TEXAS REGISTER

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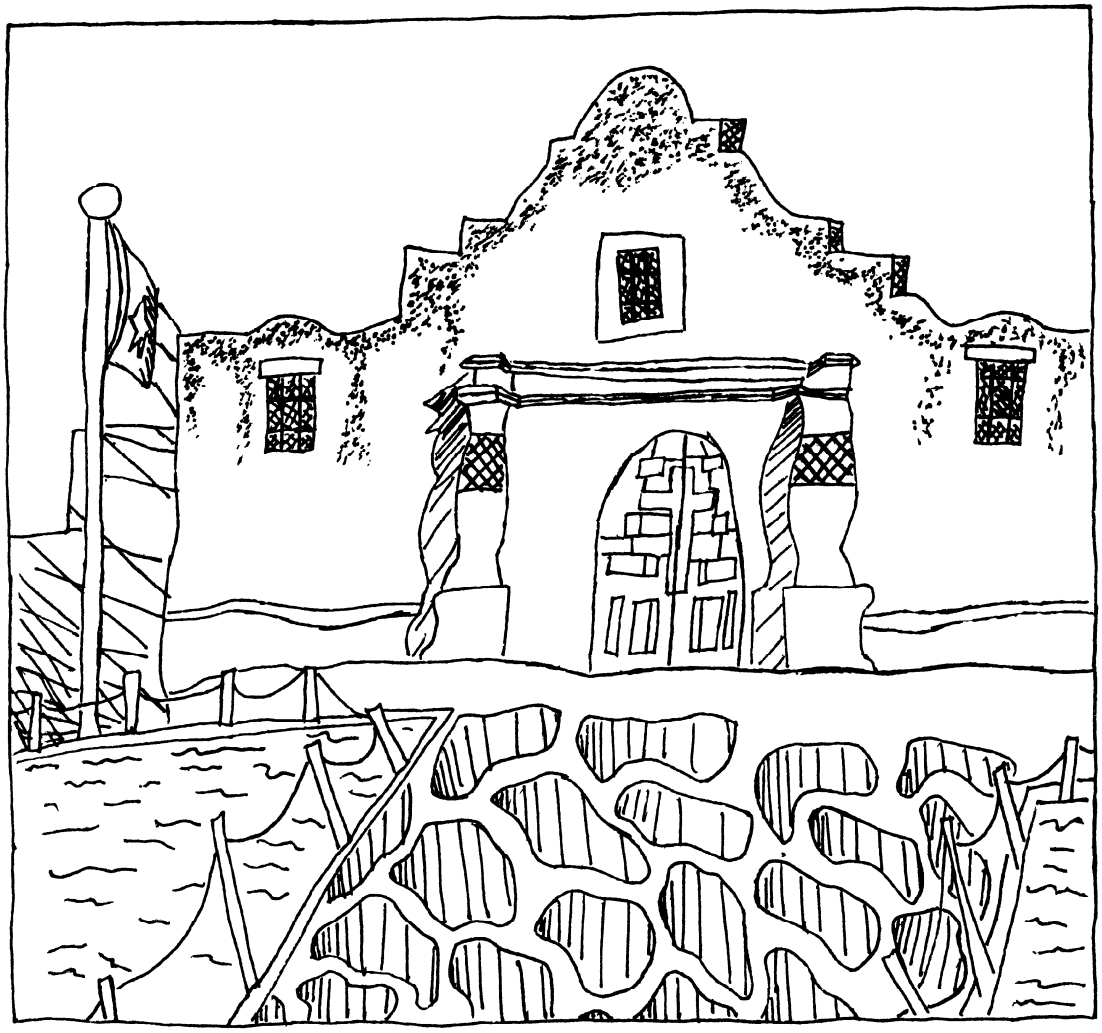

Jaime Vela

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

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

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Open Meetings

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

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

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

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

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

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

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

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

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

THE GOVERNOR

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

Appointments

Appointments for January 13, 2009

Appointed to the Texas Commission on Law Enforcement Officer Standards and Education for a term to expire August 30, 2013, Johnny E. Lovejoy, II of San Antonio (replacing Ada Brown of Dallas who resigned).

Appointed to the Telecommunications Planning and Oversight Council for a term to expire August 31, 2009, Jennifer Anderson of Anahuac (replacing Tim Shen of Houston whose term expired).

Appointed to the Telecommunications Planning and Oversight Council for a term to expire August 31, 2010, Alice E. Owen of Irving (replacing Jennifer Anderson of Anahuac whose term expired).

Appointed to the Telecommunications Planning and Oversight Council for a term to expire August 31, 2010, Johanne Ibsen-Wolford of Austin (Ms. Ibsen-Wolford is being reappointed).

Appointed to the Office of Rural Community Affairs for a term to expire February 1, 2009, Dora G. Alcala of Del Rio (replacing Lydia Saenz of Carrizo Springs who resigned).

Rick Perry, Governor

TRD-200900427

♦ ♦ ♦

Proclamation 41-3172

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of the State of Texas, did issue an Emergency Disaster Proclamation on September 8, 2008, as Hurricane Ike posed a threat of imminent disaster along the Texas Coast and in specified counties in Texas. The disaster proclamation was subsequently renewed through January 5, 2009, in the wake of Hurricane Ike.

WHEREAS, Hurricane Ike struck the State of Texas on September 13, 2008, causing substantial destruction in South and East Texas.

WHEREAS, Hurricane Ike continues to create a state of disaster for the people in the State of Texas.

WHEREAS, the state of disaster includes the counties of Anderson, Angelina, Aransas, Archer, Austin, Bell, Bexar, Bowie, Brazoria, Brazos, Burleson, Calhoun, Cass, Chambers, Cherokee, Collin, Colorado, Comal, Coryell, Dallas, Denton, Ellis, El Paso, Fort Bend, Franklin, Freestone, Galveston, Grayson, Gregg, Grimes, Hardin, Harris, Harrison, Henderson, Hill, Hopkins, Houston, Hunt, Jackson, Jasper, Jefferson, Johnson, Kaufman, Lamar, Lavaca, Leon, Liberty, Limestone, Lubbock, Madison, Marion, Matagorda, McLennan, Milam, Montgomery, Morris, Nacogdoches, Navarro, Newton, Nueces, Orange, Panola, Parker, Polk, Potter, Randall, Robertson, Rusk, Sabine, San Augustine, San Jacinto, San Patricio, Shelby, Smith, Tarrant, Titus, Tom Green, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Waller, Walker, Washington, Webb, Wharton, Williamson, Wise and Wood.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby renew the disaster proclamation and direct that all necessary measures, both public and private as authorized under Section 418.017 of the code, be implemented to meet that disaster.

As provided in Section 418.016 of the code, all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the incident.

The renewal of the disaster proclamation becomes effective on January 6, 2009, and shall remain in effect until February 4, 2009, unless renewed or terminated.

In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 2nd day of January, 2009.

Rick Perry, Governor

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

TRD-200900437

♦ ♦ ♦

Proclamation 41-3173

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of Texas, do hereby certify that there is an extreme fire hazard that poses a threat of imminent disaster in the counties of Andrews, Armstrong, Atascosa, Austin, Bandera, Bastrop, Baylor, Bee, Bell, Bexar, Blanco, Borden, Bosque, Brazoria, Brazos, Brewster, Brown, Burnet, Caldwell, Calhoun, Callahan, Castro, Chambers, Childress, Cochran, Coke, Coleman, Comal, Comanche, Concho, Cooke, Coryell, Crane, Dallam, Delta, Denton, Dickens, Dimmit, Duval, Eastland, Edwards, Ellis, Erath, Falls, Fannin, Fisher, Floyd, Freestone, Gillespie, Gonzales, Gray, Grayson, Guadalupe, Hamilton, Hardin, Haskell, Hays, Hood, Howard, Hudspeth, Hunt, Hutchinson, Irion, Jefferson, Jim Hogg, Jim Wells, Johnson, Jones, Karnes, Kendall, Kent, Kerr, Kimble, Kleberg, Knox, La Salle, Lamb, Lampasas, Lee, Leon, Liberty, Limestone, Live Oak, Llano, Loving, Lubbock, Lynn, Madison, Martin, Matagorda, Maverick, McLennan, Medina, Menard, Midland, Milam, Mills, Mitchell, Montague, Moore, Morris, Navarro, Nolan, Nueces, Oldham, Palo Pinto, Parker, Parmer, Pecos, Presidio, Rains, Real, Refugio, Robertson, Runnels, San Patricio, San Saba, Schleicher, Scurry, Shackelford, Sherman, Somervell, Starr, Stephens, Sterling, Sutton, Swisher, Tarrant, Taylor, Terrell, Terry, Throckmorton, Tom Green, Travis, Upton, Uvalde, Val Verde, Victoria, Walker, Ward, Washington, Webb, Wharton, Wheeler, Wilbarger, Williamson, Wilson, Winkler, Wise, Young, and Zavala, beginning January 16, 2009, and continuing.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby declare a state of disaster in the counties listed above based on the existence of such

threat and direct that all necessary measures both public and private as authorized under Section 418.017 of the code be implemented to meet that threat.

As provided in Section 418.016 of the code, all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the state of disaster.

In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 30th day of January, 2009.

Rick Perry, Governor

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

TRD-200900438

♦ ♦ ♦

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-0778-GA

Requestor:

Ms. Hope Andrade

Secretary of State

Post Office Box 12697

Austin, Texas 78711-2697

Re: Circumstances under which a foreign business entity is required to register with the secretary of state (RQ-0778-GA)

Briefs requested by February 27, 2009

RQ-0779-GA

Requestor:

Ms. Hope Andrade

Secretary of State

Post Office Box 12697

Austin, Texas 78711-2697

Re: Whether a private employer may limit the notarial acts performed by its employees during working hours (RQ-0779-GA)

Briefs requested by February 27, 2009

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

TRD-200900423
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: February 4, 2009

♦ ♦ ♦

EMERGENCY RULES

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

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS
SUBCHAPTER U. ASIAN CITRUS PSYLLID QUARANTINE

4 TAC §§19.410 - 19.413

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

The Texas Department of Agriculture (the department) repeals on an emergency basis §§19.410 - 19.413, concerning a quarantine for the Asian Citrus Psyllid, *Diaphorina citri* Kuwayama. The Animal and Plant Health Inspection Service (APHIS) agency of the United States Department of Agriculture (USDA) issued a Federal Order on November 2, 2007, titled, "Expansion of the quarantines for citrus greening and Asian citrus psyllids," which quarantined 32 Texas counties for this psyllid insect pest. The Federal Order required the department to establish a parallel quarantine by December 1, 2007; otherwise APHIS cautioned it would quarantine the entire state of Texas to prevent the spread of the psylllid to other states. To avoid APHIS' statewide quarantine, the department quarantined 32 counties on an emergency basis on December 14, 2007 (32 TexReg 9185). Later, the department published a proposed rule to quarantine these 32 counties in the February 22, 2008, issue of the *Texas Register* (33 TexReg 1475) and adopted the proposal on April 4, 2008 to be effective April 24, 2008 as published in the April 18, 2008, issue of the *Texas Register* (33 TexReg 3260).

As the psyllid survey continued, the insects were found in four additional counties, which were added to §19.411 and §19.413 of the quarantine on an emergency basis on August 27, 2008, as published in the September 12, 2008, issue of the *Texas Register* (33 TexReg 7653). However, the department withdrew this emergency amendment to §19.411 and §19.413 on November 5, 2008, as published in the November 21, 2008, issue of the *Texas Register* (33 TexReg 9449). Section 19.413 allows for movement of quarantined articles, which are hosts of the psyllid, from the quarantined counties of the state to free counties of the state provided a prescribed treatment regiment was followed. However, APHIS issued a federal order on January 28, 2009, which quarantined the entire state of Texas for the psyllid, and consequently rendered the department's Asian Citrus Psyllid quarantine obsolete.

The department believes that it is necessary to repeal §§19.410 - 19.413 on an emergency basis because the January 28, 2009, federal order quarantines the entire state of Texas for the psyllid. The only recourse available to the department to align with the federal quarantine is to repeal the state quarantine on an emergency basis. If the corrective action were not taken on an emergency basis, it would create confusion among the traders, primarily of the citrus plants, about the intrastate and interstate shipping requirements.

In Texas, about 90 percent of the quarantined articles, primarily citrus nursery plants, are produced by nurseries located in the 32 quarantined counties and these nurseries also sell about 70 percent of the plants into free counties. Prohibiting movement of these plants to free counties would be a significant economic hardship to these nurseries. Furthermore, APHIS informed the department if the state cannot comply with the federal requirement of prohibiting movement of the quarantined articles from the psyllid-infested counties to psyllid-free counties within a state, then APHIS would quarantine the entire state for the Asian citrus psyllid. The department consulted with representatives of the state's nursery, citrus, and produce associations, and all suggested repealing the state's Asian Citrus Psyllid Quarantine and allowing APHIS to quarantine the entire state, which would mean quarantined articles could be moved within the state without any restrictions and without the treatment. While quarantined articles are seldom moved outside Texas, APHIS would assist such movement by issuing limited permits provided the prescribed treatment regiment is followed. The department will also assist APHIS if needed to expedite issuance of the required certification. In addition, the department will inform nursery managers in the quarantined counties, who have entered into a compliance agreement with the department to treat the quarantined articles for movement to free counties that the department is canceling the agreement and that the quarantined articles are free to move within Texas without any treatment for the psyllids. The department intends to propose adoption of this emergency filing on a permanent basis in a separate submission.

The repeal of §§19.410 - 19.413 is adopted on an emergency basis in accordance with the Texas Agriculture Code (the Code), §71.001 which authorizes the department to establish a quarantine for an infested area against an in-state pest if it determines that the pest is dangerous and is not widely distributed in this state; §71.007, which authorizes the department to adopt rules as necessary to protect agricultural and horticultural interests, including rules to prevent the selling, moving, or transporting of any plant, plant product, or substance that is found to be infested or found to be from a quarantined area; or provide for specific treatment of a grove or orchard or of infested or infected plants, plant products, or substances; and, Texas Government Code, §2001.034, which provides for the adoption of administrative rules on an emergency basis, without notice and comment.

§19.410. Quarantined Pests.

§19.411. Quarantined Areas.

§19.412. Quarantined Articles.

§19.413. Restrictions.

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

Filed with the Office of the Secretary of State on January 30, 2009.

TRD-200900372
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective Date: January 30, 2009
Expiration Date: May 29, 2009
For further information, please call: (512) 463-4075

PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 102. HEALTH SPAS

The Office of the Secretary of State (Office) proposes changes to Chapter 102, concerning health spas. Amendments are proposed to §§102.1, 102.10, 102.13, 102.15, 102.18, 102.20, 102.30, 102.32, 102.35, 102.45, and 102.50. Sections 102.11, 102.12 and 102.21 are proposed as new.

These non-substantive changes are proposed in order to reorganize the rules for health spas; to specify the location of forms on the Office's web site; to clarify the procedures for amending registrations; and to conform the rules to existing practices and procedures related to health spas.

Changes to Subchapter A include adding a definition of equivalent facilities to §102.1.

Changes to Subchapter B include amendments to §102.10 deleting language from that repeats statutory language; reorganizing and expanding the ownership provisions; clarifying the procedure for amending the registration or renewal of a health spa; providing that renewals may be submitted within 90 days of expiration; and adding language about the nontransferability of a registration; explaining what may be considered a transfer in violation of the Act; and specifying the number and location of the form for application for registration. New §102.11 explains the procedure that registrants follow to amend registrations. New §102.12 explains the registration requirements for new owners of existing health spas. In addition, §102.13 was reworded to conform the language in the rules to the statutory language and to add a provision indicating that there is no fee assessed for amendment of a registration or renewal. Section 102.15 was revised to clarify that the statutory exemptions are exemptions from registration for activities and facilities that are not within the statutory definition of a health spa. Section 102.18 was reworded to clarify the procedures for requesting an exemption from the security requirements, the actions that the secretary of state will take in response to a request for exemption, the future obligations of an applicant following exemption, and to add language about the nontransferability of an exemption and what is considered a transfer.

Changes to Subchapter C include amending §102.20 to allow escrow accounts to be maintained at credit unions, to rearrange and clarify the contents of an escrow agreement and the circumstances under which the agreement is terminated and/or funds may be withdrawn. New §102.21 provides that a registrant shall submit a statement of escrow account to the secretary of state.

Changes to Subchapter D include amending §102.30 regarding acceptable forms of security to clarify that the secretary of state does not and has not accepted letters of credit as security since December 27, 2004, the effective date of the enactment of this rule. Amendments are proposed to §102.32 to clarify that the total amount paid for all prepaid memberships determines the amount of the security. Amendments are proposed to §102.35 to clarify the requirements regarding the posting of notice when a health spa closes and conform those requirements to current statutory requirements. Amendments are also proposed to this section to confirm that the secretary has no authority to accept claims after the statutory period, and to move language about the pro rata basis for claims exceeding the amount of security to follow the claims procedures and delete the duplicate language about pro rata distribution. Additional amendments are proposed to delete the duplicate definition of closed since that term is defined in the statute as well as in §102.1. Amendments are proposed to §102.45 to allow certificates of deposit provided as security to be maintained in credit unions and to incorporate the provisions related to assignment that are included in the prescribed assignment form.

Changes to Subchapter E include amending §102.50 to provide the web site location for forms.

FISCAL NOTE

Mike Powell, attorney, Business and Public Filings Division, has determined that there is no fiscal impact on state or local government if these rules are adopted.

PUBLIC BENEFIT COST NOTE

Mr. Powell has determined that the public benefit is to provide an accurate, more detailed, and clearer understanding of the policies and procedures for registering health spas with the office of the secretary of state.

There will be no additional cost to small business or individuals as a result of the adoption of these rules.

COMMENTS

Mike Powell has been designated to receive comments. Written comments should be addressed to Mr. Powell at Office of the Secretary of State, Business and Public Filings Division, P.O. Box 13297, Austin, Texas 78711-3697; or by email to mpowell@sos.state.tx.us. To be considered before the rules are adopted, comments must be received by the Office no later than 5:00 p.m., Monday, March 16, 2009.

SUBCHAPTER A. DEFINITIONS

1 TAC §102.1

STATUTORY AUTHORITY

These rules are proposed under the authority of §702.051 and §702.052 of the Texas Occupations Code which provides that the secretary may adopt rules necessary to administer the chapter and determine the disposition of a security claim.

Chapter 702 of the Texas Occupations Code is affected by these rules.

§102.1. Definitions.

Words and terms defined in the Health Spa Act (Texas Occupations Code, Chapter 702) shall have the same meaning in this chapter. In addition the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Health Spa Act, Texas Occupations Code, Chapter 702.

(2) Equivalent Facilities--Facilities that have substantially similar hours of operation, physical structures, improvements, square footage, exercise equipment, and access to instructors, trainers and classes as the closed facility.

[~~(2) Closed, closes, or closing--A condition where:~~]

[~~(A) the facilities of a health spa are no longer available to its members and equivalent facilities within 10 miles of the closed facilities have not been made available to members of the closed facilities; or~~]

[~~(B) the registrant has sold a registered location and the security required by the Health Spa Act, §702.151, has either been canceled, withdrawn, or is otherwise unavailable for the use of members; or~~]

[~~(C) the registrant has sold a registered location and the new owner has neither adopted nor honored the contracts of existing members.~~]

[~~(3) Contract--An agreement by which one becomes a member of a health spa.~~]

(3) [~~(4)~~] Fully open or fully open for business--The date on which all services of the health spa that were advertised before the opening or promised to be made available are available for use by its members.

[~~(5) Location--The physical site or place where health spa facilities are located.~~]

[~~(6) Obligor--A person other than a surety who is obligated to perform in the event of a registrant's default.~~]

[~~(7) Prepayment--A payment for all services or the use of facilities made by members of a health spa before the services or facilities are made available to the members.~~]

(4) [~~(8)~~] Registrant--A person who has registered with the secretary and has been issued a health spa operator's certificate of registration.

(5) [~~(9)~~] Secretary--The Texas secretary of state.

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

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Lorna Wassdorf
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SUBCHAPTER B. REGISTRATION PROCEDURES

1 TAC §§102.10 - 102.13, 102.15, 102.18

STATUTORY AUTHORITY

These rules are proposed under the authority of §702.051 and §702.052 of the Texas Occupations Code which provides that the secretary may adopt rules necessary to administer the chapter and determine the disposition of a security claim.

Chapter 702 of the Texas Occupations Code is affected by these rules.

§102.10. Procedure for Filing an Application for or Renewal of a Certificate of Registration [~~Statement~~].

(a) A separate application for a health spa operator's certificate of registration must be submitted for each location where the applicant operates a health spa.

