN REALTY AND LAND INC has applied for a renewal of TPDES Permit No. WQ0014081001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 450,000 gallons per day. The facility is located at 19348 Amy Lane, approximately 1.2 miles east-northeast of the intersection of Portland Road and Farm-to-Market Road 1314 and 2.5 miles northwest of the intersection of Farm-to-Market Road 1314 and U.S. Highway 59, in Porter in Montgomery County, Texas 77365.

CITY OF ALVORD has applied for a renewal of TPDES Permit No. WQ0014339001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 112,000 gallons per day. The facility is located at 915 State Highway 287 Bypass, approximately 2,500 feet south of Farm-to-Market Road 1655, adjacent to Elm Creek at a point approximately 0.5 mile southwest of the business district of the City of Alvord in Wise County, Texas 76225.

CITY OF WINDTHORST has applied for a renewal of TCEQ Permit No. WQ0014915001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 60,000 gallons per day via surface irrigation of 60 acres of non-public access agricultural land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 1,600 feet west of U.S. Highway 281 and one mile north of the intersection of U.S. Highway 281 and State Highway 25 in Archer County, Texas 76389.

NK VII PARTNERS LTD has applied for a renewal of TPDES Permit No. WQ0014993001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 5,000 gallons per day. The facility will be located at 1717 North Sam Houston Parkway East in Harris County, Texas 77038.

BRADBURY DEVELOPMENT LIMITED has applied for a new permit, proposed TPDES Permit No. WQ0015145001, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 5,000,000 gallons per day. The facility will be located approximately 2 miles west of intersection of Farm-to-Market Road 2090 and U.S. Highway 59, in Montgomery County, Texas 77372.

The following do not require publication in a newspaper. Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN (30) DAYS OF THE ISSUED DATE OF THE NOTICE.

NUECES COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NO 4 has applied for a minor amendment to the TPDES Permit No. WQ0010846002 to authorize a reduction in the discharge limit in the final phase to 600,000 MGD. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 1,200,000 gallons per day. The facility will be located on Mus-

tang Island, on the west side of State Highway 361 (Park Road 53), approximately 6.25 miles southwest of the intersection of Avenue G and State Highway 361, in the City of Port Aransas in Nueces County, Texas 78373.

If you need more information about these permit applications or the permitting process, please call the TCEQ Public Education Program, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.texas.gov. Si desea información en español, puede llamar al 1-800-687-4040.

TRD-201401463
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: April 2, 2014

◆ ◆ ◆
Texas Facilities Commission

Request for Proposals #303-5-20428-A

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Criminal Justice (TDCJ), announces the issuance of Request for Proposals (RFP) #303-5-20428-A. TFC seeks a five (5) or ten (10) year lease of approximately 8,076 square feet of office space in El Paso, Texas.

The deadline for questions is April 22, 2014, and the deadline for proposals is May 13, 2014, at 3:00 p.m. The award date is June 18, 2014. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Program Specialist, Evelyn Esquivel at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=110763.

TRD-201401474
Kay Molina
General Counsel
Texas Facilities Commission
Filed: April 2, 2014

◆ ◆ ◆
Request for Proposals #303-5-20432

The Texas Facilities Commission (TFC), on behalf of the Office of the Attorney General (OAG), announces the issuance of Request for Proposals (RFP) #303-5-20432. TFC seeks a five (5) or ten (10) year lease of approximately 68,683 square feet of office space in Houston, Texas.

The deadline for questions is April 18, 2014 and the deadline for proposals is May 2, 2014 at 3:00 p.m. The award date is June 18, 2014. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Program Specialist, Evelyn Esquivel, at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=110650.

TRD-201401339
Kay Molina
General Counsel
Texas Facilities Commission
Filed: March 27, 2014

◆ ◆ ◆
Request for Proposals #303-5-20434

The Texas Facilities Commission (TFC), on behalf of the Health and Human Services Commission (HHSC), the Department of Family and Protective Services (DFPS), the Department of Assistive and Rehabilitative Services (DARS), and the Department of Aging and Disability Services (DADS), announces the issuance of Request for Proposals (RFP) #303-5-20434. TFC seeks a five (5) or ten (10) year lease of approximately 6,458 square feet of office space in Gonzales, Gonzales County, Texas.

The deadline for questions is April 22, 2014, and the deadline for proposals is May 6, 2014, at 3:00 p.m. The award date is June 18, 2014. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Program Specialist, Evelyn Esquivel, at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=110702.

TRD-201401424
Kay Molina
General Counsel
Texas Facilities Commission
Filed: March 31, 2014

◆ ◆ ◆
Request for Proposals #303-6-20435

The Texas Facilities Commission (TFC), on behalf of the Department of Public Safety (DPS), announces the issuance of Request for Proposals (RFP) #303-6-20435. TFC seeks a five (5) or ten (10) year lease of approximately 12,725 square feet of office space in Georgetown, Texas.

The deadline for questions is April 22, 2014 and the deadline for proposals is May 5, 2014 at 3:00 p.m. The award date is June 18, 2014. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Program Specialist, Evelyn Esquivel, at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=110716.

TRD-201401437
Kay Molina
General Counsel
Texas Facilities Commission
Filed: March 31, 2014

◆ ◆ ◆
Request for Proposals #303-5-20436

The Texas Facilities Commission (TFC), on behalf of the Department of Public Safety (DPS), announces the issuance of Request for Proposals (RFP) #303-5-20436. TFC seeks a five (5) or ten (10) year lease of approximately 11,971 square feet of office space in Hempstead, Texas.

The deadline for questions is April 22, 2014, and the deadline for proposals is May 7, 2014, at 3:00 p.m. The award date is June 18, 2014. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Program Specialist, Evelyn Esquivel, at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=110718.

TRD-201401438

Kay Molina

General Counsel

Texas Facilities Commission

Filed: March 31, 2014



General Land Office

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

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of February 10, 2014 through March 31, 2014. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period extends 30 days from the date published on the Texas General Land Office web site. The notice was published on the web site on Friday, April 4, 2014. The public comment period for this project will close at 5:00 p.m. on Monday, May 5, 2014.

FEDERAL AGENCY ACTIONS:

Applicant: Seadrift Ranch Partners; Location: The project site is located on San Antonio Bay and the Victoria Barge Canal, south of Swan Point Park and Seadrift, in Calhoun County, Texas. The site can be located on the U.S.G.S. quadrangle map titled: MOSQUITO POINT, Texas. LATITUDE & LONGITUDE (NAD 83): Latitude: 28.36868 N, Longitude: - 96.69945 W - North side of Project; Latitude: 28.31870 N, Longitude: - 96.70132 W - South side of Project. Project Description: The applicant proposes to construct a marina and a series of canals that access San Antonio Bay and the Victoria Barge Canal. Two channels would connect the inland canals to San Antonio Bay and the Victoria Barge Canal. One channel is an access channel for small to medium vessels. The other channel is a flushing channel. The access channel is connected to the Victorian Barge Canal, through whooping crane critical habitat, and is located adjacent to an existing Corps disposal area. The flushing canal is connected to San Antonio Bay. According to the applicant, the residential property, marinas and inland canals, and access channels would avoid impacts to wetlands, seagrass, and oyster beds. The flushing channel excavation would im-

pact 305 square feet of fringe wetlands and 155 square feet of seagrass. Excavated material will be placed on the uplands. A 111-acre predominantly upland conservation easement will be granted to the Nature Conservancy to offset the loss of whooping crane critical habitat. CMP Project No: 14-1373-F1. Type of Application: U.S.A.C.E. permit application #SWG-2007-00310. This application will be reviewed pursuant to §10 of the Rivers and Harbors Act of 1899 and §404 of the Clean Water Act.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action or activity is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Land Commissioner for review.

Further information on the applications listed above, including a copy of the consistency certifications or consistency determinations for inspection may be obtained from Mr. Ray Newby, P.O. Box 12873, Austin, Texas 78711-2873 or via email at federal.consistency@glo.texas.gov. Comments should be sent to Mr. Newby at the above address or by email.

TRD-201401472

Larry L. Laine

Chief Clerk/Deputy Land Commissioner

General Land Office

Filed: April 2, 2014



Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rates for FluLaval Vaccine

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on May 14, 2014, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for the FluLaval Vaccine.

The public hearing will be held in the Health and Human Services Commission Public Hearing Room, Brown-Heatly Building, located at 4900 North Lamar, Austin, Texas. Entry is through security at the main entrance of the building, which faces Lamar Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (1 TAC) §355.201, which require public notice of and hearings on proposed Medicaid reimbursements. HHSC also will broadcast the public hearing; the broadcast can be accessed at <http://www.hhsc.state.tx.us/news/meetings.asp>. The broadcast will be archived and can be accessed on demand at the same website.

Proposal. The payment rates for the FluLaval Vaccine are proposed to be effective July 1, 2014.

Methodology and Justification. The proposed payment rates were calculated in accordance with 1 TAC:

§355.8081, which addresses payments for laboratory and x-ray services, radiation therapy, physical therapists' services, physician services, podiatry services, chiropractic services, optometric services, ambulance services, dentists' services, psychologists' services, licensed psychological associates' services, maternity clinic services, and tuberculosis clinic services; and

§355.8085, which addresses the reimbursement methodology for physicians and other practitioners.

Briefing Package. A briefing package describing the proposed payments will be available at <http://www.hhsc.state.tx.us/rad/rate-pack>

ets.shtml on or after April 30, 2014. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 730-7401; by fax at (512) 730-7475; or by e-mail at sarah.hambrick@hhsc.state.tx.us. The briefing package will also be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the Texas Health and Human Services Commission, Attention: Rate Analysis, Mail Code H-400, P.O. Box 149030, Austin, Texas 78714-9030; by fax to Rate Analysis at (512) 730-7475; or by e-mail to sarah.hambrick@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Texas Health and Human Services Commission, Attention: Rate Analysis, Mail Code H-400, Brown-Heatly Building, 4900 North Lamar, Austin, Texas 78751.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 730-7401 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-201401435

Jack Stick

Chief Counsel

Texas Health and Human Services Commission

Filed: March 31, 2014



Notice of Public Hearing on Proposed Medicaid Payment Rates for Medicaid Biennial Calendar Fee Review

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on May 14, 2014, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for Medicaid Biennial Calendar Fee Review.

The public hearing will be held in the Health and Human Services Commission Public Hearing Room, Brown-Heatly Building, located at 4900 North Lamar, Austin, Texas. Entry is through security at the main entrance of the building, which faces Lamar Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (1 TAC) §355.201, which require public notice of and hearings on proposed Medicaid reimbursements. HHSC also will broadcast the public hearing; the broadcast can be accessed at <http://www.hhsc.state.tx.us/news/meetings.asp>. The broadcast will be archived and can be accessed on demand at the same website.

Proposal. The payment rates for Medicaid Biennial Calendar Fee Review are proposed to be effective July 1, 2014, for the following services:

- (1) Birthing Centers
- (2) Eye and Ocular Adnexa Surgery
- (3) Nervous System Surgery
- (4) Vision Devices and Related Services

Methodology and Justification. The proposed payment rates were calculated in accordance with 1 TAC:

§355.8001, which addresses the reimbursement methodology for vision care services;

§355.8081, which addresses payments for laboratory and x-ray services, radiation therapy, physical therapists' services, physician services, podiatry services, chiropractic services, optometric services, am-

balance services, dentists' services, psychologists' services, licensed psychological associates' services, maternity clinic services, and tuberculosis clinic services;

§355.8085, which addresses the reimbursement methodology for physicians and other practitioners;

§355.8181, which addresses the reimbursement methodology for birthing center services; and

§355.8461, which addresses the reimbursement methodology for the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) eye-glass program.

Briefing Package. A briefing package describing the proposed payments will be available at <http://www.hhsc.state.tx.us/rad/rate-packets.shtml> on or after April 30, 2014. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 730-7401; by fax at (512) 730-7475; or by e-mail at sarah.hambrick@hhsc.state.tx.us. The briefing package will also be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the Texas Health and Human Services Commission, Attention: Rate Analysis, Mail Code H-400, P.O. Box 149030, Austin, Texas 78714-9030; by fax to Rate Analysis at (512) 730-7475; or by e-mail to sarah.hambrick@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Texas Health and Human Services Commission, Attention: Rate Analysis, Mail Code H-400, Brown-Heatly Building, 4900 North Lamar, Austin, Texas 78751.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 730-7401 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-201401434

Jack Stick

Chief Counsel

Texas Health and Human Services Commission

Filed: March 31, 2014



Notice of Public Hearing on Proposed Medicaid Payment Rates for Orthotic Procedures and Devices

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on May 14, 2014, at 1:30 p.m., to receive comment on proposed Medicaid payment rates for Orthotic Procedures and Devices.

The public hearing will be held in the Health and Human Services Commission Public Hearing Room, Brown-Heatly Building, located at 4900 North Lamar, Austin, Texas. Entry is through security at the main entrance of the building, which faces Lamar Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (1 TAC) §355.201, which require public notice of and hearings on proposed Medicaid reimbursements. HHSC also will broadcast the public hearing; the broadcast can be accessed at <http://www.hhsc.state.tx.us/news/meetings.asp>. The broadcast will be archived and can be accessed on demand at the same website.

Proposal. The payment rates for Orthotic Procedures and Devices are proposed to be effective July 1, 2014.

Methodology and Justification. The proposed payment rates were calculated in accordance with 1 TAC:

§355.8021, which addresses the reimbursement methodology for home health services and durable medical equipment, prosthetics, orthotics, and supplies; and

§355.8441, which addresses the reimbursement methodology for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) services.

Briefing Package. A briefing package describing the proposed payments will be available at <http://www.hhsc.state.tx.us/rad/rate-packets.shtml> on or after April 30, 2014. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 730-7401; by fax at (512) 730-7475; or by e-mail at sarah.hambrick@hhsc.state.tx.us. The briefing package will also be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the Texas Health and Human Services Commission, Attention: Rate Analysis, Mail Code H-400, P.O. Box 149030, Austin, Texas 78714-9030; by fax to Rate Analysis at (512) 730-7475; or by e-mail to sarah.hambrick@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Texas Health and Human Services Commission, Attention: Rate Analysis, Mail Code H-400, Brown-Healy Building, 4900 North Lamar, Austin, Texas 78751.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 730-7401 at least 72 hours in advance, so appropriate arrangements can be made.