[~~(a) Each health spa location shall file a registration statement containing the following information:~~]

(b) In addition to the information required by §702.102 of the Health Spa Act (Act), an applicant for a health spa operator's certificate of registration must include the following information on any application for registration or renewal of application for registration:

(1) the health spa's name [~~and physical location~~];

[~~(2) the name and address of any person who directly or indirectly owns or controls 10% or more of the issued and outstanding voting shares of a corporation, if the health spa is operated through that corporation;~~]

[~~(3) the name and address of all the partners if the health spa is operated as a general partnership;~~]

[~~(4) the name and address of each general partner if the health spa is operated by a limited partnership;~~]

[~~(5) the name and address of each person deemed to be an owner if the health spa is operated as a sole proprietorship;~~]

[~~(6) the name and address of any person or entity holding any direct or indirect ownership of the health spa, if that person or entity exercises direct control of the health spa;~~]

(2) [~~(7)~~] a detailed disclosure of the proposed facilities and services, including the hours of operation and the availability and access to instructors, trainers and classes;

(3) [~~(8)~~] the approximate square footage of the health spa;

(4) [~~(9)~~] a complete disclosure of any litigation, or any complaint filed with a governmental authority filed within two years preceding the application or currently pending relating to the failure to open or the closing of a health spa brought against the owners, officers, or directors of the applicant [~~health spa filing the registration statement that was completed within the past two years or is currently pending~~]; or a [~~notarized~~] statement signed and sworn to by or on behalf of the applicant stating that [~~which states that within the past two years~~] there has been no litigation or [~~and no~~] complaint filed with a governmental

authority relating to the failure to open or the closing of a health spa brought against the [~~health spa~~] owners, officers, or directors of the applicant [~~for which the registration statement is being filed~~]; and

(5) [~~(10)~~] the federal employer identification [~~tax~~] number of the applicant. [~~all owners and all operators of the health spa. If a corporation is the owner or the operator, the federal tax number of the corporation shall be provided.~~]

[~~(b) The registrant shall amend the registration statement not later than the 90th day after the day on which a change in the information provided in the statement occurs.~~]

(c) For purposes of compliance with the requirement of §702.102(a)(3)(C) of the Act, that the registration specify the name and address of each person who directly or indirectly owns or controls the applicant's business:

(1) if the applicant is a corporation, the name and address of each person who directly or indirectly owns or controls 10% or more of the issued and outstanding voting shares of a corporation;

(2) if the applicant is a general partnership, the name and address of each partner who directly or indirectly owns or controls 10% or more of the partnership interests;

(3) if the applicant is a limited partnership, the name and address of each general partner;

(4) if the applicant is a limited liability company, the name and address of each member who directly or indirectly owns or controls 10% or more of the membership interests;

(5) if the applicant is a sole proprietorship, the name and address of the sole proprietor; and

(6) if the applicant is an entity not otherwise described in this rule, the name and address of each person who directly or indirectly owns or controls 10% or more of the ownership interests of the entity.

(d) [~~(c)~~] The registration [~~statement~~] must be renewed one year from the original registration date and each year thereafter on or before the anniversary of the original registration date. Renewals may be submitted 90 days prior to expiration.

(e) [~~(d)~~] Each application for registration or renewal [~~statement~~] shall be signed [~~notarized~~] and sworn to before a notary public or other person authorized to administer oaths by or on behalf of the applicant [~~by the person submitting it~~].

(f) The secretary of state provides a form for the application for registration or renewal as a health spa. The form can be obtained from the Statutory Documents Section of the Office of the Secretary of State, P.O. Box 13550, Austin, Texas 78711-3550. The form is also available on the secretary of state web site at http://www.sos.state.tx.us/statdoc/statforms.shtml#HSF. See form 3001.

§102.11. Amendment.

(a) The registrant shall amend the registration or any renewal not later than the 90th day after the date on which a change in the information provided in the registration or renewal occurs.

(b) The amendment to the registration shall set forth the following information:

(1) the name of the registrant;

(2) the date of the last filed registration or renewal and any identification number assigned by the secretary to that registration or renewal; and

(3) an identification of the information that has changed and the manner in which the information has changed.

(c) The amendment shall be signed and sworn to by or on behalf of the registrant in the same manner as an original application for registration or any renewal thereof.

(d) If the amendment is filed to reflect a change in the address of the health spa, the amendment must be accompanied by a rider to any security bond reflecting the change in address.

§102.12. Transferability of Certificate of Registration.

The certificate of registration is not transferable. If a health spa is purchased or otherwise transferred to a new owner, the new owner or transferee must submit a new application for registration within five business days of the purchase or transfer. In addition, the new owner or transferee must submit a new surety bond, post other security or a new application for exemption within five business days after the ownership has been transferred. Transfer includes a sale of substantially all of the assets, a sale of a majority of the ownership interests, or a merger or consolidation of the registrant into a surviving or resulting entity. Transfer does not include the conversion of a business entity of one type into a business entity of another type or the redomestication of an entity from one jurisdiction to another jurisdiction.

§102.13. Fees.

(a) A fee of $100 will accompany the application for registration [~~statement~~].

(b) The fee for filing a renewal application [~~statement~~] is $100.

(c) The fee for an initial or renewal application that is not completed before the 31st day after it is received is forfeited and the application or renewal abandoned.

[~~(c) If an initial or renewal application is not complete before the 31st day after it is received incomplete, the file will be closed and the registration fee forfeited.~~]

(d) There is no fee for filing an amendment to a registration or renewal.

§102.15. Excluded Activities [~~Exemptions~~].

The following facilities or activities are not included within the definition of "health spa" in §702.003 of the Health Spa Act and are not required to register [~~exempt from registration~~] with the secretary under Chapter 702:

(1) facilities owned by organizations that are tax exempt under 26 United States Code 501 et seq.;

(2) private clubs owned and operated by its [~~their~~] members;

(3) entities exclusively operated for teaching dance or aerobic exercise;

(4) entities exclusively engaged in physical rehabilitation activity related to an individual's injury or disease;

(5) an individual or entity engaged in an activity authorized under a valid license issued by this state; or

(6) activities conducted or sanctioned by a school operating under the Education Code.

§102.18. Application for Exemption from the Security Requirements.

(a) A registrant meeting the requirements for exemption from the security requirements as set forth in §702.202 of the Health Spa Act (Act) must apply [~~applying~~] for an exemption from the security requirements of Subchapter D of Chapter 702 of the Act on [~~Texas Occupations Code must use~~] the application form prescribed by the secretary of state. The application for exemption must be signed and sworn to by or on behalf of the applicant.

(b) The application form may be obtained from the Statutory Documents Section of the Office of the Secretary of State, P.O. Box 13550 [12887], Austin, Texas 78711-3550 [2887, (512) 463-6906]. It is also available on the secretary of state web site [Internet] at http://www.sos.state.tx.us/statdoc/forms/3006.doc. See form 3006.

(c) The application for exemption from the security requirements must be submitted with the application for registration.

(d) If the secretary of state determines that the applicant meets the requirements for exemption, the secretary shall issue a certificate of exemption providing that the certificate holder is not required to file a surety bond or post other security for the location registered.

(e) If an applicant has been granted an exemption under §702.202(2) of the Act, the applicant must submit a statement signed by or on behalf of the applicant continues to comply with the requirements of §702.202(2), on the third anniversary of the initial registration and every three years thereafter.

(f) The certificate of exemption is not transferable. If a health spa is purchased or otherwise transferred to a new owner, the new owner must submit a surety bond, post other security or file a new application for exemption within five business days after the ownership has been transferred. Transfer includes a sale of substantially all of the assets, a sale of a majority of the ownership interests, or a merger or consolidation of the registrant into a surviving or resulting entity. Transfer does not include the conversion of a business entity of one type into a business entity of another type or the redomestication of an entity from one jurisdiction to another jurisdiction.

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

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SUBCHAPTER C. ESCROW

1 TAC §102.20, §102.21

STATUTORY AUTHORITY

These rules are proposed under the authority of §702.051 and §702.052 of the Texas Occupations Code which provides that the secretary may adopt rules necessary to administer the chapter and determine the disposition of a security claim.

Chapter 702 of the Texas Occupations Code is affected by these rules.

§102.20. Procedure for Establishing and Releasing Escrow Accounts.

(a) Unless exempted by the Health Spa Act, §702.353 a registrant or an [its] assignee or agent that accepts prepayments for [its] membership in a health spa before the date the health spa opens shall deposit all of the funds in an escrow account established with a financial institution whose accounts are insured by the Federal Deposit Insurance Corporation, [or] the Savings Association Insurance Fund, or the National Credit Union Administration which shall hold the funds as escrow agent for the benefit of the members that prepay.

(b) The following conditions apply to escrow accounts:

(1) Prepayments must be deposited at least biweekly and the first deposit must be made not later than the 14th day after the date on which the registrant or its agent accepts the first payment;

(2) The funds must remain in escrow and may not be withdrawn by the registrant unless the following conditions are met:

(A) The health spa remains open for not less than 30 days; and

(B) The registrant provides the escrow agent proof that the registrant has filed an affidavit with the secretary of state certifying that all obligations of the registrant for which a lien could be filed under Property Code, Chapter 53, have been paid and that no person is eligible to claim a lien under that chapter during the period the registrant, its agent or assignee accepts prepayments.

(3) The escrow account will terminate and the funds will be refunded to the members of the health spa under the following conditions:

(A) If the health spa does not fully open for business before the 181st day after the registrant first sells a membership in the health spa, or if the health spa does not remain open for 30 days, the escrow agreement shall terminate and all prepayment deposits shall be refunded to the members; or

(B) If another health spa is operated by the same seller and is located not more than 10 miles from the proposed location of the new health spa and the person purchasing the membership is authorized to use these other facilities, then the member of the new spa whose fees are held in escrow is entitled to receive a full refund of the membership fees from the escrow agent if the new health spa does not open before the 361st day after the date on which the new spa first sells a membership or if the new spa does not remain open for 30 days.

(4) The financial institution shall hold each prepayment as an escrow agent for the benefit of the member who made the prepayments.

(5) The financial institution will respond to each inquiry made by the secretary of state regarding the escrow account.

[(b) The registrant shall deposit prepayments received as often as biweekly and shall make the first deposit not later than the 14th day after the day on which the registrant or its agent accepts the first payment.]

[(c) Not later than the 14th day after the day on which the first prepayment is received, the registrant shall give the secretary a notarized statement that identifies the financial institution in which the prepayments are held in escrow and the name in which the account is held, together with a signed statement on a form approved by the secretary of state which authorizes the secretary of state to make inquiries of the financial institution regarding the funds in escrow.]

[(d) The escrow agreement must contain the following provisions.]

[(1) Prepayments must be deposited at least biweekly.]

[(2) The secretary must be named as fiduciary for the prepayment members.]

[(3) The prepayments shall remain in escrow until the 30th day after the date that the health spa fully opens for business.]

[(4) If the health spa does not fully open for business before the 181st day after the registrant first sells a membership in the health spa, or if the health spa does not remain open for 30 days, the escrow agreement shall terminate and all prepayment deposits shall be refunded to the members.]

[(5) If another health spa is operated by the same seller and is located not more than 10 miles from the proposed location of the new health spa and the person purchasing the membership is authorized to use these other facilities, then the member of the new spa whose fees are held in escrow is entitled to receive a full refund of the membership fees from the escrow agent if the new health spa does not open before the 361st day after the date on which the new spa first sells a membership or if the new spa does not remain open for 30 days.]

[(6) The registrant must provide the escrow agent proof that it has filed an affidavit with the secretary of state which certified that all obligations of the registrant for which a lien could be filed under the Property Code, Chapter 53, have been paid and whether any person is eligible to claim a lien under that chapter during the period the registrant or its agent accepts payments.]

[(e) The escrow agreement shall identify the escrow officer, style of the deposit account, the financial institution, and any other information which will identify the escrow account into which the prepayments have been deposited.]

[(f) The registrant shall file a copy of the escrow agreement with the secretary.]

§102.21. Statement Regarding Escrow Account.

The registrant shall submit a statement to the secretary of state that identifies the escrow agent, the style of the deposit account, the name and address of the financial institution, and any other information which will identify the escrow account into which the prepayments have been deposited. In addition, the statement must give authority to the secretary of state to direct inquiries to the financial institution regarding the escrow account. The statement shall be on a form prescribed by the secretary of state. The statement shall be signed and notarized by the registrant and signed by the escrow agent.

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

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SUBCHAPTER D. SECURITY

1 TAC §§102.30, 102.32, 102.35, 102.45

STATUTORY AUTHORITY

These rules are proposed under the authority of §702.051 and §702.052 of the Texas Occupations Code which provides that the secretary may adopt rules necessary to administer the chapter and determine the disposition of a security claim.

Chapter 702 of the Texas Occupations Code is affected by these rules.

§102.30. Acceptable Forms of Security [That May Be Filed or Posted under §702.151 of the Act].

(a) Unless exempted, a [A] health spa operator must [may] file a surety bond or post as other security:

(1) Cash or its equivalent; or

(2) a Certificate of Deposit as prescribed in §102.45 of this subchapter (relating to Procedure for Filing Certificates of Deposit as Security).

(b) The secretary of state will not accept Letters of Credit [shall not be posted] as security under §702.151 of the Health Spa Act. Letters of Credit posted as security on December 27, 2004 [the effective date of this rule] may continue as security until the expiration date of the Letter of Credit. On or before such expiration date, the health spa operator shall replace the Letter of Credit with a form of security authorized by subsection (a) of this section.

§102.32. Amount of Security Required [under §702.151 of the Act].

(a) For purposes of this section, the term "total membership" in §702.151 and §702.158 of the Health Spa Act (Act) means the health spa's total prepaid memberships. The total amount paid for all prepaid memberships determines the amount of the security that must be filed or posted.

(b) "Prepaid membership" means any membership for which [that] a member pays consideration in advance for a term that exceeds 31 days [for before the term of the membership is used by the member].

(c) An [A health spa registration] application for registration or any renewal from a health spa operator, not exempt under §702.202 of the Act, shall include a written statement from the health spa operator that specifies:

(1) the total number of prepaid memberships at the health spa location; and

(2) the total amount paid for all such prepaid memberships.

(d) The health spa operator shall file a security for each of the operator's health spa locations in the following amounts:
Figure: 1 TAC §102.32(d) (No change.)

§102.35. Adjudication of Claims and Posting of Notice of Closure.

(a) Within 10 days of receiving notice that a health spa which has posted a security with the secretary has ceased operations, the secretary shall notify the surety or obligor that:

(1) the health spa has ceased operations;

(2) the members of the health spa may have suffered financial losses within the meaning of the Health Spa Act (Act) and these rules; [and]

(3) the secretary may make a claim on the bond or other security or require that the surety or obligor holding funds compensate the members for any losses; and

(4) [(3)] the secretary intends to inform the registrant that the registrant must post a notice at the health spa location notifying the public of the fact that the health spa is closed and the procedures for and the timeframe in which documents must be submitted to the secretary [that a health spa member has 90 days from the date the notice is first posted] to perfect a claim under the security posted.

(b) The notice must be:

(1) at least 8 1/2 by 11 inches in size;

(2) posted inside and outside each entrance to the health spa; and

[(2) posted in a place that is readily accessible to the general public during the former operating hours of the health spa; and]

(3) posted continuously for at least 30 [14] days and include the following information:[.]

(A) the date the health spa is scheduled to close or relocate;

(B) that a member of the health spa may file a claim with the secretary to recover actual financial loss within the time prescribed by the Act; and

(C) the procedures for perfecting a security claim.

(c) If, no later than 10 days from the date the secretary discovers a health spa is closed, the secretary determines that the registrant has not posted the required notice, the secretary will take action to post the notice. In all cases, the secretary of state will post a notice of closure on the secretary of state's web site at: http://www.sos.state.tx.us/statdoc/healthspas/index.shtml.

(d) All [Regardless of the method utilized for notice to the members, all] claims received by the secretary after 90 days following the date [of] the [first] notice is first posted are barred and may [shall] not be considered by the secretary. The secretary has no discretion to waive the statutory time period for filing claims. [If the total of claims evidencing actual financial loss exceed the amount of the security, the secretary shall adjudicate the claims on a pro rata basis by dividing the amount of the security by the total amount of the claims in order to ascertain a percentage to be applied to each claim.]

(e) In order to perfect a claim, a claimant must submit a copy of the contract that forms a basis of the claim together with documentation or a sworn affidavit indicating the total of payments made pursuant to the contract. In the event the claimant does not submit adequate documentation, the secretary shall promptly inform the claimant of this fact together with notice that adequate documentation must be received within 30 days [by the bar date] in order for the claim to be considered.

(f) If the total of claims evidencing actual financial loss exceeds the amount of the security, the secretary shall adjudicate the claims on a pro rata basis by dividing the amount of the security by the total amount of the claims in order to ascertain a percentage to be applied to each claim.

(g) [(f)] After the time for filing claims has lapsed, the [The] secretary shall timely present claims to the surety or obligor for payment together with an administrative order signed by the secretary or deputy secretary pursuant to §702.157 of the Act [for payment by the surety or obligor].

(h) [(g)] Actual financial loss shall mean and be limited to those sums which have been paid under a health spa contract to a registrant or a registrant's assignee and, which at the time the health spa is closed, are unearned. Actual financial losses shall be computed in accordance with §702.252 of the Act [calculated] by multiplying the gross monthly payment by the total of months or partial months remaining on a contract at the time of closing minus any payments not made. For the purposes of this section the following terms shall have the following meanings.

[(1) Closed--The condition wherein the facilities of a health spa are no longer available to its members and equivalent facilities within 10 miles of the closed facility have not been made available to the members of the closed facilities; or where a registrant has sold a registered location and the security required in section of the Act has not been transferred to the new owner or the new owner has neither adopted nor honored the contracts of existing members.]

(1) [(2)] Gross monthly payment--The gross monthly payment shall be calculated by determining the total of payments, including down payments and initiation fees required by the contract, divided by the total number of months in the term of the contract.

(2) [(3)] Calculation of dates--The date of closing and the date of the contract expiration shall be rounded to the nearest full month. The total months remaining on the contract shall be calculated by subtracting the date of closing from the expiration date of the contract. The result will be expressed in whole months.

[(h) If the members' claims do not exceed the amount of the security, the registrant shall arrange for the direct payment of the claims to the members.]

(i) The surety or obligor shall provide the secretary proof of payment of the members' claims.

[(j) In the event the total of claims exceed the amount of the security, the claims shall be paid on a pro rata basis by dividing the amount of the security by the total amount of the claims. This percentage shall be applied to each claim.]

§102.45. Procedure for Filing Certificates of Deposit as Security [under the Health Spa Act, §702.151].

(a) If the registrant provides a certificate of deposit as security under the Health Spa Act, §702.151, the certificate of deposit must be issued by a financial institution in this state whose deposits are insured by the Federal Deposit Insurance Corporation, [or] the Savings Association Insurance Fund, or the National Credit Union Administration. The certificate of deposit must be assigned to the secretary of state, payable to the State of Texas for the use and benefit of each member of a health spa who suffers financial loss due to closure of a health spa. The assignment shall remain in full force and effect until expressly withdrawn by the assignor with the approval of the secretary of state.

(b) A copy of the document, issued by the financial institution evidencing[, that evidences] the existence of the certificate of deposit must be filed along with an executed assignment form. The assignment form can be obtained from the Statutory Documents Section of the Office of the Secretary of State, P.O. Box 13550 [12887], Austin, Texas 78711-3550 [2887, (512) 463-6906]. The assignment form [It] is also available on the secretary of state web site [Internet] at http://www.sos.state.tx.us/statdoc/statforms.shtml#HSF [http://www.sos.state.tx.us]. See form 3004.

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

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SUBCHAPTER E. GENERAL INFORMATION

1 TAC §102.50

STATUTORY AUTHORITY

These rules are proposed under the authority of §702.051 and §702.052 of the Texas Occupations Code which provides that the secretary may adopt rules necessary to administer the chapter and determine the disposition of a security claim.

Chapter 702 of the Texas Occupations Code is affected by these rules.

§102.50. Forms.

Forms shall be provided by the Office of the Secretary of State for the purposes of complying with the Health Spa Act, Chapter 702, and this chapter. The forms [~~are hereby adopted by reference and~~] may be obtained from the Office of the Secretary of State, Statutory Documents Section, P.O. Box 13550 [~~12887~~], Austin, Texas 78711-3550 [~~2887~~]. Forms are also available on the secretary of state web site at: http://www.sos.state.tx.us/statdoc/statforms.shtml#HSF.

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES
SUBCHAPTER C. REIMBURSEMENT METHODOLOGY FOR NURSING FACILITIES

1 TAC §355.307

The Texas Health and Human Services Commission (HHSC) proposes an amendment to §355.307, Reimbursement Setting Methodology, under Title 1 of the Texas Administrative Code (TAC), Part 15, Chapter 355, Subchapter C.