TRD-201401436
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: March 31, 2014



Public Notice

The Texas Health and Human Services Commission announces its intent to submit transmittal number 14-004 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The purpose of this amendment is to provide the requirements for establishing residency in a state for the purpose of Medicaid eligibility. The proposed amendment is effective January 1, 2014.

The proposed amendment is anticipated to have no fiscal impact. Costs associated with implementing the new application forms are administrative and captured under the agency's cost allocation plan.

To obtain copies of the proposed amendment, interested parties may contact Ashley Fox, State Plan Policy Advisor, by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-100, Austin, Texas 78711; by telephone at (512) 462-6282; by facsimile at (512) 730-7472; or by e-mail at Ashley.Fox@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201401367
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: March 28, 2014



Public Notice

The Texas Health and Human Services Commission announces its intent to submit transmittal number CHIP 36 to the Texas State Plan for Medical Assistance, under Title XXI of the Social Security Act.

The purpose of this amendment is to provide non-financial eligibility requirements for the Children's Health Insurance Program (CHIP), including policy relating to residency, citizenship, social security number, and continuous eligibility. The proposed amendment is effective January 1, 2014.

The proposed amendment is anticipated to have no fiscal impact. Costs associated with implementing the new application forms are administrative and captured under the agency's cost allocation plan.

To obtain copies of the proposed amendment, interested parties may contact Ashley Fox, State Plan Policy Advisor, by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-100, Austin, Texas 78711; by telephone at (512) 462-6282; by facsimile at (512) 730-7472; or by e-mail at ashley.fox@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201401457
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: April 1, 2014



Public Notice

The Texas Health and Human Services Commission announces its intent to submit transmittal number 14-005 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The purpose of this amendment is to provide the eligibility criteria relating to citizenship status. Federal law and regulations require that Medicaid applicants or recipients who declare themselves to be United States citizens or declare a non-citizen status, but for whom verification of citizenship or non-citizen status is unavailable, be allowed a 90-day period of reasonable opportunity to provide that verification. The proposed amendment is effective January 1, 2014.

The proposed amendment is anticipated to have no fiscal impact. Costs associated with implementing the new application forms are administrative and captured under the agency's cost allocation plan.

To obtain copies of the proposed amendment, interested parties may contact Ashley Fox, State Plan Policy Advisor, by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-100, Austin, Texas 78711; by telephone at (512) 462-6282; by facsimile at (512) 730-7472; or by e-mail at Ashley.Fox@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201401433
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: March 31, 2014



Public Notice

The Texas Health and Human Services Commission announces its intent to submit amendment number 34 to the Texas State Plan for the Children's Health Insurance Program (CHIP) under Title XXI of the Social Security Act.

The purpose of this amendment is to provide that HHSC will provide coverage under CHIP to children who are determined ineligible for Medicaid due to the elimination of income disregards. The income limits for CHIP exceed the limits for Medicaid. Children who no longer qualify for Medicaid because their household income exceeds the income limits may now qualify for CHIP under 42 CFR §457.310(d). The proposed amendment is effective January 1, 2014.

The proposed amendment is anticipated to have no fiscal impact. Costs associated with implementing the new application forms are administrative and captured under the agency's cost allocation plan.

To obtain copies of the proposed amendment, interested parties may contact Ashley Fox, State Plan Policy Advisor, by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-100, Austin, Texas 78711; by telephone at (512) 462-6282; by facsimile at (512) 730-7472; or by e-mail at Ashley.Fox@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201401456

Jack Stick

Chief Counsel

Texas Health and Human Services Commission

Filed: April 1, 2014



Public Notice

The Texas Health and Human Services Commission announces its intent to submit transmittal number CHIP 38 to the Texas State Plan for Medical Assistance, under Title XXI of the Social Security Act.

The purpose of this amendment is to indicate that the state determines eligibility for the Children's Health Insurance Program, rather than the federally facilitated marketplace (FFM), for individuals applying through the FFM. The proposed amendment is effective January 1, 2014.

The proposed amendment is anticipated to have no fiscal impact. Costs associated with implementing the new application forms are administrative and captured under the agency's cost allocation plan.

To obtain copies of the proposed amendment, interested parties may contact Ashley Fox, State Plan Policy Advisor, by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-100, Austin, Texas 78711; by telephone at (512) 462-6282; by facsimile at (512) 730-7472; or by e-mail at ashley.fox@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201401458

Jack Stick

Chief Counsel

Texas Health and Human Services Commission

Filed: April 1, 2014



Public Notice

The Texas Health and Human Services Commission (HHSC) is submitting to the Centers for Medicare and Medicaid Services (CMS) a request to renew the Medicaid waiver implemented under the author-

ity of §1915(b) of the Social Security Act for the Nonemergency Medical Transportation (NEMT) program and to approve a new Medicaid waiver application. Both the renewal and the new waiver will be effective September 1, 2014.

The State currently provides NEMT services under a Medicaid Waiver in conjunction with the State Plan. Current NEMT waiver services are delivered by Transportation Service Area Providers (TSAPS) who provide demand response services to clients in their service areas. The State proposes to keep this existing waiver.

The NEMT waiver renewal will continue to allow the State the flexibility to arrange for and assure necessary, cost-effective NEMT in specific areas of the state. The State-managed NEMT service delivery model affords TSAPS flexibility to meet client's transportation needs through direct delivery and subcontracting transportation services. The model (1) encourages preventive and primary care by ensuring that every client for whom Medicaid is the primary payor has access to necessary medical care and services; (2) arranges for quality and appropriate transportation to necessary medical care and services; (3) maintains access to necessary medical care and services; (4) maintains cost effectiveness of transportation services; and (5) fosters the State's goal of promoting coordinated human services transportation. Continuation of the current model in some areas of the State supports the use of the direct service delivery providers and the existing network of transportation providers to meet the client transportation needs. This waiver will continue to be provided utilizing a fee-for-service reimbursement.

Additionally, the State will apply for a new waiver for the delivery of NEMT services to be delivered by Managed Transportation Organizations (MTOs). MTOs will provide the full range of NEMT services to clients in their service areas (e.g., mass transit, mileage reimbursement, meal and lodging, and demand response). Through this new waiver, a managed transportation delivery model will be implemented in some parts of the State. These MTOs will have the flexibility to meet client's transportation needs through direct delivery and subcontracting transportation services. The new waiver will not change the NEMT scope or benefits to the individuals who use this service. HHSC retains sole authority to approve individual services and benefits. If approved, the new waiver will allow the MTOs to own their own vehicles and the State will reimburse utilizing a capitated arrangement.

Once the State determines which counties will be covered in each of the above options an updated notice will be posted.