Background and Justification

This rule establishes the reimbursement methodology for the Nursing Facility (NF) program, including Medicaid reimbursement rates for pediatric care facilities. HHSC, under its authority and responsibility to administer and implement rates, is updating these rules to allow a limited number of adults who were admitted to the facility as children but who are no longer children (i.e., individuals who have "aged in place") to be counted as children for purposes of determining if a facility meets the requirements for remaining a pediatric care facility. This change will apply only when the pediatric care facility is the entire facility; it will not apply to pediatric care facilities that are distinct units within a larger facility. In addition, the change will apply only to determining if an already existing pediatric care facility meets the requirements to remain a pediatric care facility. It will not apply to determining if a non-pediatric care facility meets the requirements to become a pediatric care facility. In these specific instances the proposal amends the current rule language requiring a pediatric care facility to maintain an average daily census of 80% children, to allow a limited number of adults who were admitted to the facility as children but who are no longer children to be counted as children for purposes of determining if the facility meets the requirements for remaining a pediatric care facility. The number of such individuals who may be counted as children for this purpose is limited to 15% of the facility's average daily census.

This amendment is being proposed to allow pediatric care facilities with a limited number of individuals who have "aged in place" to remain pediatric facilities. Once the number of individuals who have "aged in place" exceeds the percentage defined in the rule, the entire facility will no longer qualify as a pediatric care facility. At that point, the facility will have to create a pediatric care distinct unit if it wishes to continue receiving the pediatric reimbursement rate for its residents who are children.

Section-by-Section Summary

The proposed amendment revises §55.307 to add new clauses (i) and (ii) under subsection (c)(2)(C), to allow a limited number of adults who were admitted to a pediatric care facility as children but who are no longer children to be counted as children for purposes of determining if a facility meets the requirements for remaining a pediatric care facility.

Fiscal Note

Gordon E. Taylor, Chief Financial Officer for the Department of Aging and Disability Services, has determined that during the first five-year period the amended rule is in effect there will be no fiscal impact to state government. The proposed rule will not result in any fiscal implications for local health and human services agencies. There are no fiscal implications for local governments as a result of enforcing or administering the section.

Small Business and Micro-business Impact Analysis

HHSC has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendment. The implementation of these proposed rule amendments does not require any changes in practice or any additional cost to the contracted provider.

HHSC does not anticipate that there will be any economic cost to persons who are required to comply with this amendment. The amendment will not affect local employment.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that, for each of the first five years the amendment is in effect, the expected public benefit is that pediatric care nursing facilities with "aging out populations" will be able to remain pediatric care facilities for a limited period of time before having to create a pediatric care distinct unit.

Takings Impact Assessment

HHSC 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.

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.

Public Comment

Questions about the content of this proposal may be directed to Cheryl Jablonski in the HHSC Rate Analysis Department by telephone at (512) 491-1764. Written comments on the proposal may be submitted to Ms. Jablonski by facsimile at (512) 491-1998, by e-mail to cheryl.jablonski@hhsc.state.tx.us, or by mail to HHSC Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200, within 30 days of publication of this proposal in the *Texas Register.*

Statutory Authority

The amendment is proposed under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC to with broad rulemaking authority; and the Human Resource 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.

The proposed 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.

§355.307. Reimbursement Setting Methodology.

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

(c) Special reimbursement class. HHSC may define special reimbursement classes, including experimental reimbursement classes of service to be used in research and demonstration projects on new reimbursement methods and reimbursement classes of service, to address the cost differences of a select group of recipients. Special classes may be implemented on a statewide basis, may be limited to a specific region of the state, or may be limited to a selected group of providers.

(1) (No change.)

(2) Definitions.

(A) Pediatric care facility--Except as provided for in subparagraph (C) of this paragraph, a [~~A~~] pediatric care facility is an entire facility that has maintained an average daily census of 80% or more children for the six-month period prior to its entry into the pediatric care facility class based on the entire licensed facility. A pediatric care facility can also be a distinct unit of a facility that has maintained an average daily census of 85% or more children for the six-month period prior to its entry into the pediatric care facility class based on the distinct unit of the facility. To remain a pediatric care facility, the pediatric care facility must maintain an average daily census of 80% or more children if the pediatric care facility is an entire facility and 85% or more children if the pediatric care facility is a distinct unit of the facility. The contracted provider must request in writing by certified mail or by special mail delivery where the delivery can be verified to become a member of the pediatric care facility special reimbursement class. The request must be sent to the Texas Health and Human Services Commission.

(B) Distinct unit--A portion of a nursing facility that is physically separate from (beds are not commingled with) other units of the facility. The distinct unit can be an entire wing, a separate building, an entire floor, or an entire hallway. The distinct unit consists of all beds within the designated area. A distinct unit must consist of 28 or more Medicaid-contracted beds.

(C) Children--For the purposes of this pediatric care facility class, children are defined as being at or below 22 years of age.

(i) Only for a pediatric care facility that is designated in its entirety as a pediatric care facility, a limited number of adults who were admitted to the facility as children but who are no longer children (i.e., individuals who have "aged in place") may be counted as children for purposes of determining if the facility meets the requirements for remaining a pediatric care facility described in subparagraph (A) of this paragraph. The number of such individuals who may be counted as children for purposes of determining if the facility continues to meet the requirements for remaining a pediatric care facility is limited to 15% of the average daily census of the facility.

(ii) Individuals who have "aged in place" as described in clause (i) of this subparagraph may not be counted toward meeting the requirements for a facility to initially become a pediatric care facility nor can they be counted toward meeting the requirements for a distinct unit to remain a pediatric care facility.

(3) (No change.)

(d) - (f) (No change.)

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

Filed with the Office of the Secretary of State on February 2, 2009.

TRD-200900378
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: March 15, 2009
For further information, please call: (512) 424-6900

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) proposes amendments to §25.214, relating to Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities (Tariff for Retail Delivery Service), and §25.474, relating to Selection of Retail Provider. The amendments will facilitate more rapid switches from one retail electric provider (REP) to another if a customer decides to switch retail providers. The amendments would eliminate the requirement for a registration agent, upon receipt of a move-in or switch request from a REP, to send a switch notification to the customer and would require transmission and distribution utilities to process meter reads for customers who are switching retail electric providers within six days of receiving the request for the meter read. The amendments will also require REPs to request switches consistent with the customer's request. The commission has recently adopted new §25.475, relating to General Retail Electric Provider (REP) Requirements and Information Dis-

closures to Residential and Small Commercial Customers, that requires REPs to notify customers of the termination of a term contract for electric service at least 14 days before the termination date. The changes proposed in the Tariff for Retail Delivery Service and §25.475 would require the registration agent, TDUs and REPs to implement a shorter switching timeline and allow customers to be served by their chosen provider more quickly. This rule is a competition rule subject to judicial review as specified in PURA §39.001(e). Project Number 36536 is assigned to this proceeding.

David B. Smithson, Retail Market Analyst, Competitive Markets Division, has determined that for each year of the first five-year period the amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Mr. Smithson has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be faster processing of customer requests for electric service when a customer is switching to a new REP. There have been instances in which customers' fixed-price contracts have expired at a time when prices are rising, and they have encountered delays in moving to other low-cost retail products, because of the lengthy standard switching timeline. With these amendments, customers that are able to identify a low-cost product will be able to switch quickly to the provider offering that product. The shorter switching timeline should result in lower electricity costs and greater predictability in costs for residential and small commercial customers. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing these amendments. The amendments to §25.475 will require REPs, some of which are small or micro-businesses, to change their internal procedures and contract documents. The changes associated with implementing the proposed amendments to §25.474 are not expected to increase the impact on small and micro-businesses. Therefore, no regulatory flexibility analysis is required. There may be economic cost to persons who are required to comply with these amendments, but these costs will vary by organization and are not possible to quantify. The benefits to customers resulting from adoption of these amendments are expected to outweigh the costs. In addition, the proposed amendments include a provision that may permit transmission and distribution utilities to recover the additional costs resulting from its adoption. The commission requests that interested persons provide comments on the costs and benefits of adopting the amendments.

Although the commission concludes that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing these amendments, Mr. Smithson has prepared an economic impact statement and regulatory flexibility analysis pursuant to Texas Government Code §2006.002. In another rulemaking proceeding, the commission concluded that there are approximately 130 REPs, and that approximately 30 REPs are small or micro businesses. About half of the small and micro businesses are not currently serving customers. The small and micro businesses that are serving customers represent about $25 million in combined annual revenues and about 0.53% of annual ERCOT load. One of the organizations that filed comments in the other rulemaking proceeding contended that there are more than 30 REPs that qualify as micro businesses.

The principal impact of these amendments on small REPs is that they may need to modify their electronic communications and internal procedures concerning customer switches. Many of the small REPs purchase back-office service, including electronic communications capability, from third party service providers. To the extent that a number of REPs use these third party providers, the costs of compliance with the rule will be lower, because each REP will not have to modify its electronic communications. Instead, the third party service providers will make the modifications and provide the revised services to many REPs.

The commission considered alternatives to the rule such as using the existing out-of-cycle switches as the means of expediting customer switches. The largest TDUs are in the process of implementing advanced metering systems that will permit quicker customer switching, remote meter reading, and other service improvements. These TDUs will be able to reduce the staffing levels for their meter reading technicians as they deploy advanced meters on a widespread basis. In an effort to minimize the additional labor and other costs that the TDUs will incur in connection with these amendments and to minimize the TDUs' challenge of managing the meter reading function, the commission has proposed an expedited switch timeline that is much shorter than the current standard switch timeline but is somewhat longer than the timeline for out-of-cycle switches. The principal objective of the proposed amendments is to improve customers' service by allowing them to switch more quickly to more favorable rates. The commission has determined that the public benefits from applying the rule to small and micro businesses will substantially outweigh any adverse economic impacts on small and micro businesses.

Mr. Smithson has also determined that for each year of the first five years the amendments are in effect some TDU's may need to hire additional personnel or use additional contract services, but there should be no effect on a local economy owing to the small number of employees or contractors that would be required, 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 Monday, March 23, 2009, at 9:30 a.m. The request for a public hearing must be received within 30 days after publication.

Comments on the 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, within 20 days after publication. Reply comments are due within 30 days after publication. Sixteen copies of comments on the 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 amended rule and tariff. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the amendments. The commission will consider the costs and benefits in deciding whether to adopt the amendments. All comments should refer to Project Number 36536.

In addition to comments on the proposed amendments, the commission requests interested persons to file comments in response to the following questions:

1. What additional customer protections need to be added to PUC rules to address the removal of the "ERCOT postcard"?

2. What changes to PUC rules or ERCOT protocols need to be made to address "slamming" and a speedy switch back to the original REP at no additional cost to the retail customer?

3. What is the most appropriate means for TDUs to seek to recover significant increases in meter-related costs associated with expedited meter reads?

The commission staff will conduct a workshop on this project at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Friday, March 6, 2009, at 9:00 a.m.

SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION
DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.214

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 16 TAC §25.214 is not included in the print version of the Texas Register. The figure is available in the on-line version of the February 13, 2009, issue of the Texas Register.)

The amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 & Supplement 2008) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction and, in particular, §17.004 and §39.101, which direct the commission to implement customer protections for electric customers; §14.001, which gives the commission the general power to regulate and supervise the business of each public utility within its jurisdiction; §32.101, which requires an electric utility to file its tariff with the commission; and §36.003, which requires the commission to ensure that electric utility rates are just and reasonable.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 17.004, 32.101, 36.003, and 39.101.

§25.214. Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities.

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

(d) Pro-forma Retail Delivery Tariff.

(1) Tariff for Retail Delivery Service.

Figure: 16 TAC §25.214(d)(1)

(2) (No change.)

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

Filed with the Office of the Secretary of State on February 2, 2009.

TRD-200900391
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: March 15, 2009
For further information, please call: (512) 936-7223

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SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE

16 TAC §25.474

The amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 & Supplement 2008) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction and, in particular, §17.004 and §39.101, which direct the commission to implement customer protections for electric customers; §14.001, which gives the commission the general power to regulate and supervise the business of each public utility within its jurisdiction; §32.101, which requires an electric utility to file its tariff with the commission; and §36.003, which requires the commission to ensure that electric utility rates are just and reasonable.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 17.004, 32.101, 36.003, and 39.101.

§25.474. Selection of Retail Electric Provider.

(a) - (j) (No change.)

(k) Submission of an applicant's switch or move-in request to the registration agent. A REP shall submit a move-in or switch request to the registration agent so that the move-in or switch will be processed on the approximate scheduled date agreed to by the applicant and as allowed by the tariff of the transmission and distribution utility, municipally owned utility, or electric cooperative. A REP shall submit an applicant's switch request to the registration agent as an expedited meter read or an out of cycle meter read if the applicant requests a specific date for a switch. The [~~A~~] REP may submit an applicant's switch request to the registration agent prior to the expiration of the rescission period prescribed by subsection (j) of this section, provided that if the customer makes a timely request to cancel service the REP shall take action to ensure that the switch is canceled or the customer is promptly returned to its chosen REP without inconvenience or additional cost to the customer. [~~Additionally, the REP shall submit the move-in or switch request to the registration agent so that the move-in or switch will be processed on the approximate scheduled date agreed to by the applicant and as allowed by the tariff of the transmission and distribution utility, municipally owned utility, or electric cooperative.~~] The applicant shall be informed of the approximate scheduled date that the applicant will begin receiving electric service from the REP, and of any delays in meeting that date, if known by the REP.

(l) Duty of the registration agent. [~~When the registration agent receives a move-in or switch request from a REP, the registration agent shall process that request in accordance with the protocols.~~]

(1) When the registration agent receives a move-in or switch request from a REP, the registration agent shall process that request in accordance with this section and its protocols, to the extent that the protocols are consistent with this section.

[~~(1) Switches. The registration agent shall send a switch notification notice that shall:~~]

[~~(A) be sent in English and Spanish consistent with §25.473(d) of this title (relating to Non-English Language Requirements);~~]

[~~(B) identify the REP that initiated the switch request;~~]

[(C) inform the applicant that the applicant's REP will be switched unless the applicant requests the registration agent to cancel the switch by the date stated in the notice;]

[(D) provide a cancellation date by which the applicant may request a switch to be cancelled, no less than seven calendar days after the applicant receives the notice; and]

[(E) provide instructions for the applicant to request that the switch be cancelled. These instructions shall include a telephone number, facsimile machine number, and e-mail address to reach the registration agent. The registration agent shall take appropriate actions to process an applicant's timely request for cancellation.]

(2) The registration agent shall direct the transmission and distribution utility to implement any switch, move-in, or transfer to the affiliated REP or the POLR in accordance with this section and its [the] protocols [established by the registration agent, unless the applicant makes a timely request to cancel the transaction].

(m) (No change.)

(n) Fees. A REP, other than a municipally owned utility or an electric cooperative, shall not charge a fee to an applicant to switch to, select, or enroll with the REP unless the applicant requests an out-of-cycle meter read for the purpose of a switch [a switch that does not conform with the normal meter reading and billing cycle]. The registration agent shall not charge a fee to the end-use customer for the switch or enrollment process performed by the registration agent. To the extent that the transmission and distribution utility assesses a REP a properly tariffed charge for connection of service, out of cycle switch requests, service order cancellations or changes associated with the switching of service or the establishment of new service, any such fee may be passed on to the applicant or customer by the REP.

(o) TDU cost increases. If a TDU can demonstrate that performing expedited meter reads for the purpose of a switch have resulted in a significant increase in its meter-related costs, it may seek to recover those costs through a surcharge. The surcharge shall not be used to retroactively recover costs and shall not be reconciled, and the TDU shall not create a regulatory asset for the costs. The commission may amend the surcharge. The TDU shall provide reports on the surcharge as required by commission staff. The surcharge shall be eliminated upon completion of a general base rate proceeding.

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

Filed with the Office of the Secretary of State on February 2, 2009.

TRD-200900392
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: March 15, 2009
For further information, please call: (512) 936-7223

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 74. ELEVATORS, ESCALATORS, AND RELATED EQUIPMENT

16 TAC §74.55

The Texas Department of Licensing and Regulation ("Department") proposes amendments to an existing rule at 16 Texas Administrative Code §74.55 regarding the Elevators, Escalators, and Related Equipment program.

The rule amendment is necessary to implement the Department's new procedure requiring elevator inspectors to report to the Department when they have completed an inspection of equipment.

New subsection (d) requires inspectors to notify the Department when they have completed an inspection of any equipment. The statute, Health and Safety Code, Chapter 754, requires building owners to file with the Department a copy of the inspection report after the inspector has completed the inspection. If the owner fails to file the report, the Department has no information in its records concerning it and does not have any way to know that the inspection has been performed. By requiring the inspector to inform the Department that an inspection has been completed, the Department will be aware that a report for the equipment is due and can follow up with the owner if the report is not filed.

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 to minimal costs to the agency to maintain the information reported to the Department by elevator inspectors.

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 that the Department will be assured that it has current reports on all equipment so that it can monitor equipment for needed repairs and replacement of parts for the safety of the public.

There will be minimal costs to some elevator inspectors to comply with the rule amendment as proposed. Reporting to the Department that an inspection has been completed may, depending on the method used to file the report, cause an inspector to incur mailing, telephone, or faxing costs for any report made using those media. The reports may also be made via e-mail or by using an Online Inspection Reporting System.

Economic Impact Statement

The anticipated economic effect on small or micro-businesses or to persons who are required to comply with the rule as amended will be the minimal cost for those who elect to mail, fax, or telephone the reports to the Department. There are approximately 128 Qualified Elevator Inspectors registered with the Department and we estimate that the majority of these inspectors are small and micro-businesses although we do not have date to know precisely. The Department cannot predict how many of them will choose to file reports using a media that imposes no cost upon them.

Regulatory Flexibility Analysis

The Department specifically has included in the rules alternative methods for inspectors to use in order to avoid adverse economic impact. The proposed rule amendment includes several methods by which inspectors may report, two of which will not cause inspectors to incur any additional costs. Reports can be electronically mailed to the Department or they can be directly entered into a database prepared by the Department to accept the reports. The Department prefers that the latter method be used since it will result in the data going directly into a system that can be used to track it, thus reducing data input effort for its

employees. For those who do not have access to computers, or who do not wish to use them for making the reports, they may be filed by mail, fax or by telephone. The Department is not aware of other alternatives that would accomplish the purpose of the proposed rule.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or by facsimile to (512) 475-3032, or electronically to erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

The rule amendment is proposed under Texas Occupations Code, Chapter 51, and Texas Health and Safety Code, Chapter 754 which authorize the Texas Commission of Licensing and Regulation, 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, Chapter 51 and Texas Health and Safety Code, Chapter 754. No other statutes, articles, or codes are affected by the proposal.

§74.55. Reporting Requirements--Inspector.

(a) For new installations or alterations the inspector shall provide a copy of the Elevator Equipment Inspection Form to the Department and the building owner not later than the 10th calendar day after completing the inspection.

(b) Inspectors, by e-mail, fax, letter or telephone, shall report to the Department, within 72 hours of discovery, all equipment they encounter that does not have a decal number.

(c) The inspector shall clearly note on the inspection report any equipment found with a reportable condition, and shall report it immediately by submitting a copy of the report to the building owner and by e-mail, fax, letter or telephone to the Department within 24 hours.

(d) Inspectors, by e-mail, fax, telephone, letter, or by using the Online Inspection Reporting System, for each piece of equipment inspected, shall report to the Department within 72 hours of completing an annual inspection, or an inspection of a new installation:

(1) the inspector's TDLR license number;

(2) the ELBI number of the equipment for annual inspections;

(3) the decal number of equipment; and

(4) the date of the inspection.

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

Filed with the Office of the Secretary of State on February 2, 2009.

TRD-200900397
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: March 15, 2009
For further information, please call: (512) 463-7348

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 17. RESOURCE PLANNING

SUBCHAPTER D. RULES APPLYING TO NEW CONSTRUCTION AND ADDITION PROJECTS

19 TAC §17.30

The Texas Higher Education Coordinating Board proposes amendments to §17.30, concerning rules applying to new construction and addition projects. Specifically, the proposed amendments will revise the project standard for construction costs, and add the utilization standard. The change in the construction cost standard would replace the criteria from a range of projects approved in the past five years to the standard of construction costs not to exceed the mean plus one standard deviation above the mean of construction costs for the projects approved in the past seven years. The new standard for utilization is replacing the guideline of classroom and class laboratories hours per week. The utilization standard will be the combination of three factors; room demand, hours per week of use, and percent of student stations filled.

Susan Brown, Assistant Commissioner, Planning and Accountability, has determined that for each year of the first five years the amendments are in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the amended section.

Ms. Brown has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of administering the amended section will be more efficient Board operations relating to institution facility project approvals. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary W. Johnstone, Deputy Assistant Commissioner, Planning and Accountability, 1200 East Anderson Lane, Austin, Texas 78752, gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §§51.927, 61.027, 61.0572, and 61.058.

The amendments affect Texas Education Code, §§51.927, 61.0572, and 61.058.

§17.30. Standards for New Construction and/or Addition Projects.
To obtain Board approval for a new construction and/or addition project, an institution shall demonstrate that the project complies with the following standards:

(1) (No change.)

(2) Project Standards. The institution shall demonstrate that a new construction or addition project complies with the following project standards:

(A) (No change.)