To obtain copies of the renewal or new waiver, interested parties may contact JayLee Mathis by mail at Texas Health and Human Services Commission, P.O. Box 13247, Mail Code H-370, Austin, Texas 78711-3247, phone (512) 462-6289, fax (512) 730-7472, or by email at TX_Medicaid_Waivers@hhsc.state.tx.us.

TRD-201401473

Jack Stick

Chief Counsel

Texas Health and Human Services Commission

Filed: April 2, 2014



Public Notice of Negotiated Rulemaking Committee Meeting on Informal Dispute Resolution Process for Assisted Living Facilities

The Texas Health and Human Services Commission (HHSC), as required by House Bill 33, commenced a negotiated rulemaking process to develop an implementation plan in the form of a rule (Acts 2013, 83rd Legislature, Regular Session, Chapter 218, 2013 Texas General Laws). This rule will establish an informal dispute resolution (IDR)

process that provides for adjudication by an appropriate disinterested person of disputes relating to a statement of violations submitted by the Department of Aging and Disability Services (DADS) under §32.021(d), Human Resources Code, or Chapter 247 Health and Safety Code, to an assisted living facility.

The statutory IDR process requires assisted living facilities to request IDR no later than the 10th calendar day after notification by DADS of the violation of a standard or standards. It requires HHSC to complete the process not later than the 90th calendar day after receipt of a request from an assisted living facility for IDR.

The scope of this negotiated rulemaking includes revisions to current rules at 1 Texas Administrative Code §393.1, specific to assisted living facilities. It will not include revisions to the existing rule at §393.1 for nursing facilities or intermediate care facilities for individuals with intellectual disabilities.

The negotiated rulemaking committee adopted the following meeting schedule for this purpose:

1. April 16, 2014
2. April 30, 2014
3. May 13, 2014
4. May 27, 2014

Each meeting will be held from 8:30 a.m. - 4:00 p.m. at 4900 N. Lamar Blvd. (Brown Heatly Bldg.), Room #1430 (Public Hearing Room), Austin, Texas 78751. On April 16, 2014, the committee will meet to discuss and possibly act on the following agenda:

1. H.B. 33 discussion
2. IDR rule discussion

People with disabilities who wish to attend the meeting and require auxiliary aids or services should contact Lynda Acosta by phone at (512) 424-6646 or by email at Lynda.Acosta@hhsc.state.tx.us at least 72 hours before the meeting so appropriate arrangements can be made.

TRD-201401459
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: April 1, 2014

Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by 1ST CHOICE AUTO INSURANCE COMPANY, INC., a foreign fire and/or casualty company. The home office is in Everett, Pennsylvania.

Application to change the name of AMERICAN MINING INSURANCE COMPANY, INC. to AMERICAN MINING INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Birmingham, Alabama.

Application for admission to the State of Texas by EVERETT CASH MUTUAL INSURANCE CO., a foreign fire and/or casualty company. The home office is in Everett, Pennsylvania.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, MC 305-2C, Austin, Texas 78701.

TRD-201401471

Sara Waitt
General Counsel
Texas Department of Insurance
Filed: April 2, 2014

Texas Department of Licensing and Regulation

Vacancy on Licensed Breeders Advisory Committee

The Texas Department of Licensing and Regulation (Department) announces a vacancy on the Licensed Breeders Advisory Committee (Committee) established by Texas Occupations Code, Chapter 802. The purpose of the Committee is to advise the Texas Commission of Licensing and Regulation (Commission) and the Department on matters related to the administration and enforcement of Chapter 802, including licensing fees and standards adopted under Subchapter E.

The Committee is composed of nine members appointed by the presiding officer of the Commission, with the Commission's approval. The committee consists of the following members: two members who are licensed breeders; two members who are veterinarians; two members who represent animal welfare organizations each of which has an office based in this state; two members who represent the public; and one member who is an animal control officer as defined in §829.001, Health and Safety Code. Members of the committee serve staggered four-year terms. The terms of four or five members expire on February 1 of each odd-numbered year. This announcement is for a representative of an animal welfare organization with an office based in this state.

Interested persons should download an application from the Department website at: www.tdlr.texas.gov. Applicants can also request an application from the Texas Department of Licensing and Regulation by telephone (800) 803-9202, FAX (512) 475-2874 or email advisory.boards@tdlr.texas.gov. Applicants may be asked to appear for an interview; however, any required travel for an interview would be at the applicant's expense.

TRD-201401448
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: April 1, 2014

Texas Lottery Commission

Instant Game Number 1596 "Triple Winning 777's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1596 is "TRIPLE WINNING 777'S". The play style is "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1596 shall be \$2.00 per Ticket.

1.2 Definitions in Instant Game No. 1596.

A. Display Printing - That area of the Instant Game Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Ticket.

C. Play Symbol - The printed data under the latex on the front of the Instant Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: 1, 2, 3,

4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 777 SYMBOL, \$2.00, \$4.00, \$5.00, \$10.00, \$20.00, \$50.00, \$100, \$200, \$1,000 and \$25,000.

under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears

Figure 1: GAME NO. 1596 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWV
26	TWSX
28	TWET
29	TWNI
30	TRTY
777 SYMBOL	TRIPLE
\$2.00	TWO\$
\$4.00	FOUR\$
\$5.00	FIVE\$
\$10.00	TEN\$
\$20.00	TWENTY
\$50.00	FIFTY
\$100	ONE HUND
\$200	TWO HUND
\$1,000	ONE THOU
\$25,000	25 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the Ticket. There is a

boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining ten (10) digits of the Serial Number are the

Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of \$2.00, \$4.00, \$5.00, \$10.00 or \$20.00.

G. Mid-Tier Prize - A prize of \$50.00 or \$200.

H. High-Tier Prize - A prize of \$1,000 or \$25,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1596), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 125 within each Pack. The format will be: 1596-0000001-001.

K. Pack - A Pack of "TRIPLE WINNING 777'S" Instant Game Tickets contains 125 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One Ticket will be folded over to expose a front and back of one Ticket on each Pack. Please note the books will be in an A, B, C and D configuration.

L. Non-Winning Ticket - A Ticket which is not programmed to be a winning Ticket or a Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "TRIPLE WINNING 777'S" Instant Game No. 1596 Ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each Instant Ticket. A prize winner in the "TRIPLE WINNING 777'S" Instant Game is determined once the latex on the Ticket is scratched off to expose 23 (twenty-three) Play Symbols. If a player matches any of YOUR NUMBERS Play Symbols to any of the WINNING NUMBERS Play Symbols, the player wins the prize for that number. If a player reveals a "777" Play Symbol, the player wins TRIPLE the prize for that symbol. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game Ticket, all of the following requirements must be met:

1. Exactly 23 (twenty-three) Play Symbols must appear under the Latex Overprint on the front portion of the Ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;
3. Each of the Play Symbols must be present in its entirety and be fully legible;
4. Each of the Play Symbols must be printed in black ink except for dual image games;
5. The Ticket shall be intact;
6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Ticket;

8. The Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The Ticket must not be counterfeit in whole or in part;

10. The Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Ticket must not have been stolen, nor appear on any list of omitted Tickets or non-activated Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The Ticket must be complete and not miscut and have exactly 23 (twenty-three) Play Symbols under the Latex Overprint on the front portion of the Ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the Ticket;

14. The Serial Number of an apparent winning Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Tickets, and a Ticket with that Serial Number shall not have been paid previously;

15. The Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 23 (twenty-three) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 23 (twenty-three) Play Symbols on the Ticket must be printed in the symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Ticket Serial Numbers must be printed in the serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Ticket. In the event a defective Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Ticket with another unplayed Ticket in that Instant Game (or a Ticket of equivalent sales price from any other current Texas Lottery Instant Game) or refund the retail sales price of the Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Players can win up to ten (10) times on a Ticket in accordance with the approved prize structure.