(B) Cost--The construction building cost per gross square foot shall not exceed one standard deviation above the mean

[~~be within the range~~] of similar projects approved by the Board within the last seven [~~five~~] years, adjusted for inflation as described in the board's Construction Cost report (§17.100 of this title (relating to Board Reports)). The estimated construction cost of the project will be adjusted by the future inflation factor based on the projected timeline of the construction midpoint. If the construction cost per gross square foot exceeds one standard deviation above the mean [~~the maximum cost~~] of similarly approved projects, [~~the cost per gross square foot shall not exceed the highest actual construction cost per gross square foot based on industry standards~~] as published periodically by the Coordinating Board [~~unless~~] the institution shall [~~can~~] demonstrate that the higher cost is due to market conditions or other circumstances that warrant the higher cost.

(C) (No change.)

(D) Usage Efficiency--The use of existing classroom and class laboratory facilities will be considered when the project includes Education & General (E&G) square footage.

(i) Classroom usage efficiency--

(I) A score of 75 points or higher is considered as meeting the standard.

(II) The classroom score will determine compliance for projects involving the following facility types: classroom, general; auditorium/theater; other facility types that appear, as determined by the THECB staff, to contain classrooms or similar space.

(III) The approval authority as specified in Texas Higher Education Coordinating Board (THECB) rules has the discretion to consider classroom score in considering approval for projects related to any facility type.

(ii) Class laboratory usage efficiency--

(I) A score of 75 points or higher is considered as meeting the standard.

(II) The class laboratory score will determine compliance for projects involving facility type laboratory, general and other facility types that appear, as determined by the THECB staff, to contain class laboratories or similar space.

(III) The approval authority as specified in THECB rules has the discretion to consider class laboratory score in considering approval for projects related to any facility type.

(iii) Overall usage efficiency--

(I) Overall score is a function of the classroom and class laboratory scores. A combined score of 150 or higher, as determined by summing the classroom and class laboratory scores, is considered as meeting the overall standard.

(II) The overall score will determine compliance for projects involving the following facility types: athletic; library/study facilities; office, general; office, high rise; office, technology; physical plant; student center; other; and projects that, at the discretion of the THECB staff, cannot clearly be classified in a single category of facility type.

(III) The approval authority as specified in THECB rules has the discretion to consider the overall score in considering approval for projects related to all facility types.

(iv) Non-compliance--If an institution is not in compliance with any standard outlined in clauses (i) - (iii) of this subparagraph, the Board may approve the project if the institution has submitted a written plan of action, on a form specified by the Board, for substantial progress toward meeting the standard. The plan must include:

(I) An explanation of the factors influencing the current utilization score and the expected growth and how the plan of action will improve institutional performance.

(II) A demonstration that, upon completion of the project, the institution will meet the utilization standards.

(III) The plan shall be signed by the president of the institution. The president of the institution may not delegate this authority within the requesting institution.

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

Filed with the Office of the Secretary of State on February 2, 2009.

TRD-200900393
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: April 30, 2009
For further information, please call: (512) 427-6114

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19 TAC §17.31

(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 Higher Education Coordinating Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Higher Education Coordinating Board proposes the repeal of §17.31, concerning rules applying to new construction and addition projects. Specifically, the proposed repeal will delete the additional guideline section. The change in the construction cost standard would replace the criteria from a range of projects approved in the past five years to the standard of construction costs not to exceed the mean plus one standard deviation above the mean of construction costs for the projects approved in the past seven years. The new standard for utilization is replacing the guideline of classroom and class laboratories hours per week. The utilization standard will be the combination of three factors; room demand, hours per week of use, and percent of student stations filled.

Susan Brown, Assistant Commissioner, Planning and Accountability, has determined that for each year of the first five years the repeal is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the repeal as proposed.

Ms. Brown has also determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of administering the repeal will be more efficient Board operations relating to institution facility project approvals. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the repeal as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary W. Johnstone, Deputy Assistant Commissioner, Planning and Accountability, 1200 East Anderson Lane, Austin, Texas 78752,

gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The repeal is proposed under the Texas Education Code, §§51.927, 61.027, 61.0572, and 61.058.

The repeal affects Texas Education Code, §§51.927, 61.0572, and 61.058.

§17.31. Additional Guidelines.

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

Filed with the Office of the Secretary of State on February 2, 2009.

TRD-200900394
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: April 30, 2009
For further information, please call: (512) 427-6114

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SUBCHAPTER K. REPORTS

19 TAC §17.100

The Texas Higher Education Coordinating Board proposes amendments to §17.100, concerning rules applying to board reports. Specifically, the proposed amendments will revise the definition of construction costs for the board report. The change in the construction cost report would replace the average cost with the mean and mean plus one standard deviation above the mean on the report for the projects approved in the past seven, instead of five years. The rule change would also add adjustments for the region of the state where the project is located and the future inflation factor. The rule change would modify the report to include only costs of new construction/additions and repair and renovation only. The separate calculation of parking construction and housing costs would be eliminated and would continue to be included in the report as a facility type.

Susan Brown, Assistant Commissioner, Planning and Accountability, has determined that for each year of the first five years the amendments are in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the amended section.

Ms. Brown has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of administering the amended section will be more efficient Board operations relating to institution facility project approvals. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary W. Johnstone, Deputy Assistant Commissioner, Planning and Accountability, 1200 East Anderson Lane, Austin, Texas 78752, gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Education Code, §§51.927, 61.027, 61.0572, and 61.058.

The amendments affect Texas Education Code, §§51.927, 61.0572, and 61.058.

§17.100. Board Reports.

The Board shall annually prepare the following reports:

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

(4) Construction Costs.

(A) Periodic Review. The Board shall annually (not later than October 1 of each year) calculate and report mean and one standard deviation above the mean [~~average~~] construction building costs per square foot. The costs shall be based on similar projects approved by the Board, within the immediate prior seven [~~five~~] years, annually adjusted for inflation for the region of the state where the project is located. As a minimum, the calculations shall be developed for both new construction/addition and repair and renovation for all facility types available [~~the following project types~~] and shall be published on the agency website.

~~[(i) New construction/addition;]~~

~~[(ii) Repair and renovation;]~~

~~[(iii) Parking construction costs; and]~~

~~[(iv) Housing costs per bed for residential projects.]~~

(B) (No change.)

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

Filed with the Office of the Secretary of State on February 2, 2009.

TRD-200900395
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: April 30, 2009
For further information, please call: (512) 427-6114

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PART 2. TEXAS EDUCATION AGENCY

CHAPTER 30. ADMINISTRATION
SUBCHAPTER A. STATE BOARD OF EDUCATION: GENERAL PROVISIONS

19 TAC §30.1

The State Board of Education (SBOE) proposes an amendment to §30.1, concerning petitioning for adoption of rule changes. The section establishes the SBOE process for petitioning the adoption of changes to SBOE rules, as required by Texas Government Code, §2001.021. The proposed amendment would adopt in rule the form to be used when an individual elects to petition adoption of SBOE rule changes in the Texas Administrative Code.

Texas Government Code, §2001.021, requires that procedures to petition for the adoption of rule changes be adopted by rule. To comply with statute, the SBOE adopted 19 TAC Chapter 30, Ad-

ministration, Subchapter A, State Board of Education: General Provisions, §30.1, Petition for Adoption of Rule Changes, effective December 5, 2004. Prior to the adoption of 19 TAC §30.1, procedures to petition for the adoption of changes to SBOE rules were included as part of the SBOE's operating rules.

In conjunction with the adoption of the review of SBOE rules in 19 TAC Chapter 30, Subchapter A, during its January 2009 meeting, the SBOE approved for first reading and filing authorization the proposed amendment to 19 TAC §30.1. At the advice of Texas Education Agency (TEA) legal counsel, the proposed amendment would adopt in rule as a figure the form used to petition for the adoption of rule changes to ensure compliance with statute and increase public awareness. The form has been posted on the TEA rules website since initial adoption of 19 TAC §30.1 in December 2004. Technical updates would also be incorporated throughout the rule, including adding new subsection (d) to clarify that the SBOE may propose language that differs from the language proposed by the petitioner.

Criss Cloudt, associate commissioner for assessment, accountability, and data quality, has determined that for the first five-year period the amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendment.

Dr. Cloudt has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment would be to help increase public awareness of the SBOE's procedures for petitioning rule changes by adopting in rule the petition form. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

In addition, there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register.*

The amendment is proposed under the Texas Government Code, §2001.021, which authorizes a state agency to by rule prescribe the form for a petition and the procedure for the submission, consideration, and disposition.

The amendment implements the Texas Government Code, §2001.021.

§30.1. Petition for Adoption of Rule Changes.

(a) Any interested person may petition for the adoption , [~~or~~] amendment , or repeal of a rule of the State Board of Education (SBOE) by filing a petition on a form provided in this subsection [~~approved by the commissioner of education~~] . The petition shall be signed and submitted to the commissioner of education [~~or a designee~~] . In consultation with the persons in the Texas Education Agency who are responsible for the area with which the rule is concerned, the commissioner [~~of education~~] shall evaluate the merits of the proposal to determine whether to recommend that rulemaking proceedings be initiated or that the petition be denied.

Figure: 19 TAC §30.1(a)

(b) In accordance with the Texas Government Code, §2001.021, the agency must respond to the petitioner [~~a petition for the adoption or amendment of a rule~~] within 60 days of receipt of the petition.

(1) Where possible, the commissioner's recommendation concerning the petition shall be placed on the SBOE [~~board~~] agenda, and the SBOE [~~board~~] shall act on the petition within the 60-day time limit.

(2) Where the time required to review the petition or the scheduling of SBOE [~~board~~] meetings will not permit the SBOE [~~board~~] to act on the petition within the required 60 days, the commissioner [~~of education~~] or a designee shall respond to the petitioner within the required 60 days, notifying the petitioner of the date of the SBOE [~~board~~] meeting at which the recommendation will be presented to the SBOE [~~board~~] for action.

(c) The SBOE [~~State Board of Education~~] will review the petition and the recommendation of the commissioner and will either direct the commissioner to begin the rulemaking process or deny the petition, giving reasons for the denial. The commissioner or designee will notify the petitioner of the SBOE's [~~board's~~] action related to the petition.

(d) If the SBOE initiates rulemaking procedures in response to a petition, the rule text which the SBOE proposes may differ from the rule text proposed by the petitioner.

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

Filed with the Office of the Secretary of State on February 2, 2009.

TRD-200900386
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: March 15, 2009
For further information, please call: (512) 475-1497

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CHAPTER 112. TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR SCIENCE

The State Board of Education (SBOE) proposes amendments to §§112.1, 112.21, and 112.41 and new §§112.10 - 112.16, 112.17 - 112.20, and 112.31 - 112.39, concerning the Texas essential knowledge and skills (TEKS) for science. The sections establish the TEKS for science courses in elementary, middle school, and high school. The proposed amendments and new sections would establish revised science TEKS for implementation beginning with the 2010-2011 school year.

In January, February, April, May, September, October, and December 2008, educator committees were convened to review the science TEKS, including the development of TEKS for a new earth and space science course. During the September 2008 meeting, the SBOE received draft recommendations for proposed revisions to the science TEKS. Informal public feedback and feedback from expert reviewers was shared with the science TEKS review committees as they continued to work

on their recommendations for proposed revisions in November and December 2008. A discussion item regarding the proposed amendments to 19 TAC Chapter 112 was presented to the SBOE Committee of the Full Board during the November 2008 meeting.

During its January 2009 meeting, the SBOE took action to approve for first reading and filing authorization proposed revisions to 19 TAC Chapter 112, Texas Essential Knowledge and Skills for Science, Subchapter A, Elementary, Subchapter B, Middle School, and Subchapter C, High School.

Anita Givens, acting associate commissioner for standards and programs, has determined that for the first five-year period the amendments and new sections are in effect there will be fiscal implications for state and local government as a result of enforcing or administering the amendments and new sections.

There will be normal business costs associated with this process for the Texas Education Agency (TEA), including staff travel, meeting accommodations, and production and dissemination of documents. In addition, a need for the development and implementation of professional development to help teachers and administrators understand the amended science TEKS is anticipated. It is not possible to determine the exact fiscal implication until input is received from districts regarding potential needs. It is also possible that additional instructional materials or supplements to instructional materials might be needed.

There are anticipated fiscal implications for school districts to implement the revised TEKS, which may include the need for professional development and revisions to district-developed databases, curriculum, and scope and sequence documents. Since curriculum and instruction decisions are made at the local district level, it is difficult to estimate the fiscal impact on any given district.

Ms. Givens has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the rule actions would include better alignment of the TEKS and coordination of the standards with the adoption of instructional materials. There is no anticipated economic cost to persons who are required to comply with the proposed amendments and new sections.

There is no direct adverse economic impact for small businesses or microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. In conjunction with the regularly scheduled March 2009 State Board of Education meeting, a public hearing on the proposal will be held on Wednesday, March 25, 2009, in Room 1-104, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas.

SUBCHAPTER A. ELEMENTARY

19 TAC §§112.1, 112.10 - 112.16

The amendment and new sections are proposed under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; and §28.002, which authorizes the SBOE to by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments.

The amendment and new sections implement the Texas Education Code, §7.102(c)(4) and §28.002.

§112.1. Implementation of Texas Essential Knowledge and Skills for Science, Elementary.

The provisions of §§112.2 - 112.7 of this subchapter shall be superseded by §§112.11 - 112.16 of this subchapter beginning with the 2010-2011 school year [~~implemented by school districts beginning September 1, 1998, and at that time shall supersede §75.28(a)-(f) of this title (relating to Science)~~].

§112.10. Implementation of Texas Essential Knowledge and Skills for Science, Elementary, Beginning with School Year 2010-2011.

The provisions of §§112.11 - 112.16 of this subchapter shall be implemented by school districts beginning with the 2010-2011 school year and at that time shall supersede §§112.2 - 112.7 of this subchapter.

§112.11. Science, Kindergarten, Beginning with School Year 2010-2011.

(a) Introduction.

(1) Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process."

(2) Recurring themes are pervasive in sciences, mathematics, and technology. These ideas transcend disciplinary boundaries and include patterns, cycles, systems, models, and change and constancy.

(3) The study of elementary science includes planning and safely implementing classroom and outdoor investigations using scientific processes, including inquiry methods, analyzing information, making informed decisions, and using tools to collect and record information, while addressing the major concepts and vocabulary, in the context of physical, earth, and life sciences. Districts are encouraged to facilitate classroom and outdoor investigations for at least 80% of instructional time.

(4) In Kindergarten, students observe and describe the natural world using their five senses. Students do science as inquiry in order to develop and enrich their abilities to understand scientific concepts and processes. Students develop vocabulary through their experiences investigating properties of common objects, earth materials, and organisms.

(A) A central theme throughout the study of scientific investigation and reasoning; matter and energy; force, motion, and energy; Earth and space; and organisms and environment is active engagement in asking questions, communicating ideas, and exploring with scientific tools. Scientific investigation and reasoning involves practicing safe procedures, asking questions about the natural world, and seeking answers to those questions through simple observations and descriptive investigations.

(B) Matter is described in terms of its physical properties, including relative size and mass, shape, color, and texture. The importance of light, heat, and sound energy is identified as it relates to the students' everyday life. The location and motion of objects are explored.

(C) Weather is recorded and discussed on a daily basis so students may begin to recognize patterns in the weather. Other patterns are observed in the appearance of objects in the sky.

(D) In life science, students recognize the interdependence of organisms in the natural world. They understand that all organisms have basic needs that can be satisfied through interactions with living and nonliving things. Students will investigate the life cycle of plants and identify likenesses between parents and offspring.

(b) Knowledge and skills.

(1) Scientific investigation and reasoning. The student conducts classroom and outdoor investigations following home and school safety procedures and uses environmentally appropriate and responsible practices. The student is expected to:

(A) identify and demonstrate safe practices as described in the Texas Safety Standards during classroom and outdoor investigations, including wearing safety goggles, washing hands, and using materials appropriately;

(B) discuss the importance of safe practices to keep self and others safe and healthy; and

(C) demonstrate how to use, conserve, and dispose of natural resources and materials such as conserving water and reusing or recycling paper, plastic, and metal.

(2) Scientific investigation and reasoning. The student develops abilities to ask questions and seek answers in classroom and outdoor investigations. The student is expected to:

(A) ask questions about organisms, objects, and events observed in the natural world;

(B) plan and conduct simple descriptive investigations such as ways objects move;

(C) collect data and make observations using simple equipment such as hand lenses, primary balances, and non-standard measurement tools;

(D) record and organize data and observations using pictures, numbers, and words; and

(E) communicate observations with others about simple descriptive investigations.

(3) Scientific investigation and reasoning. The student knows that information and critical thinking are used in scientific problem solving. The student is expected to:

(A) identify and explain a problem such as the impact of littering on the playground and propose a solution in his/her own words;

(B) make predictions based on observable patterns in nature such as the shapes of leaves; and

(C) explore that scientists investigate different things in the natural world and use tools to help in their investigations.

(4) Scientific investigation and reasoning. The student uses age-appropriate tools and models to investigate the natural world. The student is expected to:

(A) collect information using tools, including cameras; computers; hand lenses; non-standard measuring items such as paper clips and clothespins; weather instruments such as demonstration thermometers and wind socks; primary balances; cups; bowls; timing devices, including clocks and timers; magnets; collecting nets; notebooks; and materials to support observations of habitats of organisms such as terrariums and aquariums; and

(B) use senses as a tool of observation to identify properties and patterns of organisms, objects, and events in the environment.

(5) Matter and energy. The student knows that objects have properties and patterns. The student is expected to:

(A) observe and record properties of objects, including relative size and mass, such as bigger or smaller and heavier or lighter, shape, color, and texture; and

(B) observe, record, and discuss how materials can be changed by heating or cooling.

(6) Force, motion, and energy. The student knows that energy, force, and motion are related and are a part of their everyday life. The student is expected to:

(A) use the five senses to explore different forms of energy such as light, heat, and sound;

(B) explore interactions between magnets and various materials;

(C) observe and describe the location of an object in relation to another such as above, below, behind, in front of, and beside; and

(D) observe and describe the ways that objects can move such as in a straight line, zigzag, up and down, back and forth, round and round, and fast and slow.

(7) Earth and space. The student knows that the natural world includes earth materials. The student is expected to:

(A) observe, describe, compare, and sort rocks by size, shape, color, and texture;

(B) observe and describe physical properties of natural sources of water, including color and clarity; and

(C) give examples of ways rocks, soil, and water are useful.

(8) Earth and space. The student knows that there are recognizable patterns in the natural world and among objects in the sky. The student is expected to:

(A) observe and describe weather changes from day to day and over seasons;

(B) identify events that have repeating patterns, including seasons of the year and day and night; and

(C) observe, describe, and illustrate objects in the sky such as the clouds, Moon, and stars, including the Sun.

(9) Organisms and environments. The student knows that plants and animals have basic needs and depend on the living and nonliving things around them for survival. The student is expected to:

(A) differentiate between living and nonliving things based upon whether they have basic needs and produce offspring; and

(B) examine evidence that living organisms have basic needs such as food, water, and shelter for animals and air, water, nutrients, sunlight, and space for plants.

(10) Organisms and environments. The student knows that organisms resemble their parents and have structures and processes that help them survive within their environments. The student is expected to:

(A) sort plants and animals into groups based on physical characteristics such as color, size, body covering, or leaf shape;

(B) identify parts of plants such as roots, stem, and leaves and parts of animals such as head, eyes, and limbs;

(C) identify ways that young plants resemble the parent plant; and

(D) observe changes that are part of a simple life cycle of a plant: seed, seedling, plant, flower, and fruit.

§112.12. Science, Grade 1, Beginning with School Year 2010-2011.

(a) Introduction.

(1) Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process."

(2) Recurring themes are pervasive in sciences, mathematics, and technology. These ideas transcend disciplinary boundaries and include patterns, cycles, systems, models, and change and constancy.

(3) The study of elementary science includes planning and safely implementing classroom and outdoor investigations using scientific processes, including inquiry methods, analyzing information, making informed decisions, and using tools to collect and record information, while addressing the major concepts and vocabulary, in the context of physical, earth, and life sciences. Districts are encouraged to facilitate classroom and outdoor investigations for at least 80% of instructional time.

(4) In Grade 1, students observe and describe the natural world using their five senses. Students do science as inquiry in order to develop and enrich their abilities to understand the world around them in the context of scientific concepts and processes. Students develop vocabulary through their experiences investigating properties of common objects, earth materials, and organisms.

(A) A central theme in first grade science is active engagement in asking questions, communicating ideas, and exploring with scientific tools in order to explain scientific concepts and processes like scientific investigation and reasoning; matter and energy; force, motion, and energy; Earth and space; and organisms and environment. Scientific investigation and reasoning involves practicing safe procedures, asking questions about the natural world, and seeking answers to those questions through simple observations and descriptive investigations.

(B) Matter is described in terms of its physical properties, including relative size and mass, shape, color, and texture. The importance of light, heat, and sound energy is identified as it relates to the students' everyday life. The location and motion of objects are explored.

(C) Weather is recorded and discussed on a daily basis so students may begin to recognize patterns in the weather. In addition, patterns are observed in the appearance of objects in the sky.