B. Adjacent Non-Winning Tickets within a Pack will not have identical Play and Prize Symbol patterns. Two (2) Tickets have identical Play and Prize Symbol patterns if they have the same Play and Prize Symbols in the same positions.

C. The Top Prize Symbol will appear on every Ticket unless otherwise restricted.

D. Each Ticket will have three (3) different "WINNING NUMBERS" Play Symbols.

E. Non-winning "YOUR NUMBERS" Play Symbols will all be different.

F. Non-winning Prize Symbols will never appear more than two (2) times.

G. The "777" (tripler) Play Symbol will never appear in the "WINNING NUMBERS" Play Symbol spots.

H. The "777" (tripler) Play Symbol will appear as dictated by the prize structure.

I. Non-winning Prize Symbols will never be the same as the winning Prize Symbol(s).

J. No prize amount in a non-winning spot will correspond with the "YOUR NUMBERS" Play Symbol (i.e., 5 and \$5).

2.3 Procedure for Claiming Prizes.

A. To claim a "TRIPLE WINNING 777'S" Instant Game prize of \$2.00, \$4.00, \$5.00, \$10.00, \$20.00, \$50.00 or \$200, a claimant shall sign the back of the Ticket in the space designated on the Ticket and present the winning Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Ticket; provided that the Texas Lottery Retailer may, but is not required to pay a \$50.00 or \$200 Ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "TRIPLE WINNING 777'S" Instant Game prize of \$1,000 or \$25,000, the claimant must sign the winning Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Ticket for that prize upon presentation of proper identification. When paying a prize of \$600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "TRIPLE WINNING 777'S" Instant Game prize, the claimant must sign the winning Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. a sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under \$600 from the "TRIPLE WINNING 777'S" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of \$600 or more from the "TRIPLE WINNING 777'S" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Tickets ordered. The number of actual prizes available in a game may vary based on number of Tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game Ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game Ticket in the space designated, a Ticket shall be owned by the physical possessor of said Ticket. When a signature is placed on the back of the Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Ticket in the space designated. If more than one name appears on the back of

the Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game Tickets and shall not be required to pay on a lost or stolen Instant Game Ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 Tickets in the Instant Game No. 1596. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1596 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
\$2	480,000	12.50
\$4	576,000	10.42
\$5	144,000	41.67
\$10	72,000	83.33
\$20	48,000	125.00
\$50	25,225	237.86
\$200	2,500	2,400.00
\$1,000	75	80,000.00
\$25,000	12	500,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.45. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1596 without advance notice, at which point no further Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Instant Game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game Ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1596, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201401410
 Bob Biard
 General Counsel
 Texas Lottery Commission
 Filed: March 28, 2014



Instant Game Number 1639 "5X the Cash"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1639 is "5X THE CASH". The play style is "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1639 shall be \$1.00 per Ticket.

1.2 Definitions in Instant Game No. 1639.

A. Display Printing - That area of the Instant Game Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Ticket.

C. Play Symbol - The printed data under the latex on the front of the Instant Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: 1, 2, 3, 4, 6, 7, 8, 9, 10, 5X SYMBOL, \$1.00, \$2.00, \$5.00, \$10.00, \$20.00, \$40.00, \$100 and \$5,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1639 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
5X SYMBOL	TIMES 5
\$1.00	ONE\$
\$2.00	TWO\$
\$5.00	FIVE\$
\$10.00	TEN\$
\$20.00	TWENTY
\$40.00	FORTY
\$100	ONE HUND
\$5,000	FIV THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the Ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of \$1.00, \$2.00, \$5.00, \$10.00 or \$20.00.

G. Mid-Tier Prize - A prize of \$40.00 or \$100.

H. High-Tier Prize - A prize of \$5,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Ticket.

J. Pack-Ticket Number - A 11 (eleven) digit number consisting of the four (4) digit game number (1639), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 150 within each Pack. The format will be: 1639-0000001-001.

K. Pack - A Pack of "5X THE CASH" Instant Game Tickets contains 150 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; Tickets 006 to 010 on the next page; etc.; and Tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of Ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A Ticket which is not programmed to be a winning Ticket or a Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery

pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "5X THE CASH" Instant Game No. 1639 Ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each Instant Ticket. A prize winner in the "5X THE CASH" Instant Game is determined once the latex on the Ticket is scratched off to expose 11 (eleven) Play Symbols. If the player matches any of YOUR NUMBERS Play Symbols to the WINNING NUMBER Play Symbol, the player wins the prize for that number. If a player reveals a "5X" Play Symbol, the player wins 5 TIMES the prize for that symbol. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game Ticket, all of the following requirements must be met:

1. Exactly 11 (eleven) Play Symbols must appear under the Latex Overprint on the front portion of the Ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;
3. Each of the Play Symbols must be present in its entirety and be fully legible;
4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The Ticket shall be intact;
6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;
7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Ticket;
8. The Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;
9. The Ticket must not be counterfeit in whole or in part;
10. The Ticket must have been issued by the Texas Lottery in an authorized manner;
11. The Ticket must not have been stolen, nor appear on any list of omitted Tickets or non-activated Tickets on file at the Texas Lottery;
12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;
13. The Ticket must be complete and not miscut and have exactly 11 (eleven) Play Symbols under the Latex Overprint on the front portion of the Ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the Ticket;
14. The Serial Number of an apparent winning Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Tickets, and a Ticket with that Serial Number shall not have been paid previously;
15. The Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;
16. Each of the 11 (eleven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;
17. Each of the 11 (eleven) Play Symbols on the Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;
18. The Display Printing on the Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and
19. The Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Ticket. In the event a defective Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Ticket with another unplayed Ticket in that Instant Game (or a Ticket of equivalent sales price from any other current Texas Lottery Instant Game) or refund the retail sales price of the Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Players can win up to five (5) times on a Ticket in accordance with the approved prize structure.

B. Adjacent Non-Winning Tickets within a Pack will not have identical Play and Prize Symbol patterns. Two (2) Tickets have identical Play

and Prize Symbol patterns if they have the same symbols in the same positions.