(D) In life science, students recognize the interdependence of organisms in the natural world. They understand that all organisms have basic needs that can be satisfied through interactions with living and nonliving things. Students will investigate life cycles of animals and identify likenesses between parents and offspring.

(b) Knowledge and skills.

(1) Scientific investigation and reasoning. The student conducts classroom and outdoor investigations following home and school safety procedures and uses environmentally appropriate and responsible practices. The student is expected to:

(A) recognize and demonstrate safe practices as described in the Texas Safety Standards during classroom and outdoor investigations, including wearing safety goggles, washing hands, and using materials appropriately;

(B) recognize the importance of safe practices to keep self and others safe and healthy; and

(C) identify and learn how to use natural resources and materials, including conservation and reuse or recycling of paper, plastic, and metals.

(2) Scientific investigation and reasoning. The student develops abilities to ask questions and seek answers in classroom and outdoor investigations. The student is expected to:

(A) ask questions about organisms, objects, and events observed in the natural world;

(B) plan and conduct simple descriptive investigations such as ways objects move;

(C) collect data and make observations using simple equipment such as hand lenses, primary balances, and non-standard measurement tools;

(D) record and organize data using pictures, numbers, and words; and

(E) communicate observations and provide reasons for explanations using student-generated data from simple descriptive investigations.

(3) Scientific investigation and reasoning. The student knows that information and critical thinking are used in scientific problem solving. The student is expected to:

(A) identify and explain a problem such as finding a home for a classroom pet and propose a solution in his/her own words;

(B) make predictions based on observable patterns; and

(C) describe what scientists do.

(4) Scientific investigation and reasoning. The student uses age-appropriate tools and models to investigate the natural world. The student is expected to:

(A) collect, record, and compare information using tools, including cameras; computers; hand lenses; non-standard measuring items such as paper clips and clothespins; weather tools such as classroom demonstration thermometers and weather vanes; primary balances; cups; bowls; timing devices, including clocks and timers; magnets; collecting nets; notebooks; materials to support observations of habitats of organisms such as aquariums and terrariums; and safety goggles; and

(B) measure and compare organisms and objects using non-standard units.

(5) Matter and energy. The student knows that objects have properties and patterns. The student is expected to:

(A) classify objects by observable properties of the materials from which they are made such as larger and smaller, heavier and lighter, shape, color, and texture; and

(B) predict and identify changes in materials caused by heating and cooling such as ice melting, water freezing, and water evaporating.

(6) Force, motion, and energy. The student knows that force, motion, and energy are related and are a part of everyday life. The student is expected to:

(A) identify and discuss how different forms of energy such as light, heat, and sound are important to everyday life;

(B) predict and describe how a magnet can be used to push or pull an object;

(C) describe the change in the location of an object such as closer to, nearer to, and farther from; and

(D) demonstrate and record the ways that objects can move such as in a straight line, zig zag, up and down, back and forth, round and round, and fast and slow.

(7) Earth and space. The student knows that the natural world includes rocks, soil, and water that can be observed in cycles, patterns, and systems. The student is expected to:

(A) observe, compare, describe, and sort components of soil by size, texture, and color;

(B) identify and describe a variety of natural sources of water, including streams, lakes, and oceans; and

(C) gather evidence of how rocks, soil, and water help to make useful products.

(8) Earth and space. The student knows that the natural world includes the air around us and objects in the sky. The student is expected to:

(A) record weather information, including relative temperature, such as hot or cold, clear or cloudy, calm or windy, and rainy or icy;

(B) observe and record changes in the appearance of objects in the sky such as clouds, the Moon, and stars, including the Sun;

(C) identify characteristics of the seasons of the year; and

(D) demonstrate that air is all around us and observe that wind is moving air.

(9) Organisms and environments. The student knows that the living environment is composed of relationships between organisms and the life cycles that occur. The student is expected to:

(A) sort and classify living and nonliving things based upon whether or not they have basic needs and produce offspring;

(B) analyze and record examples of interdependence found in various situations such as terrariums and aquariums or pet and caregiver; and

(C) gather evidence of interdependence among living organisms such as energy transfer through food chains and animals using plants for shelter.

(10) Organisms and environments. The student knows that organisms resemble their parents and have structures and processes that help them survive within their environments. The student is expected to:

(A) investigate how the external characteristics of an animal are related to where it lives, how it moves, and what it eats;

(B) identify and compare the parts of plants;

(C) compare ways that young animals resemble their parents; and

(D) observe and record life cycles of animals such as a chicken, frog, or fish.

§112.13. Science, Grade 2, Beginning with School Year 2010-2011.

(a) Introduction.

(1) Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process."

(2) Recurring themes are pervasive in sciences, mathematics, and technology. These ideas transcend disciplinary boundaries and include patterns, cycles, systems, models, and change and constancy.

(3) The study of elementary science includes planning and safely implementing classroom and outdoor investigations using scientific processes, including inquiry methods, analyzing information, making informed decisions, and using tools to collect and record information, while addressing the major concepts and vocabulary, in the context of physical, earth, and life sciences. Districts are encouraged to facilitate classroom and outdoor investigations for at least 60% of instructional time.

(4) In Grade 2, careful observation and investigation are used to learn about the natural world and reveal patterns, changes, and cycles. Students should understand that certain types of questions can be answered by using observation and investigations and that the information gathered in these may change as new observations are made. As students participate in investigation, they develop the skills necessary to do science as well as develop new science concepts.

(A) Within the physical environment, students expand their understanding of the properties of objects such as shape, mass, temperature, and flexibility then use those properties to compare, classify, and then combine the objects to do something that they could not do before. Students manipulate objects to demonstrate a change in motion and position.

(B) Within the natural environment, students will observe the properties of earth materials as well as predictable patterns that occur on Earth and in the sky. The students understand that those patterns are used to make choices in clothing, activities, and transportation.

(C) Within the living environment, students explore patterns, systems, and cycles by investigating characteristics of organisms, life cycles, and interactions among all the components within their habitat. Students examine how living organisms depend on each other and on their environment.

(b) Knowledge and skills.

(1) Scientific investigation and reasoning. The student conducts classroom and outdoor investigations following home and school safety procedures. The student is expected to:

(A) identify and demonstrate safe practices as described in the Texas Safety Standards during classroom and outdoor investigations, including wearing safety goggles, washing hands, and using materials appropriately;

(B) describe the importance of safe practices; and

(C) identify and demonstrate how to use, conserve, and dispose of natural resources and materials such as conserving water and reuse or recycling of paper, plastic, and metal.

(2) Scientific investigation and reasoning. The student develops abilities necessary to do scientific inquiry in classroom and outdoor investigations. The student is expected to:

(A) ask questions about organisms, objects, and events during observations and investigations;

(B) plan and conduct descriptive investigations such as how organisms grow;

(C) collect data from observations using simple equipment such as hand lenses, primary balances, thermometers, and non-standard measurement tools;

(D) record and organize data using pictures, numbers, and words;

(E) communicate observations and justify explanations using student-generated data from simple descriptive investigations; and

(F) compare results of investigations with what students and scientists know about the world.

(3) Scientific investigation and reasoning. The student knows that information and critical thinking, scientific problem solving, and the contributions of scientists are used in making decisions. The student is expected to:

(A) identify and explain a problem in his/her own words and propose a task and solution for the problem such as lack of water in a habitat;

(B) make predictions based on observable patterns; and

(C) identify what a scientist is and explore what different scientists do.

(4) Scientific investigation and reasoning. The student uses age-appropriate tools and models to investigate the natural world. The student is expected to:

(A) collect, record, and compare information using tools, including cameras; computers; hand lenses; rulers; weather instruments such as thermometers and rain gauges; primary balances; plastic beakers; timing devices, including clocks and stopwatches; magnets; collecting nets; notebooks; materials to support observations of habitats of organisms such as terrariums and aquariums; and safety goggles; and

(B) measure and compare organisms and objects using non-standard units that approximate metric units.

(5) Matter and energy. The student knows that matter has physical properties and those properties determine how it is described, classified, changed, and used. The student is expected to:

(A) classify matter by physical properties, including shape, relative mass, relative temperature, texture, flexibility, and whether material is a solid or liquid;

(B) compare changes in materials caused by heating and cooling;

(C) demonstrate that things can be done to materials to change their physical properties such as cutting, folding, sanding, and melting; and

(D) combine materials that when put together can do things that they cannot do by themselves such as building a tower or a bridge and justify the selection of those materials based on their physical properties.

(6) Force, motion, and energy. The student knows that forces cause change and energy exists in many forms. The student is expected to:

(A) investigate the effects on an object by increasing or decreasing amounts of light, heat, and sound energy such as how the color of an object appears different in dimmer light or how heat melts butter;

(B) observe and identify how magnets are used in everyday life;

(C) trace the changes in the position of an object over time such as a cup rolling on the floor and a car rolling down a ramp; and

(D) compare patterns of movement of objects such as sliding, rolling, and spinning.

(7) Earth and space. The student knows that the natural world includes earth materials. The student is expected to:

(A) observe and describe the various sizes of rock such as boulders and gravel;

(B) identify and compare the properties of natural sources of freshwater and saltwater; and

(C) distinguish between natural and manmade resources.

(8) Earth and space. The student knows that there are recognizable patterns in the natural world and among objects in the sky. The student is expected to:

(A) measure, record, and graph weather information, including temperature, wind conditions, precipitation, and cloud coverage, in order to identify patterns in the data;

(B) identify the importance of weather and seasonal information to make choices in clothing, activities, and transportation;

(C) explore the processes in the water cycle, including evaporation, condensation, and precipitation, as connected to weather conditions; and

(D) observe, describe, and record patterns caused by objects in the sky, including shadows and the appearance of the Moon.

(9) Organisms and environments. The student knows that living organisms have basic needs that must be met for them to survive within their environment. The student is expected to:

(A) identify the basic needs of plants and animals;

(B) identify factors in the environment, including temperature and precipitation, that affect growth and behavior such as migration, hibernation, and dormancy of living things; and

(C) compare and give examples of the ways living organisms depend on each other and on their environments such as food chains within a garden, park, beach, lake, and wooded area.

(10) Organisms and environments. The student knows that organisms resemble their parents and have structures and processes that help them survive within their environments. The student is expected to:

(A) observe, record, and compare how the physical characteristics and behaviors of animals help them meet their basic needs such as fins help fish move and balance in the water;

(B) observe, record, and compare how the physical characteristics of plants help them meet their basic needs such as stems carry water throughout the plant; and

(C) investigate and record some of the unique stages that insects undergo during their life cycle.

§112.14. Science, Grade 3, Beginning with School Year 2010-2011.

(a) Introduction.

(1) Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and

predictions of natural phenomena, as well as the knowledge generated through this process."

(2) Recurring themes are pervasive in sciences, mathematics, and technology. These ideas transcend disciplinary boundaries and include patterns, cycles, systems, models, and change and constancy.

(3) The study of elementary science includes planning and safely implementing classroom and outdoor investigations using scientific methods, analyzing information, making informed decisions, and using tools to collect and record information while addressing the content and vocabulary in physical, earth, and life sciences. Districts are encouraged to facilitate classroom and outdoor investigations for at least 60% of instructional time.

(4) In Grade 3, students learn that the study of science uses appropriate tools and safe practices in planning and implementing investigations, asking and answering questions, collecting data by observing and measuring, and by using models to support scientific inquiry about the natural world.

(A) Students recognize that patterns, relationships, and cycles exist in matter. Students will investigate the physical properties of matter and will learn that changes occur. They explore mixtures and investigate light, sound, and heat/thermal energy in everyday life. Students manipulate objects by pushing and pulling to demonstrate changes in motion and position.

(B) Students investigate how the surface of Earth changes and provides resources that humans use. As students explore objects in the sky, they describe how relationships affect patterns and cycles on Earth. Students will construct models to demonstrate Sun, Earth, and Moon system relationships and will describe the Sun's role in the water cycle.

(C) Students explore patterns, systems, and cycles within environments by investigating characteristics of organisms, life cycles, and interactions among all components of the natural environment. Students examine how the environment plays a key role in survival. Students know that when changes in the environment occur organisms may thrive, become ill, or perish.

(b) Knowledge and skills.

(1) Scientific investigation and reasoning. The student conducts classroom and outdoor investigations following school and home safety procedures and environmentally appropriate practices. The student is expected to:

(A) demonstrate safe practices as described in the Texas Safety Standards during classroom and outdoor investigations, including observing a schoolyard habitat; and

(B) make informed choices in the use and conservation of natural resources by recycling or reusing materials such as paper, aluminum cans, and plastics.

(2) Scientific investigation and reasoning. The student uses scientific inquiry methods during laboratory and outdoor investigations. The student is expected to:

(A) plan and implement descriptive investigations, including asking and answering questions, making inferences, and selecting and using equipment or technology needed, to solve a specific problem in the natural world;

(B) collect data by observing and measuring using the metric system and recognize differences between observed and measured data;

(C) construct maps, graphic organizers, simple tables, charts, and bar graphs using tools and current technology to organize, examine, and evaluate measured data;

(D) analyze and interpret patterns in data to construct reasonable explanations based on evidence from investigations;

(E) demonstrate that repeated investigations may increase the reliability of results; and

(F) communicate valid conclusions supported by data in writing, by drawing pictures, and through verbal discussion.

(3) Scientific investigation and reasoning. The student knows that information, critical thinking, scientific problem solving, and the contributions of scientists are used in making decisions. The student is expected to:

(A) justify an explanation, argument, or conclusion using student-generated data;

(B) draw inferences and evaluate accuracy of product claims found in advertisements and labels such as for toys and food;

(C) represent the natural world using models such as volcanoes or Sun, Earth, and Moon system and identify their limitations, including size, properties, and materials; and

(D) connect grade-level appropriate science concepts with the history of science, science careers, and contributions of scientists.

(4) Scientific investigation and reasoning. The student knows how to use a variety of tools and methods to conduct science inquiry. The student is expected to:

(A) collect, record, and analyze information using tools, including microscopes; cameras; computers; hand lenses; metric rulers; Celsius thermometers; pan balances; graduated cylinders; beakers; hot plates; meter sticks; compasses; timing devices, including clocks and stopwatches; magnets; collecting nets; notebooks; sound recorders; Sun, Earth, and Moon system models; and materials to support observation of habitats of organisms such as terrariums and aquariums; and

(B) use safety equipment as appropriate, including safety goggles and gloves.

(5) Matter and energy. The student knows that matter has measurable physical properties and those properties determine how matter is classified, changed, and used. The student is expected to:

(A) measure, test, and record physical properties of matter, including temperature, mass, magnetism, and the ability to sink or float;

(B) describe and classify samples of matter as solids, liquids, and gases and demonstrate that solids have a definite shape and that liquids and gases take the shape of their container;

(C) predict, observe, and record changes in the state of matter caused by heating or cooling; and

(D) explore and recognize that a mixture is created when two materials are combined such as gravel and sand and metal and plastic paper clips.

(6) Force, motion, and energy. The student knows that forces cause change and that energy exists in many forms. The student is expected to:

(A) explore different forms of energy, including light, sound, and heat/thermal in everyday life;

(B) demonstrate and observe that position and motion can be changed by pushing and pulling objects such as swings, cars, and balls; and

(C) observe forces such as magnetism and gravity acting on objects.

(7) Earth and space. The student knows that Earth consists of natural resources and its surface is constantly changing. The student is expected to:

(A) explore and record how soils are formed by weathering of rock and the decomposition of plant and animal remains;

(B) investigate rapid changes in Earth's surface such as volcanic eruptions, earthquakes, and landslides;

(C) identify and compare different landforms, including mountains, hills, valleys, and plains; and

(D) explore the characteristics of natural resources that make them useful in products and materials such as clothing and furniture and how resources may be conserved.

(8) Earth and space. The student knows there are recognizable patterns in the natural world and in the Sun, Earth, and Moon system. The student is expected to:

(A) observe, measure, record, and compare day-to-day weather changes in different locations at the same time that include air temperature, wind direction, and precipitation;

(B) describe and illustrate the Sun as a star composed of gases that provides light and heat energy for the water cycle; and

(C) construct models that demonstrate the relationship of the Sun, Earth, and Moon, including orbits and positions.

(9) Organisms and environments. The student knows that organisms have characteristics that help them survive and can describe patterns, cycles, systems, and relationships within the environments. The student is expected to:

(A) observe and describe the physical characteristics of environments and how they support populations and communities within an ecosystem;

(B) identify and describe the flow of energy in a food chain and predict how changes in a food chain affect the ecosystem such as removal of frogs from a pond or bees from a field; and

(C) describe environmental changes such as floods and droughts where some organisms thrive and others perish or move to new locations.

(10) Organisms and environments. The student knows that organisms undergo similar life processes and have structures that help them survive within their environments. The student is expected to:

(A) explore how structures and functions of plants and animals allow them to survive in a particular environment;

(B) explore that some characteristics of organisms are inherited such as the number of limbs on an animal or flower color and recognize that some behaviors are learned from the environment such as animals using tools to get food; and

(C) investigate and compare how animals and plants undergo a series of orderly changes in their diverse life cycles such as tomato plants, mealworms, and lady bugs.

§112.15. Science, Grade 4, Beginning with School Year 2010-2011.

(a) Introduction.

(1) Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process."

(2) Recurring themes are pervasive in sciences, mathematics, and technology. These ideas transcend disciplinary boundaries and include patterns, cycles, systems, models, and change and constancy.

(3) The study of elementary science includes planning and safely implementing classroom and outdoor investigations using scientific processes, including inquiry methods, analyzing information, making informed decisions, and using tools to collect and record information, while addressing the major concepts and vocabulary, in the context of physical, earth, and life sciences. Districts are encouraged to facilitate classroom and outdoor investigations for at least 50% of instructional time.

(4) In Grade 4, investigations are used to learn about the natural world. Students should understand that certain types of questions can be answered by investigations and that methods, models, and conclusions built from these investigations change as new observations are made. Models of objects and events are tools for understanding the natural world and can show how systems work. They have limitations and based on new discoveries are constantly being modified to more closely reflect the natural world.

(A) Within the natural environment, students know that earth materials have properties that are constantly changing due to Earth's forces. The students learn that the natural world consists of resources, including renewable and nonrenewable, and their responsibility to conserve our natural resources for future generations. They will also explore Sun, Earth, and Moon relationships. The students will recognize that our major source of energy is the Sun.

(B) Within the living environment, students know and understand that living organisms within an ecosystem interact with one another and with their environment. The students will recognize that plants and animals have basic needs, and they are met through a flow of energy known as food webs. Students will explore how all living organisms go through a life cycle and that adaptations enable organisms to survive in their ecosystem.

(b) Knowledge and skills.

(1) Scientific investigation and reasoning. The student conducts classroom and outdoor investigations, following home and school safety procedures and environmentally appropriate and ethical practices. The student is expected to:

(A) demonstrate safe practices and the use of safety equipment as described in the Texas Safety Standards during classroom and outdoor investigations; and

(B) make informed choices in the use and conservation of natural resources and reusing and recycling of materials such as paper, aluminum, glass, cans, and plastic.

(2) Scientific investigation and reasoning. The student uses scientific inquiry methods during laboratory and outdoor investigations. The student is expected to:

(A) plan and implement descriptive investigations, including asking well-defined questions, making inferences, and selecting and using appropriate equipment or technology to answer his/her questions;

(B) collect and record data by observing and measuring, using the metric system, and using descriptive words and numerals such as labeled drawings, writing, and concept maps;

(C) construct simple tables, charts, bar graphs, and maps using tools and current technology to organize, examine, and evaluate data;

(D) analyze data and interpret patterns to construct reasonable explanations from data that can be observed and measured;

(E) perform repeated investigations to increase the reliability of results; and

(F) communicate valid, oral, and written results supported by data.

(3) Scientific investigation and reasoning. The student uses critical thinking and scientific problem solving to make informed decisions. The student is expected to:

(A) justify explanations, arguments, or conclusions using student-generated data;

(B) draw inferences and evaluate accuracy of services and product claims found in advertisements and labels such as for toys, food, and sunscreen;

(C) represent the natural world using models such as rivers, stream tables, or fossils and identify their limitations, including accuracy and size; and

(D) connect grade-level appropriate science concepts with the history of science, science careers, and contributions of scientists.

(4) Scientific investigation and reasoning. The student knows how to use a variety of tools, materials, equipment, and models to conduct science inquiry. The student is expected to:

(A) collect, record, and analyze information using tools, including calculators; microscopes; cameras; computers; hand lenses; metric rulers; Celsius thermometers; mirrors; pan balances; triple beam balances; graduated cylinders; beakers; hot plates; meter sticks; compasses; timing devices, including clocks and stopwatches; magnets; collecting nets; notebooks; and materials to support observation of habitats of organisms such as terrariums and aquariums; and

(B) use safety equipment as appropriate, including safety goggles and gloves.

(5) Matter and energy. The student knows that matter has measurable physical properties and those properties determine how matter is classified, changed, and used. The student is expected to:

(A) measure, compare, and contrast physical properties of matter, including size, mass, volume, states (solid, liquid, gas), temperature, magnetism, and the ability to sink or float;

(B) predict the changes caused by heating and cooling such as ice becoming liquid water and condensation forming on the outside of a glass of ice water; and

(C) compare and contrast a variety of mixtures and solutions such as rocks in sand, sand in water, or sugar in water.

(6) Force, motion, and energy. The student knows that energy occurs in many forms and can be observed in cycles, patterns, and systems. The student is expected to:

(A) differentiate among forms of energy, including sound, electricity, light, and heat/thermal;

(B) differentiate between conductors and insulators;

(C) demonstrate that electricity travels in a closed path, creating an electrical circuit, and explore an electromagnetic field; and

(D) design an experiment to test the effect of force of an object.

(7) Earth and space. The students know that Earth consists of useful resources and its surface is constantly changing. The student is expected to:

(A) examine properties of soils, including color and texture, capacity to retain water, and ability to support the growth of plants;

(B) observe and identify slow changes to Earth's surface caused by weathering, erosion, and deposition from water, wind, and ice; and

(C) identify and classify Earth's renewable resources, including air, plants, water, and animals; and nonrenewable resources, including coal, oil, and natural gas; and the importance of conservation.

(8) Earth and space. The student knows that there are recognizable patterns in the natural world and among the Sun, Earth, and Moon system. The student is expected to:

(A) identify changes in living organisms that occur over the seasons;

(B) describe and illustrate the continuous movement of water above and on the surface of Earth through the water cycle and explain the role of the Sun as a major source of energy in this process; and

(C) collect and analyze data to identify sequences and predict patterns of change in shadows, in the reflection of sunlight, and in the observable appearance of the Moon over time.

(9) Organisms and environments. The student knows and understands that living organisms within an ecosystem interact with one another and with their environment. The student is expected to:

(A) investigate that most plants need sunlight, water, and carbon dioxide to make their own food, while animals are dependent on other organisms for food, producers, and consumers; and

(B) describe the flow of energy through food webs, beginning with the Sun, and predict how changes in the ecosystem affect the food web such as a fire in a forest.

(10) Organisms and environments. The student knows that organisms undergo similar life processes and have structures that help them survive within their environment. The student is expected to:

(A) explore how adaptations enable organisms to survive in their environment such as comparing birds' beaks and leaves on plants;

(B) demonstrate that some likenesses between parents and offspring are inherited, passed from generation to generation such as eye color in humans or shapes of leaves in plants. Other likenesses are learned such as table manners or reading a book and seals balancing balls on their noses; and

(C) explore, illustrate, and compare life cycles in living organisms such as butterflies, beetles, radishes, or lima beans.

§112.16. Science, Grade 5, Beginning with School Year 2010-2011.

(a) Introduction.

(1) Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process."

(2) Recurring themes are pervasive in sciences, mathematics, and technology. These ideas transcend disciplinary boundaries and include patterns, cycles, systems, models, and change and constancy.

(3) The study of elementary science includes planning and safely implementing classroom and outdoor investigations using scientific processes, including inquiry methods, analyzing information, making informed decisions, and using tools to collect and record information, while addressing the major concepts and vocabulary, in the context of physical, earth, and life sciences. Districts are encouraged to facilitate classroom and outdoor investigations for at least 50% of instructional time.

(4) In Grade 5, investigations are used to learn about the natural world. Students should understand that certain types of questions can be answered by investigations and that methods, models, and conclusions built from these investigations change as new observations are made. Models of objects and events are tools for understanding the natural world and can show how systems work. They have limitations and based on new discoveries are constantly being modified to more closely reflect the natural world.

(A) Within the physical environment, students learn about the physical properties of matter, including magnetism, physical states of matter, relative density, solubility in water, and the ability to conduct or insulate electrical and heat energy. Students explore the uses of light, thermal, electrical, and sound energies.

(B) Within the natural environment, students learn how changes occur on Earth's surface and that predictable patterns occur in the sky. Students learn that the natural world consists of resources, including nonrenewable, renewable, and alternative energy sources.

(C) Within the living environment, students learn that structure and function of organisms can improve the survival of members of a species. Students learn to differentiate between inherited traits and learned behaviors. Students learn that life cycles occur in animals and plants and that the carbon dioxide-oxygen cycle occurs naturally to support the living environment.

(b) Knowledge and skills.

(1) Scientific investigation and reasoning. The student conducts classroom and outdoor investigations following home and school safety procedures and environmentally appropriate and ethical practices. The student is expected to:

(A) demonstrate safe practices and the use of safety equipment as described in the Texas Safety Standards during classroom and outdoor investigations; and

(B) make informed choices in the conservation, disposal, and recycling of materials.

(2) Scientific investigation and reasoning. The student uses scientific methods during laboratory and outdoor investigations. The student is expected to:

(A) describe, plan, and implement simple experimental investigations testing one variable;

(B) ask well-defined questions, formulate testable hypotheses, and select and use appropriate equipment and technology;

(C) collect information by detailed observations and accurate measuring;

(D) analyze and interpret information to construct reasonable explanations from direct (observable) and indirect (inferred) evidence;

(E) demonstrate that repeated investigations may increase the reliability of results;

(F) communicate valid conclusions in both written and verbal forms; and

(G) construct appropriate simple graphs, tables, maps, and charts using technology, including computers, to organize, examine, and evaluate information.

(3) Scientific investigation and reasoning. The student uses critical thinking and scientific problem solving to make informed decisions. The student is expected to:

(A) use scientific evidence to develop and evaluate scientific explanations;

(B) evaluate the accuracy of the information related to promotional materials for products and services such as nutritional labels;

(C) draw or develop a model that represents how something works or looks that cannot be seen such as how a soda dispensing machine works; and

(D) connect grade-level appropriate science concepts with the history of science, science careers, and contributions of scientists.

(4) Scientific investigation and reasoning. The student knows how to use a variety of tools and methods to conduct science inquiry. The student is expected to:

(A) collect, record, and analyze information using tools, including calculators; microscopes; cameras; computers; hand lenses; metric rulers; Celsius thermometers; prisms; mirrors; pan balances; triple beam balances; graduated cylinders; beakers; hot plates; meter sticks; timing devices, including clocks and stopwatches; magnets; collecting nets; notebooks; and materials to support observations of habitats or organisms such as terrariums and aquariums; and

(B) use safety equipment, including safety goggles and gloves.

(5) Matter and energy. The student knows that matter has measurable physical properties and those properties determine how matter is classified, changed, and used. The student is expected to:

(A) classify matter based on physical properties, including mass, magnetism, physical state (solid, liquid, and gas), relative density (sinking and floating), solubility in water, and the ability to conduct or insulate thermal energy or electric energy;

(B) identify the boiling and freezing/melting points of water on the Celsius scale;

(C) demonstrate that some mixtures maintain physical properties of their ingredients such as iron filings and sand; and

(D) identify changes that can occur in the physical properties of the ingredients of solutions such as dissolving salt in water or adding lemon juice to water.

(6) Force, motion, and energy. The student knows that energy occurs in many forms and can be observed in cycles, patterns, and systems. The student is expected to:

(A) explore the uses of energy, including light, thermal, electrical, and sound energy;

(B) demonstrate that the flow of electricity in circuits requires a complete path through which an electric current can pass and can produce light, heat, and sound; and

(C) demonstrate that light travels in a straight line until it strikes an object or travels through one medium to another and demonstrate that light can be reflected such as the use of mirrors or other shiny surfaces and refracted such as the appearance of an object when observed through water.

(7) Earth and space. The student knows Earth's surface is constantly changing and consists of useful resources. The student is expected to:

(A) explore the processes that led to the formation of sedimentary rocks and fossil fuels;

(B) recognize how landforms such as deltas, canyons, and sand dunes are the result of changes to Earth's surface by wind, water, and ice;

(C) identify alternative energy resources such as wind, solar, hydroelectric, geothermal, and biofuels; and

(D) identify fossils as evidence of past living organisms and the nature of the environments at the time using models.

(8) Earth and space. The student knows that there are recognizable patterns in the natural world and among the Sun, Earth, and Moon system. The student is expected to:

(A) differentiate between weather and climate;

(B) explain how the Sun and the ocean interact in the water cycle; and

(C) demonstrate that Earth rotates on its axis once approximately every 24 hours causing the day/night cycle and the apparent movement of the Sun across the sky.

(9) Organisms and environments. The student knows that there are relationships, systems, and cycles within environments. The student is expected to:

(A) observe the way organisms live and survive in their ecosystem by interacting with the living and non-living elements;

(B) describe how the flow of energy derived from the Sun, used by producers to create their own food, is transferred through a food chain and food web to consumers and decomposers;

(C) predict the effects of changes in ecosystems caused by living organisms, including humans, such as the overpopulation of grazers or the building of highways; and

(D) identify the significance of the carbon dioxide-oxygen cycle to the survival of plants and animals.

(10) Organisms and environments. The student knows that organisms undergo similar life processes and have structures that help them survive within their environments. The student is expected to:

(A) compare the structures and functions of different species that help them live and survive such as hooves on prairie animals or webbed feet in aquatic animals;

(B) differentiate between inherited traits of plants and animals such as spines on a cactus or shape of a beak and learned behaviors such as an animal learning tricks or a child riding a bicycle; and

(C) describe the differences between complete and incomplete metamorphosis of insects.

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

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Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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SUBCHAPTER B. MIDDLE SCHOOL

19 TAC §§112.17 - 112.21

The new sections and amendment are proposed under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments; and §28.008, which authorizes the SBOE to incorporate college readiness standards and expectations approved by the commissioner of education and the Texas Higher Education Coordinating Board into the essential knowledge and skills identified by the board under §28.002(c).

The new sections and amendment implement the Texas Education Code, §§7.102(c)(4), 28.002, and 28.008.

§112.17. Implementation of Texas Essential Knowledge and Skills for Science, Middle School, Beginning with School Year 2010-2011.

The provisions of §§112.18 - 112.20 of this subchapter shall be implemented by school districts beginning with the 2010-2011 school year and at that time shall supersede §§112.22 - 112.24 of this subchapter.

§112.18. Science, Grade 6, Beginning with School Year 2010-2011.

(a) Introduction.

(1) Science, as defined by the National Academy of Science, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process." This vast body of changing and increasing knowledge is described by physical, mathematical, and conceptual models. Students should know that some questions are outside the realm of science because they deal with phenomena that are not scientifically testable.

(2) Scientific hypotheses are tentative and testable statements that must be capable of being supported or not supported by observational evidence. Hypotheses of durable explanatory power that have been tested over a wide variety of conditions become theories. Scientific theories are based on natural and physical phenomena and are capable of being tested by multiple, independent researchers. Students should know that scientific theories, unlike hypotheses, are well-established and highly reliable, but they may still be subject to change as new information and technologies are developed. Students should be able to distinguish between scientific decision-making methods and ethical/social decisions that involve the application of scientific information.

(3) Grade 6 science is interdisciplinary in nature; however, much of the content focus is on physical science. National standards in science are organized as multi-grade blocks such as Grades 5-8 rather than individual grade levels. In order to follow the grade level format used in Texas, the various national standards are found among Grades

6, 7, and 8. Recurring themes are pervasive in sciences, mathematics, and technology. These ideas transcend disciplinary boundaries and include change and constancy, patterns, cycles, systems, models, and scale.

(4) The strands for Grade 6 include:

(A) Scientific investigations and reasoning.

(i) To develop a rich knowledge of science and the natural world, students must become familiar with different modes of scientific inquiry, rules of evidence, ways of formulating questions, ways of proposing explanations, and the diverse ways scientists study the natural world and propose explanations based on evidence derived from their work.

(ii) Scientific investigations are conducted for different reasons. All investigations require a research question, careful observations, data gathering, and analysis of the data to identify the patterns that will explain the findings. Descriptive investigations are used to explore new phenomena such as conducting surveys of organisms or measuring the abiotic components in a given habitat. Descriptive statistics include frequency, range, mean, median, and mode. A hypothesis is not required in a descriptive investigation. On the other hand, when conditions can be controlled in order to focus on a single variable, experimental research design is used to determine causation. Students should experience both types of investigations and understand that different scientific research questions require different research designs.

(iii) Scientific investigations are used to learn about the natural world. Students should understand that certain types of questions can be answered by investigations, and the methods, models, and conclusions built from these investigations change as new observations are made. Models of objects and events are tools for understanding the natural world and can show how systems work. Models have limitations and based on new discoveries are constantly being modified to more closely reflect the natural world.

(B) Matter and energy.

(i) Matter can be classified as elements, compounds, or mixtures. Students have already had experience with mixtures in Grade 5, so Grade 6 will concentrate on developing an understanding of elements and compounds. It is important that students learn the differences between elements and compounds based on observations, description of physical properties, and chemical reactions. Elements are represented by chemical symbols, while compounds are represented by chemical formulas. Subsequent grades will learn about the differences at the molecular and atomic level.

(ii) Elements are classified as metals, nonmetals, and metalloids based on their physical properties. The elements are divided into three groups on the Periodic Table. Each different substance usually has a different density, so density can be used as an identifying property. Therefore, calculating density aids classification of substances.

(iii) Energy resources are available on a renewable, nonrenewable, or indefinite basis. Understanding the origins and uses of these resources enables informed decision making. Students should consider the ethical/social issues surrounding Earth's natural energy resources, while looking at the advantages and disadvantages of their long-term uses.

(C) Force, motion, and energy. Energy occurs in two types, potential and kinetic, and can take several forms. Thermal energy can be transferred by conduction, convection, or radiation. It can also be changed from one form to another. Students will investigate the relationship between force and motion using a variety of means, including calculations and measurements.

(D) Earth and space. The focus of this strand is on introducing Earth's processes. Students should develop an understanding of Earth as part of our solar system. The topics include organization of our solar system, the role of gravity, and space exploration.

(E) Organisms and environments. Students will gain an understanding of the broadest taxonomic classifications of organisms and how characteristics determine their classification. The other major topics developed in this strand include the interdependence between organisms and their environments and the levels of organization within an ecosystem.

(b) Knowledge and skills.

(1) Scientific investigation and reasoning. The student, for at least 40% of instructional time, conducts laboratory and field investigations following safety procedures and environmentally appropriate and ethical practices. The student is expected to:

(A) demonstrate safe practices during laboratory and field investigations as outlined in the Texas Safety Standards; and

(B) practice appropriate use and conservation of resources, including disposal, reuse, or recycling of materials.

(2) Scientific investigation and reasoning. The student uses scientific inquiry methods during laboratory and field investigations. The student is expected to:

(A) plan and implement descriptive investigations by making observations, asking well-defined questions, and using appropriate equipment and technology;

(B) design and implement experimental investigations by making observations, asking well-defined questions, formulating testable hypotheses, and using appropriate equipment and technology;

(C) collect and record data using the International System of Units (SI) and qualitative means such as labeled drawings, writing, and graphic organizers;

(D) construct tables and graphs, using repeated trials and means, to organize data and identify patterns; and

(E) analyze data to formulate reasonable explanations, communicate valid conclusions supported by the data, and predict trends.

(3) Scientific investigation and reasoning. The student uses critical thinking, scientific reasoning, and problem solving to make informed decisions and knows the contributions of relevant scientists. The student is expected to:

(A) differentiate among scientific fact, scientific hypothesis, scientific theory, and scientific law;

(B) use models to represent aspects of the natural world such as a model of Earth's layers;

(C) identify advantages and limitations of models such as size, scale, properties, and materials; and

(D) relate the impact of research on scientific thought and society, including the history of science and contributions of scientists as related to the content.

(4) Scientific investigation and reasoning. The student knows how to use a variety of tools and safety equipment to conduct science inquiry. The student is expected to:

(A) use appropriate tools to collect, record, and analyze information, including journals/notebooks, beakers, Petri dishes, meter sticks, graduated cylinders, hot plates, test tubes, triple beam balances, microscopes, thermometers, calculators, computers, timing devices, and other equipment as needed to teach the curriculum; and

(B) use preventative safety equipment, including chemical splash goggles, aprons, and gloves, and be prepared to use emergency safety equipment, including an eye/face wash, a fire blanket, and a fire extinguisher.

(5) Matter and energy. The student knows the differences between elements and compounds. The student is expected to:

(A) know that an element is a pure substance represented by chemical symbols;

(B) recognize that a limited number of the many known elements comprise the largest portion of solid Earth, living matter, oceans, and the atmosphere;

(C) differentiate between elements and compounds on the most basic level; and

(D) identify the formation of compounds by using the evidence of a possible chemical change such as production of a gas, change in temperature, production of a precipitate, or color change.

(6) Matter and energy. The student knows matter has physical properties that can be used for classification. The student is expected to:

(A) compare metals, nonmetals, and metalloids using physical properties such as luster, conductivity, or malleability;

(B) calculate density to identify an unknown substance; and

(C) test the physical properties of minerals, including hardness, color, luster, and streak.

(7) Matter and energy. The student knows that some of Earth's energy resources are available on a nearly perpetual basis, while others can be renewed over a relatively short period of time. Some energy resources, once depleted, are essentially nonrenewable. The student is expected to:

(A) research and debate the advantages and disadvantages of using coal, oil, natural gas, nuclear power, biomass, wind, hydropower, geothermal, and solar resources; and

(B) design a logical plan to manage energy resources in the home, school, or community.

(8) Force, motion, and energy. The student knows force and motion are related to potential and kinetic energy. The student is expected to:

(A) compare and contrast potential and kinetic energy;

(B) identify and describe the changes in direction, motion, and speed of an object when acted upon by unbalanced forces;

(C) calculate average speed using distance and time measurements; and

(D) measure and graph changes in motion.

(9) Force, motion, and energy. The student knows that the Law of Conservation of Energy states that energy can neither be created nor destroyed, it just changes form. The student is expected to:

(A) investigate methods of thermal energy transfer, including conduction, convection, and radiation;

(B) verify through investigations that thermal energy moves in a predictable pattern from warmer to cooler until all the substances attain the same temperature such as an ice cube melting; and

(C) demonstrate energy transformations such as energy in a flashlight battery changes from chemical energy to electrical energy to light energy.

(10) Earth and space. The student understands the structure of Earth, the rock cycle, and plate tectonics. The student is expected to:

(A) build a model to illustrate the structural layers of Earth, including the inner core, outer core, mantle, crust, asthenosphere, and lithosphere;

(B) classify rocks as metamorphic, igneous, or sedimentary by the processes of their formation;

(C) identify the major tectonic plates, including Eurasian, African, Indo-Australian, Pacific, North American, and South American; and

(D) describe how plate tectonics causes major geological events such as ocean basins, earthquakes, volcanic eruptions, and mountain building.

(11) Earth and space. The student understands the organization of our solar system and the relationships among the various bodies that comprise it. The student is expected to:

(A) describe the physical properties, locations, and movements of the Sun, planets, Galilean moons, meteors, asteroids, and comets;

(B) understand that gravity is the force that governs the motion of our solar system; and

(C) describe the history and future of space exploration, including the types of equipment and transportation needed for space travel.

(12) Organisms and environments. The student knows all organisms are classified into Domains and Kingdoms. Organisms within these taxonomic groups share similar characteristics which allow them to interact with the living and nonliving parts of their ecosystem. The student is expected to:

(A) understand that all organisms are composed of one or more cells;

(B) recognize that the presence of a nucleus determines whether a cell is prokaryotic or eukaryotic;

(C) recognize that the broadest taxonomic classification of living organisms is divided into currently recognized Domains;

(D) identify the basic characteristics of organisms, including prokaryotic or eukaryotic, unicellular or multicellular, autotrophic or heterotrophic, and mode of reproduction, that further classify them in the currently recognized Kingdoms;

(E) describe biotic and abiotic parts of an ecosystem in which organisms interact; and

(F) diagram the levels of organization within an ecosystem, including organism, population, community, and ecosystem.

§112.19. Science, Grade 7, Beginning with School Year 2010-2011.

(a) Introduction.

(1) Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge gener-

ated through this process." This vast body of changing and increasing knowledge is described by physical, mathematical, and conceptual models. Students should know that some questions are outside the realm of science because they deal with phenomena that are not scientifically testable.

(2) Scientific hypotheses are tentative and testable statements that must be capable of being supported or not supported by observational evidence. Hypotheses of durable explanatory power that have been tested over a wide variety of conditions become theories. Scientific theories are based on natural and physical phenomena and are capable of being tested by multiple, independent researchers. Students should know that scientific theories, unlike hypotheses, are well-established and highly reliable, but they may still be subject to change as new information and technologies are developed. Students should be able to distinguish between scientific decision-making methods and ethical/social decisions that involve the application of scientific information.

(3) Grade 7 science is interdisciplinary in nature; however, much of the content focus is on organisms and the environment. National standards in science are organized as a multi-grade blocks such as Grades 5-8 rather than individual grade levels. In order to follow the grade level format used in Texas, the various national standards are found among Grades 6, 7, and 8. Recurring themes are pervasive in sciences, mathematics, and technology. These ideas transcend disciplinary boundaries and include change and constancy, patterns, cycles, systems, models, and scale.

(4) The strands for Grade 7 include:

(A) Scientific investigation and reasoning.