C. Non-winning "YOUR NUMBERS" Play Symbols will all be different.

D. Non-winning Prize Symbols will never appear more than two (2) times.

E. The "5X" Play Symbol will never appear in the "WINNING NUMBER" Play Symbol spot.

F. The "5X" Play Symbol will appear as dictated by the prize structure.

G. Non-winning Prize Symbols will never be the same as the winning Prize Symbol(s).

H. The Top Prize Symbol will appear on every Ticket unless otherwise restricted.

I. No prize amount in a non-winning spot will correspond with the "YOUR NUMBERS" Play Symbol (i.e., 5 and \$5).

2.3 Procedure for Claiming Prizes.

A. To claim a "5X THE CASH" Instant Game prize of \$1.00, \$2.00, \$5.00, \$10.00, \$20.00, \$40.00 or \$100, a claimant shall sign the back of the Ticket in the space designated on the Ticket and present the winning Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a \$40.00 or \$100 Ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "5X THE CASH" Instant Game prize of \$5,000, the claimant must sign the winning Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Ticket for that prize upon presentation of proper identification. When paying a prize of \$600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "5X THE CASH" Instant Game prize, the claimant must sign the winning Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. A sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under \$600 from the "5X THE CASH" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of \$600 or more from the "5X THE CASH" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or

within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Tickets ordered. The number of actual prizes available in a game may vary based on number of Tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game Ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game Ticket in the space designated, a Ticket shall be owned by the physical possessor of said Ticket. When a signature is placed on the back of the Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Ticket in the space designated. If more than one name appears on the back of the Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game Tickets and shall not be required to pay on a lost or stolen Instant Game Ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 20,160,000 Tickets in the Instant Game No. 1639. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1639 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
\$1	2,419,200	8.33
\$2	1,478,400	13.64
\$5	336,000	60.00
\$10	100,800	200.00
\$20	67,200	300.00
\$40	53,592	376.18
\$100	3,360	6,000.00
\$5,000	42	480,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.52. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1639 without advance notice, at which point no further Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Instant Game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game Ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1639, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201401411

Bob Biard

General Counsel

Texas Lottery Commission

Filed: March 28, 2014



Instant Game Number 1641 "20X the Cash"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1641 is "20X THE CASH". The play style is "key number match."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1641 shall be \$5.00 per Ticket.

1.2 Definitions in Instant Game No. 1641.

A. Display Printing - That area of the Instant Game Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Ticket.

C. Play Symbol - The printed data under the latex on the front of the Instant Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: 1, 2, 3, 4, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 5X SYMBOL, 10X SYMBOL, 20X SYMBOL, \$5.00, \$10.00, \$15.00, \$20.00, \$40.00, \$50.00, \$100, \$500, \$1,000, \$10,000 and \$250,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1641 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
6	SIX
7	SVN
8	EGT
9	NIN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRV
5X SYMBOL	TIMES5
10X SYMBOL	TIMES10
20X SYMBOL	TIMES20
\$5.00	FIVES\$
\$10.00	TEN\$
\$15.00	FIFTN
\$20.00	TWENTY
\$40.00	FORTY
\$50.00	FIFTY
\$100	ONE HUND
\$500	FIV HUND
\$1,000	ONE THOU
\$10,000	TEN THOU
\$250,000	2HUN 50THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the Ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of \$5.00, \$10.00 or \$20.00.

G. Mid-Tier Prize - A prize of \$50.00, \$100 or \$500.

H. High-Tier Prize - A prize of \$1,000, \$10,000 or \$250,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1641), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 075 within each Pack. The format will be: 1641-0000001-001.

K. Pack - A Pack of "20X THE CASH" Instant Game Tickets contains 075 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The Packs will alternate. One will show the front of Ticket 001 and back of 075 while the other fold will show the back of Ticket 001 and front of 075.

L. Non-Winning Ticket - A Ticket which is not programmed to be a winning Ticket or a Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "20X THE CASH" Instant Game No. 1641 Ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each Instant Ticket. A prize winner in the "20X THE CASH" Instant Game is determined once the latex on the Ticket is scratched off to expose 46 (forty-six) Play Symbols. If a player matches any of YOUR NUMBERS Play Symbols to any of the WINNING NUMBERS Play Symbols, the player wins the prize for that number. If a player reveals a "5X" Play Symbol, the player wins 5 TIMES the prize for that symbol. If a player reveals a "10X" Play Symbol, the player wins 10 TIMES the prize for that symbol. If a player reveals a "20X" Play Symbol, the player wins 20 TIMES the prize for that symbol. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game Ticket, all of the following requirements must be met:

1. Exactly 46 (forty-six) Play Symbols must appear under the Latex Overprint on the front portion of the Ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;
3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The Ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Ticket;

8. The Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The Ticket must not be counterfeit in whole or in part;

10. The Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Ticket must not have been stolen, nor appear on any list of omitted Tickets or non-activated Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The Ticket must be complete and not miscut and have exactly 46 (forty-six) Play Symbols under the Latex Overprint on the front portion of the Ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the Ticket;

14. The Serial Number of an apparent winning Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Tickets, and a Ticket with that Serial Number shall not have been paid previously;

15. The Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 46 (forty-six) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 46 (forty-six) Play Symbols on the Ticket must be printed in the symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Ticket Serial Numbers must be printed in the serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Ticket. In the event a defective Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Ticket with another unplayed Ticket in that Instant Game (or a Ticket of equivalent sales price from any other current Texas Lottery Instant Game) or refund the retail sales price of the Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Players can win up to twenty (20) times on a Ticket in accordance with the approved prize structure.

B. Adjacent Non-Winning Tickets within a Pack will not have identical Play and Prize Symbol patterns. Two (2) Tickets have identical Play and Prize Symbol patterns if they have the same Play and Prize Symbols in the same positions.

C. The top Prize Symbol will appear on every Ticket unless otherwise restricted by other parameters, play action or prize structure.

D. Each Ticket will have six (6) different "WINNING NUMBERS" Play Symbols.

E. Non-winning "YOUR NUMBERS" Play Symbols will all be different.

F. Non-winning Prize Symbols will never appear more than two (2) times.

G. The "5X" Play Symbol will never appear in the "WINNING NUMBERS" Play Symbol spots.

H. The "10X" Play Symbol will never appear in the "WINNING NUMBERS" Play Symbol spots.

I. The "20X" Play Symbol will never appear in the "WINNING NUMBERS" Play Symbol spots.

J. The "5X" Play Symbol will appear as dictated by the prize structure.

K. The "10X" Play Symbol will appear as dictated by the prize structure.

L. The "20X" Play Symbol will appear as dictated by the prize structure.

M. Non-winning Prize Symbols will never be the same as the winning Prize Symbol(s).

N. No prize amount in a non-winning spot will correspond with the "YOUR NUMBERS" Play Symbol (i.e., 15 and \$15).

2.3 Procedure for Claiming Prizes.

A. To claim a "20X THE CASH" Instant Game prize of \$5.00, \$10.00, \$20.00, \$50.00, \$100 or \$500, a claimant shall sign the back of the Ticket in the space designated on the Ticket and present the winning Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a \$50.00, \$100 or \$500 Ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "20X THE CASH" Instant Game prize of \$1,000, \$10,000 or \$250,000, the claimant must sign the winning Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Ticket for that prize upon presentation of proper identification. When paying a prize of \$600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "20X THE CASH" Instant Game prize, the claimant must sign the winning Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. A sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under \$600 from the "20X THE CASH" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of \$600 or more from the "20X THE CASH" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Tickets ordered. The number of actual prizes available in a game may vary based on number of Tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant

Game Ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game Ticket in the space designated, a Ticket shall be owned by the physical possessor of said Ticket. When a signature is placed on the back of the Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Ticket

in the space designated. If more than one name appears on the back of the Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game Tickets and shall not be required to pay on a lost or stolen Instant Game Ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 20,400,000 Tickets in the Instant Game No. 1641. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1641 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
\$5	2,176,000	9.38
\$10	2,856,000	7.14
\$20	544,000	37.50
\$50	269,790	75.61
\$100	10,540	1,935.48
\$500	1,360	15,000.00
\$1,000	220	92,727.27
\$10,000	35	582,857.14
\$250,000	13	1,569,230.77

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.48. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1641 without advance notice, at which point no further Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Instant Game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game Ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1641, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201401442
 Bob Biard
 General Counsel
 Texas Lottery Commission
 Filed: April 1, 2014

Notice of Receipt of Amendment Request for Importation of Waste

Please take notice that, pursuant to Texas Low-Level Radioactive Waste Disposal Compact Commission rule 31 TAC §675.23, the Compact Commission has received an amendment request for an agreement for import for disposal of low-level radioactive waste from:

Nextera Energy (TLLRWDC #1-0051-01)

6610 Nuclear Road

Two Rivers, Wisconsin 54241

The amendment request will be placed on the Compact Commission web site, www.tllrwdcc.org, where it will be available for inspection and copying.

Comments on the amendment request are due to be received by April 29, 2014. Comments should be mailed to:

Texas Low-Level Radioactive Waste Disposal Compact Commission

Attn: Leigh Ing, Executive Director

333 Guadalupe St., #3-240

Austin, Texas 78701

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Texas Low-Level Radioactive Waste Disposal Compact Commission

Comments may also be submitted via email to: administration@tllr-wdccc.org.

TRD-201401452

Audrey Ferrell
Administrator

Texas Low-Level Radioactive Waste Disposal Compact Commission
Filed: April 1, 2014



Notice of Receipt of Amendment Request for Importation of Waste

Please take notice that, pursuant to Texas Low-Level Radioactive Waste Disposal Compact Commission rule 31 TAC §675.23, the Compact Commission has received an amendment request for an agreement for import for disposal of low-level radioactive waste from:

Tennessee Valley Authority (TLLRWDC #1-0031-03)

1101 Market Street

Chattanooga, Tennessee 37402

The amendment request will be placed on the Compact Commission web site, www.tllrwccc.org, where it will be available for inspection and copying.

Comments on the amendment request are due to be received by April 29, 2014. Comments should be mailed to:

Texas Low-Level Radioactive Waste Disposal Compact Commission
Attn: Leigh Ing, Executive Director

333 Guadalupe St., #3-240

Austin, Texas 78701

Comments may also be submitted via email to: administration@tllr-wdccc.org.

TRD-201401453

Audrey Ferrell
Administrator

Texas Low-Level Radioactive Waste Disposal Compact Commission
Filed: April 1, 2014



Notice of Receipt of Import Application for Importation of Waste

Please take notice that, pursuant to Texas Low-Level Radioactive Waste Disposal Compact Commission rule 31 TAC §675.23, the Compact Commission has received an application for and a proposed agreement for import for disposal of low-level radioactive waste from:

Thomas Gray & Associates (TLLRWDC #1-0063-00)

3106 S. Faith Home Road

Turlock, California 95380

The application will be placed on the Compact Commission web site, www.tllrwccc.org, where it will be available for inspection and copying.

Comments on the application are due to be received by April 29, 2014. Comments should be mailed to:

Texas Low-Level Radioactive Waste Disposal Compact Commission
Attn: Leigh Ing, Executive Director

333 Guadalupe St., #3-240

Austin, Texas 78701

Comments may also be submitted via email to: administration@tllr-wdccc.org.

TRD-201401454

Audrey Ferrell
Administrator

Texas Low-Level Radioactive Waste Disposal Compact Commission
Filed: April 1, 2014



Notice of Receipt of Import Application for Importation of Waste

Please take notice that, pursuant to Texas Low-Level Radioactive Waste Disposal Compact Commission rule 31 TAC §675.23, the Compact Commission has received an application for and a proposed agreement for import for disposal of low-level radioactive waste from:

Exelon (TLLRWDC #1-0064-00)

4300 Winfield Road

Warrenville, Illinois 60555

The application will be placed on the Compact Commission web site, www.tllrwccc.org, where it will be available for inspection and copying.

Comments on the application are due to be received by April 29, 2014. Comments should be mailed to:

Texas Low-Level Radioactive Waste Disposal Compact Commission
Attn: Leigh Ing, Executive Director

333 Guadalupe St., #3-240

Austin, Texas 78701

Comments may also be submitted via email to: administration@tllr-wdccc.org.

TRD-201401455

Audrey Ferrell
Administrator

Texas Low-Level Radioactive Waste Disposal Compact Commission
Filed: April 1, 2014



Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on March 31, 2014, to amend a state-issued certificate of franchise authority, pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Universal Cable Holdings, Inc. d/b/a Suddenlink Communications for Amendment to a State-Issued Certificate of Franchise Authority, Project Number 42340.

The requested amendment is to expand the service area footprint to include the city limits of Clarendon, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888)

782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All inquiries should reference Project Number 42340.

TRD-201401470

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 2, 2014



Notice of Application for Service Area Exception

Notice is given to the public of the filing with the Public Utility Commission of an application on March 26, 2014, for an amendment to certificated service area for a service area exception within Nueces County.

Docket Style and Number: Joint Application of Robstown Utility Systems and Nueces Electric Cooperative, Inc. to Amend a Certificate of Convenience and Necessity for a Service Area Exception within Nueces County. Docket Number 42333.

The Application: Robstown Utility Systems (RUS) and Nueces Electric Cooperative, Inc. (NEC) filed a joint application for a service area boundary exception to allow RUS to provide service to part of a specific customer's site located within the certificated service area of NEC and for NEC to provide service to the remaining portion of the same specific customer's site located within the certificated service area of RUS.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than April 8, 2014, by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 42333.

TRD-201401444

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 1, 2014



Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on March 25, 2014, to amend a certificate of convenience and necessity for a proposed transmission line in Upton County, Texas.

Docket Style and Number: Application of Oncor Electric Delivery Company LLC to Amend its Certificate of Convenience and Necessity for a Proposed 138-kV Transmission Line in Upton County (Benedum - Centralia), Docket Number 42221.

The Application: The application of Oncor Electric Delivery Company LLC (Oncor) is designated as the Benedum - Centralia 138-kV Transmission Line Project. The facilities include construction of a new 138-kV double-circuit transmission line between the Lower Colorado River Authority's (LCRA) new Benedum Switching Station, located approximately 5 miles south of Ranch to Market 2401 and 0.5 miles east of County Road 112, and Oncor's new Centralia Substation, located approximately 8.5 miles east of State Highway 349, just north of the Atlas Edward Gas Processing Facility in Upton County.