(i) To develop a rich knowledge of science and the natural world, students must become familiar with different modes of scientific inquiry, rules of evidence, ways of formulating questions, ways of proposing explanations, and the diverse ways scientists study the natural world and propose explanations based on evidence derived from their work.

(ii) Scientific investigations are conducted for different reasons. All investigations require a research question, careful observations, data gathering, and analysis of the data to identify the patterns that will explain the findings. Descriptive investigations are used to explore new phenomena such as conducting surveys of organisms or measuring the abiotic components in a given habitat. Descriptive statistics include frequency, range, mean, median, and mode. A hypothesis is not required in a descriptive investigation. On the other hand, when conditions can be controlled in order to focus on a single variable, experimental research design is used to determine causation. Students should experience both types of investigations and understand that different scientific research questions require different research designs.

(iii) Scientific investigations are used to learn about the natural world. Students should understand that certain types of questions can be answered by investigations, and the methods, models, and conclusions built from these investigations change as new observations are made. Models of objects and events are tools for understanding the natural world and can show how systems work. Models have limitations and based on new discoveries are constantly being modified to more closely reflect the natural world.

(B) Matter and energy. Matter and energy are conserved throughout living systems. Radiant energy from the Sun drives much of the flow of energy throughout living systems due to the process of photosynthesis in organisms described as producers. Most consumers then depend on producers to meet their energy needs. Decomposers play an important role in recycling matter. Organic compounds are composed of carbon and other elements that are recycled due to chemical changes that rearrange the elements for the particular needs of that living system. Large molecules such as carbohydrates are composed of chains of smaller units such as sugars, similar to a train being composed of multiple box cars. Subsequent grade levels will learn about the differences at the molecular and atomic level.

(C) Force, motion, and energy. Force, motion, and energy are observed in living systems and the environment in several ways. Interactions between muscular and skeletal systems allow the body to apply forces and transform energy both internally and externally. Force and motion can also describe the direction and growth of seedlings, turgor pressure, and geotropism. Catastrophic events of weather systems such as hurricanes, floods, and tornadoes can shape and restructure the environment through the force and motion evident in them. Weathering, erosion, and deposition occur in environments due to the forces of gravity, wind, ice, and water.

(D) Earth and space. Earth and space phenomena can be observed in a variety of settings. Both natural events and human activities can impact Earth systems. There are characteristics of Earth and relationships to objects in our solar system that allow life to exist.

(E) Organisms and environments.

(i) Students will understand the relationship between living organisms and their environment. Different environments support different living organisms that are adapted to that region of Earth. Organisms are living systems that maintain a steady state with that environment and whose balance may be disrupted by internal and external stimuli. External stimuli include human activity or the environment. Successful organisms can reestablish a balance through different processes such as a feedback mechanism. Ecological succession can be seen on a broad or small scale.

(ii) Students learn that all organisms obtain energy, get rid of wastes, grow, and reproduce. During both sexual and asexual reproduction, traits are passed onto the next generation. These traits are contained in genetic material that is found on genes within a chromosome from the parent. Changes in traits sometimes occur in a population over many generations. One of the ways a change can occur is through the process of natural selection. Students extend their understanding of structures in living systems from a previous focus on external structures to an understanding of internal structures and functions within living things.

(iii) All living organisms are made up of smaller units called cells. All cells use energy, get rid of wastes, and contain genetic material. Students will compare plant and animal cells and understand the internal structures within them that allow them to obtain energy, get rid of wastes, grow, and reproduce in different ways. Cells can organize into tissues, tissues into organs, and organs into organ systems. Students will learn the major functions of human body systems such as the ability of the integumentary system to protect against infection, injury, and ultraviolet (UV) radiation; regulate body temperature; and remove waste.

(b) Knowledge and skills.

(1) Scientific investigation and reasoning. The student, for at least 40% of the instructional time, conducts laboratory and field investigations following safety procedures and environmentally appropriate and ethical practices. The student is expected to:

(A) demonstrate safe practices during laboratory and field investigations as outlined in the Texas Safety Standards; and

(B) practice appropriate use and conservation of resources, including disposal, reuse, or recycling of materials.

(2) Scientific investigation and reasoning. The student uses scientific inquiry methods during laboratory and field investigations. The student is expected to:

(A) plan and implement descriptive investigations by making observations, asking well-defined questions, and using appropriate equipment and technology;

(B) design and implement experimental investigations by making observations, asking well-defined questions, formulating testable hypotheses, and using appropriate equipment and technology;

(C) collect and record data using the International System of Units (SI) and qualitative means such as labeled drawings, writing, and graphic organizers;

(D) construct tables and graphs, using repeated trials and means, to organize data and identify patterns; and

(E) analyze data to formulate reasonable explanations, communicate valid conclusions supported by the data, and predict trends.

(3) Scientific investigation and reasoning. The student uses critical thinking, scientific reasoning, and problem solving to make informed decisions and knows the contributions of relevant scientists. The student is expected to:

(A) differentiate among scientific fact, scientific hypothesis, scientific theory, and scientific law;

(B) use models to represent aspects of the natural world such as human body systems and plant and animal cells;

(C) identify advantages and limitations of models such as size, scale, properties, and materials; and

(D) relate the impact of research on scientific thought and society, including the history of science and contributions of scientists as related to the content.

(4) Science investigation and reasoning. The student knows how to use a variety of tools and safety equipment to conduct science inquiry. The student is expected to:

(A) use appropriate tools to collect, record, and analyze information, including life science models, hand lens, stereoscopes, microscopes, beakers, Petri dishes, microscope slides, graduated cylinders, test tubes, meter sticks, metric rulers, metric tape measures, timing devices, hot plates, balances, thermometers, calculators, water test kits, computers, temperature and pH probes, collecting nets, insect traps, globes, digital cameras, journals/notebooks, and other equipment as needed to teach the curriculum; and

(B) use preventative safety equipment, including chemical splash goggles, aprons, and gloves, and be prepared to use emergency safety equipment, including an eye/face wash, a fire blanket, and a fire extinguisher.

(5) Matter and energy. The student knows that interactions occur between matter and energy. The student is expected to:

(A) recognize that radiant energy from the Sun is transformed into chemical energy through the process of photosynthesis;

(B) demonstrate and explain the cycling of matter within living systems such as in the decay of biomass in a compost bin; and

(C) diagram the flow of energy through living systems, including food chains, food webs, and energy pyramids.

(6) Matter and energy. The student knows that matter has physical and chemical properties and can undergo physical and chemical changes. The student is expected to:

(A) identify that organic compounds contain carbon and other elements such as hydrogen, oxygen, phosphorus, nitrogen, or sulfur;

(B) distinguish between physical and chemical changes in matter in the digestive system; and

(C) recognize how large molecules are broken down into smaller molecules such as carbohydrates can be broken down into sugars.

(7) Force, motion, and energy. The student knows that there is a relationship among force, motion, and energy. The student is expected to:

(A) contrast situations where work is done with different amounts of force to situations where no work is done such as moving a box with a ramp and without a ramp, or standing still;

(B) relate the amount of work done during an everyday activity to energy transformations; and

(C) demonstrate and illustrate forces that affect motion in everyday life such as emergence of seedlings, turgor pressure, and geotropism.

(8) Earth and space. The student knows that natural events and human activity can impact Earth systems. The student is expected to:

(A) predict and describe how different types of catastrophic events impact ecosystems such as floods, hurricanes, or tornadoes;

(B) analyze the effects of weathering, erosion, and deposition on the environment in ecoregions of Texas; and

(C) model the effects of human activity on groundwater and surface water in a watershed.

(9) Earth and space. The student knows components of our solar system. The student is expected to:

(A) analyze the characteristics of objects in our solar system that allow life to exist such as the proximity of the Sun, presence of water, and composition of the atmosphere; and

(B) identify the accommodations, considering the characteristics of our solar system, that enabled manned space exploration.

(10) Organisms and environments. The student knows that there is a relationship between organisms and the environment. The student is expected to:

(A) observe and describe how different environments, including microhabitats in schoolyards and biomes, support different varieties of organisms;

(B) describe how biodiversity contributes to the sustainability of an ecosystem; and

(C) observe, record, and describe the role of ecological succession such as in a microhabitat of a garden with weeds.

(11) Organisms and environments. The student knows that populations and species demonstrate variation and inherit many of their unique traits through gradual processes over many generations. The student is expected to:

(A) examine organisms or their structures such as insects or leaves and use dichotomous keys for identification;

(B) explain variation within a population or species by comparing external features, behaviors, or physiology of organisms that enhance their survival such as migration, hibernation, or storage of food in a bulb; and

(C) identify some changes in genetic traits that have occurred over several generations through natural selection and selective breeding such as the Galapagos Medium Ground Finch *(Geospiza fortis)* or domestic animals.

(12) Organisms and environments. The student knows that living systems at all levels of organization demonstrate the complementary nature of structure and function. The student is expected to:

(A) investigate and explain how internal structures of organisms are adapted to perform specific functions such as gills in fish, hollow bones in birds, or xylem in plants;

(B) identify the main functions of the systems of the human organism, including the circulatory, respiratory, skeletal, muscular, digestive, excretory, reproductive, integumentary, nervous, and endocrine systems;

(C) recognize levels of organization in plants and animals, including cells, tissues, organs, organ systems, and organisms;

(D) differentiate between structure and function in plant and animal cell organelles, including cell membrane, cell wall, nucleus, cytoplasm, mitochondrion, chloroplast, and vacuole;

(E) compare the functions of a cell to the functions of organisms such as waste removal; and

(F) recognize that according to cell theory all organisms are composed of cells and cells carry on similar functions such as extracting energy from food to sustain life.

(13) Organisms and environments. The student knows that a living organism must be able to maintain balance in stable internal conditions in response to external and internal stimuli. The student is expected to:

(A) investigate how organisms respond to external stimuli found in the environment such as phototropism and fight or flight; and

(B) describe and relate responses in organisms that may result from internal stimuli such as wilting in plants and fever or vomiting in animals that allow them to maintain balance.

(14) Organisms and environments. The student knows that reproduction is a characteristic of living organisms and that the instructions for traits are governed in the genetic material. The student is expected to:

(A) define heredity as the passage of genetic instructions from one generation to the next generation;

(B) compare the results of uniform or diverse offspring from sexual reproduction or asexual reproduction; and

(C) recognize that inherited traits of individuals are governed in the genetic material found in the genes within chromosomes.

§112.20. Science, Grade 8, Beginning with School Year 2010-2011.

(a) Introduction.

(1) Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process." This vast body of changing and increasing knowledge is described by physical, mathematical, and conceptual models. Students should know that some questions are outside the realm of science because they deal with phenomena that are not scientifically testable.

(2) Scientific hypotheses are tentative and testable statements that must be capable of being supported or not supported by observational evidence. Hypotheses of durable explanatory power that have been tested over a wide variety of conditions become theories. Scientific theories are based on natural and physical phenomena and are capable of being tested by multiple, independent researchers. Students should know that scientific theories, unlike hypotheses, are well-established and highly reliable, but they may still be subject to change as new information and technologies are developed. Students should be able to distinguish between scientific decision-making methods and ethical/social decisions that involve the application of scientific information.

(3) Grade 8 science is interdisciplinary in nature; however, much of the content focus is on earth and space science. National standards in science are organized as multi-grade blocks such as Grades 5-8 rather than individual grade levels. In order to follow the grade level format used in Texas, the various national standards are found among Grades 6, 7, and 8. Recurring themes are pervasive in sciences, mathematics, and technology. These ideas transcend disciplinary boundaries and include change and constancy, patterns, cycles, systems, models, and scale.

(4) The strands for Grade 8 include:

(A) Scientific investigation and reasoning.

(i) To develop a rich knowledge of science and the natural world, students must become familiar with different modes of scientific inquiry, rules of evidence, ways of formulating questions, ways of proposing explanations, and the diverse ways scientists study the natural world and propose explanations based on evidence derived from their work.

(ii) Scientific investigations are conducted for different reasons. All investigations require a research question, careful observations, data gathering, and analysis of the data to identify the patterns that will explain the findings. Descriptive investigations are used to explore new phenomena such as conducting surveys of organisms or measuring the abiotic components in a given habitat. Descriptive statistics include frequency, range, mean, median, and mode. A hypothesis is not required in a descriptive investigation. On the other hand, when conditions can be controlled in order to focus on a single variable, experimental research design is used to determine causation. Students should experience both types of investigations and understand that different scientific research questions require different research designs.

(iii) Scientific investigations are used to learn about the natural world. Students should understand that certain types of questions can be answered by investigations, and the methods, models, and conclusions built from these investigations change as new observations are made. Models of objects and events are tools for understanding the natural world and can show how systems work. Models have limitations and based on new discoveries are constantly being modified to more closely reflect the natural world.

(B) Matter and energy. Students recognize that matter is composed of atoms. Students examine information on the Periodic Table to recognize that elements are grouped into families. In addition, students understand the basic concept of conservation of mass. Lab activities will allow students to demonstrate evidence of chemical re-

actions. They will use chemical formulas and balanced equations to show chemical reactions and the formation of new substances.

(C) Force, motion, and energy. Students experiment with the relationship between forces and motion through the study of Newton's three laws. Students learn how these forces relate to geologic processes and astronomical phenomena. In addition, students recognize that these laws are evident in everyday objects and activities. Mathematics is used to calculate speed using distance and time measurements.

(D) Earth and space. Students identify the role of natural events in altering Earth systems. Cycles within Sun, Earth, and Moon systems are studied as students learn about seasons, tides, and lunar phases. Students learn that stars and galaxies are part of the universe and that distances in space are measured by using light waves. In addition, students use data to research scientific theories of the origin of the universe. Students will illustrate how Earth features change over time by plate tectonics. They will interpret land and erosional features on topographic maps. Students learn how interactions in solar, weather, and ocean systems create changes in weather patterns and climate.

(E) Organisms and environments. In studies of living systems, students explore the interdependence between these systems. Interactions between organisms in ecosystems, including producer/consumer, predator/prey, and parasite/host relationships, are investigated in aquatic and terrestrial systems. Students describe how biotic and abiotic factors affect the number of organisms and populations present in an ecosystem. In addition, students explore how organisms and their populations respond to short- and long-term environmental changes, including those caused by human activities.

(b) Knowledge and skills.

(1) Scientific investigation and reasoning. The student, for at least 40% of instructional time, conducts laboratory and field investigations following safety procedures and environmentally appropriate and ethical practices. The student is expected to:

(A) demonstrate safe practices during laboratory and field investigations as outlined in the Texas Safety Standards; and

(B) practice appropriate use and conservation of resources, including disposal, reuse, or recycling of materials.

(2) Scientific investigation and reasoning. The student uses scientific inquiry methods during laboratory and field investigations. The student is expected to:

(A) plan and implement descriptive investigations by making observations, asking well-defined questions, and using appropriate equipment and technology;

(B) design and implement experimental investigations by making observations, asking well-defined questions, formulating testable hypotheses, and using appropriate equipment and technology;

(C) collect and record data using the International System of Units (SI) and qualitative means such as labeled drawings, writing, and graphic organizers;

(D) construct tables and graphs, using repeated trials and means, to organize data and identify patterns; and

(E) analyze data to formulate reasonable explanations, communicate valid conclusions supported by the data, and predict trends.

(3) Scientific investigation and reasoning. The student uses critical thinking, scientific reasoning, and problem solving to make informed decisions and knows the contributions of relevant scientists. The student is expected to:

(A) differentiate among scientific fact, scientific hypothesis, scientific theory, and scientific law;

(B) use models to represent aspects of the natural world such as an atom, a molecule, space, or a geologic feature;

(C) identify advantages and limitations of models such as size, scale, properties, and materials; and

(D) relate the impact of research on scientific thought and society, including the history of science and contributions of scientists as related to the content.

(4) Scientific investigation and reasoning. The student knows how to use a variety of tools and safety equipment to conduct science inquiry. The student is expected to:

(A) use appropriate tools to collect, record, and analyze information, including lab journals/notebooks, beakers, meter sticks, graduated cylinders, anemometers, psychrometers, hot plates, test tubes, spring scales, balances, microscopes, thermometers, calculators, computers, spectroscopes, timing devices, and other equipment as needed to teach the curriculum; and

(B) use preventative safety equipment, including chemical splash goggles, aprons, and gloves, and be prepared to use emergency safety equipment, including an eye/face wash, a fire blanket, and a fire extinguisher.

(5) Matter and energy. The student knows that matter is composed of atoms and has chemical and physical properties. The student is expected to:

(A) describe the structure of atoms, including the masses, electrical charges, and locations, of protons and neutrons in the nucleus and electrons in the electron cloud;

(B) identify that protons determine an element's identity and valence electrons determine its chemical properties, including reactivity;

(C) interpret the arrangement of the Periodic Table, including groups and periods, to explain how properties are used to classify elements;

(D) recognize that chemical formulas are used to identify substances and determine the number of atoms of each element in chemical formulas containing subscripts;

(E) investigate how evidence of chemical reactions indicate that new substances with different properties are formed; and

(F) recognize whether a chemical equation containing coefficients is balanced or not and how that relates to the law of conservation of mass.

(6) Force, motion, and energy. The student knows that there is a relationship between force, motion, and energy. The student is expected to:

(A) demonstrate and calculate how unbalanced forces change the speed or direction of an object's motion;

(B) differentiate between speed, velocity, and acceleration; and

(C) investigate and describe applications of Newton's law of inertia, law of force and acceleration, and law of action-reaction such as in vehicle restraints, sports activities, amusement park rides, Earth's tectonic activities, and rocket launches.

(7) Earth and space. The student knows the effects resulting from cyclical movements of the Sun, Earth, and Moon. The student is expected to:

(A) model and illustrate how the tilted Earth rotates on its axis, causing day and night, and revolves around the Sun causing changes in seasons;

(B) demonstrate and predict the sequence of events in the lunar cycle; and

(C) relate the lunar cycle to its effect on ocean tides.

(8) Earth and space. The student knows characteristics of the universe. The student is expected to:

(A) describe components of the universe, including stars, nebulae, and galaxies, and use models such as the Herzt-sprung-Russell diagram for classification;

(B) recognize that the Sun is a medium-sized star near the edge of a disc-shaped galaxy of stars and that the Sun is many thousands of times closer to Earth than any other star;

(C) explore how different wavelengths of the electromagnetic spectrum such as light and radio waves are used to gain information about distances and properties of components in the universe;

(D) model and describe how light years are used to measure distances and sizes in the universe; and

(E) research how scientific data are used as evidence to develop scientific theories to describe the origin of the universe.

(9) Earth and space. The student knows that natural events can impact Earth systems. The student is expected to:

(A) describe the historical development of evidence that supports plate tectonic theory;

(B) relate plate tectonics to the formation of crustal features; and

(C) interpret topographic maps and satellite views to identify land and erosional features and predict how these features may be reshaped by weathering.

(10) Earth and space. The student knows that climatic interactions exist among Earth, ocean, and weather systems. The student is expected to:

(A) recognize that the Sun provides the energy that drives convection within the atmosphere and oceans, producing winds and ocean currents;

(B) identify how global patterns of atmospheric movement influence local weather using weather maps that show high and low pressures and fronts; and

(C) identify the role of the oceans in the formation of weather systems such as hurricanes.

(11) Organisms and environments. The student knows that interdependence occurs among living systems and the environment and that human activities can affect these systems. The student is expected to:

(A) describe producer/consumer, predator/prey, and parasite/host relationships as they occur in food webs within marine, freshwater, and terrestrial ecosystems;

(B) investigate how organisms and populations in an ecosystem depend on and may compete for biotic and abiotic factors such as quantity of light, water, range of temperatures, or soil composition;

(C) explore how short- and long-term environmental changes affect organisms and traits in subsequent populations; and

(D) recognize human dependence on ocean systems and explain how human activities such as runoff, artificial reefs, or use of resources have modified these systems.

§112.21. Implementation of Texas Essential Knowledge and Skills for Science, Middle School.

The provisions of §§112.22 - 112.24 of this subchapter shall be superseded by §§112.18 - 112.20 of this subchapter beginning with the 2010-2011 school year [~~implemented by school districts beginning September 1, 1998, and at that time shall supersede §75.28(g) and §75.44 of this title (relating to Science)~~].

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

Filed with the Office of the Secretary of State on February 2, 2009.

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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SUBCHAPTER C. HIGH SCHOOL

19 TAC §§112.31 - 112.39, 112.41

The new sections and amendment are proposed under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments; §28.008, which authorizes the SBOE to incorporate college readiness standards and expectations approved by the commissioner of education and the Texas Higher Education Coordinating Board into the essential knowledge and skills identified by the board under §28.002(c); and §28.025, which authorizes the SBOE to by rule determine curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with the required curriculum under §28.002.

The new sections and amendment implement the Texas Education Code, §§7.102(c)(4), 28.002, 28.008, and 28.025.

§112.31. Implementation of Texas Essential Knowledge and Skills for Science, High School, Beginning with School Year 2010-2011.