The total estimated cost for the project is \$13,831,000. The proposed project is estimated to be approximately 10 miles in length. Only one route has been proposed because all necessary right-of-way (ROW) for the project is acquired. Atlas Pipeline Mid-Continent West Tex LLC was involved in the ROW acquisition.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. The deadline for intervention in this proceeding is May 9, 2014. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 42221.

TRD-201401406

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: March 28, 2014



Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on March 28, 2014, to amend a certificate of convenience and necessity for a proposed transmission line in Crockett County, Texas.

Docket Style and Number: Application of American Electric Power Texas North Company to Amend its Certificate of Convenience and Necessity for the Esmeralda to Yucca 138-kV Transmission Line in Crockett County, Docket Number 42265.

The Application: The application of American Electric Power Texas North Company (AEP TNC) for a proposed 138-kV transmission lines is designated as the Esmeralda to Yucca 138-kV Transmission Line Project. The facilities include construction of a new single circuit 138-kV transmission line extending from the proposed AEP TNC Esmeralda Substation, located on the west side of State Highway 205, to the proposed AEP TNC Yucca Substation located north of the existing AEP TNC Barnhart Phillips Substation. AEP TNC plans to construct the transmission line on steel single-pole structures.

The proposed notice states the estimated cost for the routing options ranges from approximately \$14.7 million to \$17.7 million depending on the route chosen. However, this amount does not include the estimated construction cost for the Esmeralda Substation at \$12.9 million and \$3.8 million for the Yucca Substation. Therefore, the total estimated cost for the Esmeralda to Yucca 138-kV Transmission Line Project is actually \$31.3 million to \$34.4 million. The proposed project is estimated to be approximately 14.7 to 17.2 miles in length. The proposed project is presented with five alternate routes. Any of the routes or route segments presented in the application could, however, be approved by the commission.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. The deadline for intervention in this proceeding is May 12, 2014. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 42265.

TRD-201401443



Public Notice of Forms Publication and Request for Comments

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the forms are not included in the print version of the Texas Register. The forms are available in the on-line version of the April 11, 2014, issue of the Texas Register.)

Staff of the Public Utility Commission of Texas (commission staff) request comments on its proposed forms and instructions which will be utilized in conjunction with the proposed new Chapter 24 substantive rules related to the economic regulation of water and sewer service. The commission is requesting comment in separate projects on the implementation of substantive rules (42190) and procedural rules (42191) applicable to water and sewer service providers. The forms and instructions are substantially similar to those currently utilized at the Texas Commission on Environmental Quality (TCEQ) but include necessary changes to implement the rules in accordance with commission procedures. The commission will begin the economic regulation of water and sewer utilities beginning September 1, 2014, pursuant to House Bill 1600 and Senate Bill 567, 83rd Legislature, Regular Session.

Comments on the proposed forms may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. Sixteen copies of comments on the forms are required to be filed. Comments on the forms are due May 12, 2014. Comments should be organized in a manner consistent with the organization of the forms. All comments should refer to Project Number 42192 and include the name of the specific form document (because there are multiple forms).

Questions concerning Project Number 42192 should be directed to Christina Mann at (512) 936-7377. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1.

- [1. Water Utility Tariff](#)
- [2. Instructions for an Application for Sale, Transfer, or Merger of a Retail Public Utility](#)
- [3. Application for Sale, Transfer, or Merger of a Retail Public Utility](#)
- [4. Sewer Utility Tariff](#)
- [5. Instructions for Application for a Water or Wastewater Rate/Tariff Change](#)
- [6. Application for a Water or Wastewater Rate/Tariff Change](#)
- [7. Registration of Submetered or Allocated Utility Service](#)
- [8. Public Utility Commission of Texas Application for Exempt Utility Registration](#)

[9. Petition to Discontinue Service \(and Cancel\) a Certificate of Convenience and Necessity](#)

[10. Application to Obtain or Amend a Certificate of Convenience and Necessity \(CCN\) under Water Code §13.255](#)

[11. Instructions and Checklist - Application to Obtain or Amend a Water/Sewer Certificate of Convenience and Necessity \(CCN\)](#)

[12. Application to Obtain or Amend a Water or Sewer Certificate of Convenience and Necessity \(CCN\)](#)

[13. Appeal of the Cost of Obtaining Service from a Water Supply Corporation](#)

[14. Water and Wastewater Utilities Annual Report Instructions](#)

[15. Water and Wastewater Utilities Annual Report](#)

TRD-201401469

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 2, 2014



Workforce Solutions Capital Area

Amended Request for Proposals

The Workforce Solutions Capital Area Workforce Board ("Board") is soliciting proposals from qualified organizations for the management and operation of its Child Care Services (CCS) program.

This Request for Proposals (RFP) was issued at 1:00 p.m. (CST) on Monday, March 10, 2014. The RFP may be obtained in-person from the Board Office located at 6505 Airport Boulevard, Suite 101-E, Austin, Texas 78752; electronically by submitting a request to sandra.valenzuela@wfscapitalarea.com; or downloading from www.wfscapitalarea.com.

The deadline for the Letter of Intent to Bid is April 2, 2014, 4:00 p.m. (CST). The deadline for submission of proposals is 12:00 p.m. (noon/CST), April 25, 2014.

Workforce Solutions Capital Area Workforce Board is an equal opportunity employer/program. Auxiliary aids and services are available upon request, for persons with disabilities. Relay Texas: 1-800-735-2969 (TTY) and 711 (Voice).

TRD-201401461

Alan D. Miller
Executive Director
Workforce Solutions Capital Area
Filed: April 2, 2014



How to Use the Texas Register

Information Available: The 14 sections of the *Texas Register* represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the *Texas Register* is referenced by citing the volume in which the document appears, the words “TexReg” and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 39 (2014) is cited as follows: 39 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written “39 TexReg 2 issue date,” while on the opposite page, page 3, in the lower right-hand corner, would be written “issue date 39 TexReg 3.”

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the *Texas Register* office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using *Texas Register* indexes, the *Texas Administrative Code*, section numbers, or TRD number.

Both the *Texas Register* and the *Texas Administrative Code* are available online at: <http://www.sos.state.tx.us>. The *Register* is available in an .html version as well as a .pdf (portable document

format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The *Texas Administrative Code (TAC)* is the compilation of all final state agency rules published in the *Texas Register*. Following its effective date, a rule is entered into the *Texas Administrative Code*. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the *TAC*.

The *TAC* volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State’s website at <http://www.sos.state.tx.us/tac>.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the *TAC*, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the *TAC* scheme, each section is designated by a *TAC* number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the *Texas Administrative Code*; *TAC* stands for the *Texas Administrative Code*; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the *Texas Administrative Code*, please look at the *Index of Rules*. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the *Texas Register*. If a rule has changed during the time period covered by the table, the rule’s *TAC* number will be printed with the *Texas Register* page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION

Part 4. Office of the Secretary of State

Chapter 91. Texas Register

40 TAC §3.704.....950 (P)

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***Note:** Back issues of the *Texas Register*, published before September 9, 2005, must be ordered through the Texas Register Section of the Office of the Secretary of State at (512) 463-5561.

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