The provisions of §§112.32 - 112.39 of this subchapter shall be implemented by school districts beginning with the 2010-2011 school year and at that time shall supersede §§112.42 - 112.49 of this subchapter.

§112.32. Aquatic Science, Beginning with School Year 2010-2011.

(a) General requirements. Students shall be awarded one credit for successful completion of this course. Required prerequisite:

one unit of high school Biology. Suggested prerequisite: Chemistry or concurrent enrollment in Chemistry. This course is recommended for students in Grades 10, 11, or 12.

(b) Introduction.

(1) Aquatic Science. In Aquatic Science, students study the interactions of biotic and abiotic components in aquatic environments, including impacts on aquatic systems. Investigations and field work in this course may emphasize fresh water or marine aspects of aquatic science depending primarily upon the natural resources available for study near the school. Students who successfully complete Aquatic Science will acquire knowledge about a variety of aquatic systems, conduct investigations and observations of aquatic environments, work collaboratively with peers, and develop critical-thinking and problem-solving skills.

(2) Nature of science. Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process." This vast body of changing and increasing knowledge is described by physical, mathematical, and conceptual models. Students should know that some questions are outside the realm of science because they deal with phenomena that are not scientifically testable.

(3) Scientific inquiry. Scientific inquiry is the planned and deliberate investigation of the natural world. Scientific methods of investigation can be experimental, descriptive, or comparative. The method chosen should be appropriate to the question being asked.

(4) Science and social ethics. Scientific decision making is a way of answering questions about the natural world. Students should be able to distinguish between scientific decision-making methods and ethical and social decisions that involve the application of scientific information.

(5) Scientific systems. A system is a collection of cycles, structures, and processes that interact. All systems have basic properties that can be described in terms of space, time, energy, and matter. Change and constancy occur in systems as patterns and can be observed, measured, and modeled. These patterns help to make predictions that can be scientifically tested. Students should analyze a system in terms of its components and how these components relate to each other, to the whole, and to the external environment.

(c) Knowledge and skills.

(1) Scientific processes. The student, for at least 40% of instructional time, conducts laboratory and field investigations using safe, environmentally appropriate, and ethical practices. The student is expected to:

(A) demonstrate safe practices during laboratory and field investigations, including chemical, electrical, and fire safety, and safe handling of live and preserved organisms; and

(B) make wise choices in the use and conservation of resources and the disposal or recycling of materials.

(2) Scientific processes. The student uses scientific methods during laboratory and field investigations. The student is expected to:

(A) know the definition of science and understand that it has limitations, as specified in subsection (b)(2) of this section;

(B) know that scientific hypotheses are tentative and testable statements that must be capable of being supported or not supported by observational evidence. Hypotheses of durable explanatory power which have been tested over a wide variety of conditions are incorporated into theories;

(C) know that scientific theories are based on natural and physical phenomena and are capable of being tested by multiple independent researchers. Unlike hypotheses, scientific theories are well-established and highly reliable explanations, but they may be subject to change as new areas of science and new technologies are developed;

(D) distinguish between scientific hypotheses and scientific theories;

(E) plan and implement investigative procedures, including asking questions, formulating testable hypotheses, and selecting, handling, and maintaining appropriate equipment and technology;

(F) collect data individually or collaboratively, make measurements with precision and accuracy, record values using appropriate units, and calculate statistically relevant quantities to describe data, including mean, median, and range;

(G) demonstrate the use of course apparatuses, equipment, techniques, and procedures;

(H) organize, analyze, evaluate, build models, make inferences, and predict trends from data;

(I) perform calculations using dimensional analysis, significant digits, and scientific notation; and

(J) communicate valid conclusions using essential vocabulary and multiple modes of expression such as lab reports, labeled drawings, graphic organizers, journals, summaries, oral reports, and technology-based reports.

(3) Scientific processes. The student uses critical thinking, scientific reasoning, and problem solving to make informed decisions within and outside the classroom. The student is expected to:

(A) analyze and evaluate scientific explanations using empirical evidence, logical reasoning, and experimental and observational testing;

(B) communicate and apply scientific information extracted from written text;

(C) make responsible choices in selecting everyday products and services using scientific information;

(D) evaluate the impact of research and technology on scientific thought, society, and the environment;

(E) describe the connection between aquatic science and future careers; and

(F) explore and describe the history of aquatic science and contributions of scientists.

(4) Science concepts. Students know that aquatic environments are the product of Earth systems interactions. The student is expected to:

(A) identify key features and characteristics of atmospheric, geological, hydrological, and biological systems as they relate to aquatic environments;

(B) apply systems thinking to the examination of aquatic environments, including positive and negative feedback cycles; and

(C) collect and evaluate global environmental data using technology such as maps, visualizations, satellite data, Global Posi-

tioning System (GPS), Geographic Information System (GIS), weather balloons, buoys, etc.

(5) Science concepts. The student conducts long-term studies on local aquatic environments. Local natural environments are to be preferred over artificial or virtual environments. The student is expected to:

(A) evaluate data over a period of time from an established aquatic environment documenting seasonal changes and the behavior of organisms;

(B) collect baseline quantitative data, including pH, salinity, temperature, mineral content, nitrogen compounds, and turbidity from an aquatic environment;

(C) analyze interrelationships among producers, consumers, and decomposers in a local aquatic ecosystem; and

(D) identify the interdependence of organisms in an aquatic environment such as in a pond, river, lake, ocean, or aquifer and the biosphere.

(6) Science concepts. The student knows the role of cycles in an aquatic environment. The student is expected to:

(A) identify the role of carbon, nitrogen, water, and nutrient cycles in an aquatic environment, including upwellings and turnovers; and

(B) examine the interrelationships between aquatic systems and climate and weather, including El Niño and La Niña, currents, and hurricanes.

(7) Science concepts. The student knows the origin and use of water in a watershed. The student is expected to:

(A) identify sources and determine the amounts of water in a watershed, including rainfall, groundwater, and surface water;

(B) identify factors that contribute to how water flows through a watershed; and

(C) identify water quantity and quality in a local watershed.

(8) Science concepts. The student knows that geological phenomena and fluid dynamics affect aquatic systems. The student is expected to:

(A) demonstrate basic principles of fluid dynamics, including hydrostatic pressure, density, salinity, and buoyancy;

(B) identify interrelationships between ocean currents, climates, and geologic features; and

(C) describe and explain fluid dynamics in an upwelling and lake turnover.

(9) Science concepts. The student knows the types and components of aquatic ecosystems. The student is expected to:

(A) differentiate among freshwater, brackish, and saltwater ecosystems;

(B) identify the major properties and components of different marine and freshwater life zones; and

(C) identify biological, chemical, geological, and physical components of an aquatic life zone as they relate to the organisms in it.

(10) Science concepts. The student knows environmental adaptations of aquatic organisms. The student is expected to:

(A) classify different aquatic organisms using tools such as dichotomous keys;

(B) compare and describe how adaptations allow an organism to exist within an aquatic environment; and

(C) compare differences in adaptations of aquatic organisms to fresh water and marine environments.

(11) Science concepts. The student knows about the interdependence and interactions that occur in aquatic environments. The student is expected to:

(A) identify how energy flows and matter cycles through both fresh water and salt water aquatic systems, including food webs, chains, and pyramids; and

(B) evaluate the factors affecting aquatic population cycles.

(12) Science concepts. The student understands how human activities impact aquatic environments. The student is expected to:

(A) predict effects of chemical, organic, physical, and thermal changes from humans on the living and nonliving components of an aquatic ecosystem;

(B) analyze the cumulative impact of human population growth on an aquatic system;

(C) investigate the role of humans in unbalanced systems such as invasive species, fish farming, cultural eutrophication, or red tides;

(D) analyze and discuss how human activities such as fishing, transportation, dams, and recreation influence aquatic environments; and

(E) understand the impact of various laws and policies such as The Endangered Species Act, right of capture laws, or Clean Water Act on aquatic systems.

§112.33. Astronomy, Beginning with School Year 2010-2011.

(a) General requirements. Students shall be awarded one credit for successful completion of this course. Suggested prerequisite: one unit of high school science. This course is recommended for students in Grade 11 or 12.

(b) Introduction.

(1) Astronomy. In Astronomy, students conduct laboratory and field investigations, use scientific methods, and make informed decisions using critical thinking and scientific problem solving. Students study the following topics: astronomy in civilization, patterns and objects in the sky, our place in space, the moon, reasons for the seasons, planets, the sun, stars, galaxies, cosmology, and space exploration. Students who successfully complete Astronomy will acquire knowledge within a conceptual framework, conduct observations of the sky, work collaboratively, and develop critical-thinking skills.

(2) Nature of science. Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process." This vast body of changing and increasing knowledge is described by physical, mathematical, and conceptual models. Students should know that some questions are outside the realm of science because they deal with phenomena that are not scientifically testable.

(3) Scientific inquiry. Scientific inquiry is the planned and deliberate investigation of the natural world. Scientific methods of

investigation can be experimental, descriptive, or comparative. The method chosen should be appropriate to the question being asked.

(4) Science and social ethics. Scientific decision making is a way of answering questions about the natural world. Students should be able to distinguish between scientific decision-making methods and ethical and social decisions that involve the application of scientific information.

(5) Scientific systems. A system is a collection of cycles, structures, and processes that interact. All systems have basic properties that can be described in terms of space, time, energy, and matter. Change and constancy occur in systems as patterns and can be observed, measured, and modeled. These patterns help to make predictions that can be scientifically tested. Students should analyze a system in terms of its components and how these components relate to each other, to the whole, and to the external environment.

(c) Knowledge and skills.

(1) Scientific processes. The student, for at least 40% of instructional time, conducts laboratory and field investigations using safe, environmentally appropriate, and ethical practices. The student is expected to:

(A) demonstrate safe practices during laboratory and field investigations; and

(B) make wise choices in the use and conservation of resources and the disposal or recycling of materials.

(2) Scientific processes. The student uses scientific methods during laboratory and field investigations. The student is expected to:

(A) know the definition of science and understand that it has limitations, as specified in subsection (b)(2) of this section;

(B) know that scientific hypotheses are tentative and testable statements that must be capable of being supported or not supported by observational evidence. Hypotheses of durable explanatory power which have been tested over a wide variety of conditions are incorporated into theories;

(C) know that scientific theories are based on natural and physical phenomena and are capable of being tested by multiple independent researchers. Unlike hypotheses, scientific theories are well-established and highly-reliable explanations, but may be subject to change as new areas of science and new technologies are developed;

(D) distinguish between scientific hypotheses and scientific theories;

(E) plan and implement investigative procedures, including making observations, asking questions, formulating testable hypotheses, and selecting equipment and technology;

(F) collect data and make measurements with accuracy and precision;

(G) organize, analyze, evaluate, make inferences, and predict trends from data, including making new revised hypotheses when appropriate;

(H) communicate valid conclusions in writing, oral presentations, and through collaborative projects; and

(I) use astronomical technology such as telescopes, binoculars, sextants, computers, and software.

(3) Scientific processes. The student uses critical thinking, scientific reasoning, and problem solving to make informed decisions within and outside the classroom. The student is expected to:

(A) analyze and evaluate scientific explanations using empirical evidence, logical reasoning, and experimental and observational testing;

(B) draw inferences based on data related to promotional materials for products and services;

(C) evaluate the impact of research on scientific thought, society, and the environment; and

(D) describe the connection between astronomy and future careers.

(4) Science concepts. The student recognizes the importance and uses of astronomy in civilization. The student is expected to:

(A) research and describe the use of astronomy in ancient civilizations such as the Egyptians, Mayans, Aztecs, Europeans, and the native Americans;

(B) research and describe the contributions of scientists to our changing understanding of astronomy, including Ptolemy, Copernicus, Tycho Brahe, Kepler, Galileo, Newton, Einstein, and Hubble, and the contribution of women astronomers, including Maria Mitchell and Henrietta Swan Leavitt;

(C) describe and explain the historical origins of the perceived patterns of constellations and the role of constellations in ancient and modern navigation; and

(D) explain the contributions of modern astronomy to today's society, including the identification of potential asteroid/comet impact hazards and the Sun's effects on communication, navigation, and high-tech devices.

(5) Science concepts. The student develops a familiarity with the sky. The student is expected to:

(A) observe and record the apparent movement of the Sun and Moon during the day;

(B) observe and record the apparent movement of the Moon, planets, and stars in the nighttime sky; and

(C) recognize and identify constellations such as Ursa Major, Ursa Minor, Orion, Cassiopeia, and constellations of the zodiac.

(6) Science concepts. The student knows our place in space. The student is expected to:

(A) compare and contrast the scale, size, and distance of the Sun, Earth, and Moon system through the use of data and modeling;

(B) compare and contrast the scale, size, and distance of objects in the solar system such as the Sun and planets through the use of data and modeling;

(C) examine the scale, size, and distance of the stars, Milky Way, and other galaxies through the use of data and modeling;

(D) relate apparent versus absolute magnitude to the distances of celestial objects; and

(E) demonstrate the use of units of measurement in astronomy, including Astronomical Units and light years.

(7) Science concepts. The student knows the role of the Moon in the Sun, Earth, and Moon system. The student is expected to:

(A) observe and record data about lunar phases and use that information to model the Sun, Earth, and Moon system;

(B) illustrate the cause of lunar phases by showing positions of the Moon relative to Earth and the Sun for each phase, in-

cluding new moon, waxing crescent, first quarter, waxing gibbous, full moon, waning gibbous, third quarter, and waning crescent;

(C) identify and differentiate the causes of lunar and solar eclipses, including differentiating between lunar phases and eclipses; and

(D) identify the effects of the Moon on tides.

(8) Science concepts. The student knows the reasons for the seasons. The student is expected to:

(A) recognize that seasons are caused by the tilt of Earth's axis;

(B) explain how latitudinal position affects the length of day and night throughout the year;

(C) recognize that the angle of incidence of sunlight determines the concentration of solar energy received on Earth at a particular location; and

(D) examine the relationship of the seasons to equinoxes, solstices, the tropics, and the equator.

(9) Science concepts. The student knows that planets of different size, composition, and surface features orbit around the Sun. The student is expected to:

(A) compare and contrast the factors essential to life on Earth such as temperature, water, mass, and gases to conditions on other planets;

(B) compare the planets in terms of orbit, size, composition, rotation, atmosphere, natural satellites, and geological activity;

(C) relate the role of Newton's law of universal gravitation to the motion of the planets around the Sun and to the motion of natural and artificial satellites around the planets; and

(D) explore the origins and significance of small solar system bodies, including asteroids, comets, and Kuiper belt objects.

(10) Science concepts. The student knows the role of the Sun as the star in our solar system. The student is expected to:

(A) identify the approximate mass, size, motion, temperature, structure, and composition of the Sun;

(B) distinguish between nuclear fusion and nuclear fission, and identify the source of energy within the Sun as nuclear fusion of hydrogen to helium;

(C) describe the eleven-year solar cycle and the significance of sunspots; and

(D) analyze solar magnetic storm activity, including coronal mass ejections, prominences, flares, and sunspots.

(11) Science concepts. The student knows the characteristics and life cycle of stars. The student is expected to:

(A) identify the characteristics of main sequence stars, including surface temperature, age, relative size, and composition;

(B) characterize star formation in stellar nurseries from giant molecular clouds, to protostars, to the development of main sequence stars;

(C) evaluate the relationship between mass and fusion on the dying process and properties of stars;

(D) differentiate among the end states of stars, including white dwarfs, neutron stars, and black holes;

(E) compare how the mass and gravity of a main sequence star will determine its end state as a white dwarf, neutron star, or black hole;

(F) relate the use of spectroscopy in obtaining physical data on celestial objects such as temperature, chemical composition, and relative motion; and

(G) use the Hertzsprung-Russell diagram to plot and examine the life cycle of stars from birth to death.

(12) Science concepts. The student knows the variety and properties of galaxies. The student is expected to:

(A) describe characteristics of galaxies;

(B) recognize the type, structure, and components of our Milky Way galaxy and location of our solar system within it; and

(C) compare and contrast the different types of galaxies, including spiral, elliptical, irregular, and dwarf.

(13) Science concepts. The student knows the scientific theories of cosmology. The student is expected to:

(A) research and describe the historical development of the Big Bang Theory, including red shift, cosmic microwave background radiation, and other supporting evidence;

(B) research and describe current theories of the evolution of the universe, including estimates for the age of the universe; and

(C) research and describe scientific hypotheses of the fate of the universe, including open and closed universes and the role of dark matter and dark energy.

(14) Science concepts. The student recognizes the benefits and challenges of space exploration to the study of the universe. The student is expected to:

(A) identify and explain the contributions of human space flight and future plans and challenges;

(B) recognize the advancement of knowledge in astronomy through robotic space flight;

(C) analyze the importance of ground-based technology in astronomical studies;

(D) recognize the importance of space telescopes to the collection of astronomical data across the electromagnetic spectrum; and

(E) demonstrate an awareness of new developments and discoveries in astronomy.

§112.34. Biology, Beginning with School Year 2010-2011.

(a) General requirements. Students shall be awarded one credit for successful completion of this course. Prerequisites: none. This course is recommended for students in Grade 9, 10, or 11.

(b) Introduction.

(1) Biology. In Biology, students conduct laboratory and field investigations, use scientific methods during investigations, and make informed decisions using critical thinking and scientific problem solving. Students in Biology study a variety of topics that include: structures and functions of cells and viruses; growth and development of organisms; cells, tissues, and organs; nucleic acids and genetics; biological evolution; taxonomy; metabolism and energy transfers in living organisms; living systems; homeostasis; and ecosystems and the environment.

(2) Nature of science. Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process." This vast body of changing and increasing knowledge is described by physical, mathematical, and conceptual models. Students should know that some questions are outside the realm of science because they deal with phenomena that are not scientifically testable.

(3) Scientific inquiry. Scientific inquiry is the planned and deliberate investigation of the natural world. Scientific methods of investigation are experimental, descriptive, or comparative. The method chosen should be appropriate to the question being asked.

(4) Science and social ethics. Scientific decision making is a way of answering questions about the natural world. Students should be able to distinguish between scientific decision-making methods (scientific methods) and ethical and social decisions that involve science (the application of scientific information).

(5) Science, systems, and models. A system is a collection of cycles, structures, and processes that interact. All systems have basic properties that can be described in space, time, energy, and matter. Change and constancy occur in systems as patterns and can be observed, measured, and modeled. These patterns help to make predictions that can be scientifically tested. Students should analyze a system in terms of its components and how these components relate to each other, to the whole, and to the external environment.

(c) Knowledge and skills.

(1) Scientific processes. The student, for at least 40% of instructional time, conducts laboratory and field investigations using safe, environmentally appropriate, and ethical practices. The student is expected to:

(A) demonstrate safe practices during laboratory and field investigations; and

(B) make wise choices in the use and conservation of resources and the disposal or recycling of materials.

(2) Scientific processes. The student uses scientific methods and equipment during laboratory and field investigations. The student is expected to:

(A) know the definition of science and understand that it has limitations, as specified in subsection (b)(2) of this section;

(B) know that hypotheses are tentative and testable statements that must be capable of being supported or not supported by observational evidence. Hypotheses of durable explanatory power which have been tested over a wide variety of conditions are incorporated into theories;

(C) know scientific theories are based on natural and physical phenomena and are capable of being tested by multiple independent researchers. Unlike hypotheses, scientific theories are well-established and highly-reliable explanations, but they may be subject to change as new areas or science and new technologies are developed;

(D) distinguish between scientific hypotheses and scientific theories;

(E) plan and implement investigative procedures, including asking questions, formulating testable hypotheses, and selecting equipment and technology;

(F) collect and organize qualitative and quantitative data and make measurements with accuracy and precision using tools such as calculators, spreadsheet software, data-collecting probes, computers, standard laboratory glassware, microscopes, various prepared slides, stereoscopes, metric rulers, electronic balances, gel electrophoresis apparatuses, micropipettors, hand lenses, Celsius thermometers, hot plates, lab notebooks or journals, timing devices, cameras, Petri dishes, lab incubators, dissection equipment, meter sticks, and models, diagrams, or samples of biological specimens or structures;

(G) analyze, evaluate, make inferences, and predict trends from data; and

(H) communicate valid conclusions supported by the data through methods such as lab reports, labeled drawings, graphic organizers, journals, summaries, oral reports, and technology-based reports.

(3) Scientific processes. The student uses critical thinking, scientific reasoning, and problem solving to make informed decisions within and outside the classroom. The student is expected to:

(A) analyze and evaluate scientific explanations using empirical evidence, logical reasoning, and experimental and observational testing;

(B) evaluate promotional claims that relate to biological issues such as product labeling and advertisements;

(C) evaluate the impact of scientific research on society and the environment;

(D) evaluate models according to their limitations in representing biological objects or events; and

(E) communicate and apply scientific information extracted from various sources.

(4) Science concepts. The student knows that cells are the basic structures of all living things with specialized parts that perform specific functions and that viruses are different from cells. The student is expected to:

(A) compare and contrast prokaryotic and eukaryotic cells;

(B) investigate and explain cellular processes, including homeostasis, energy conversions, transport of molecules, and synthesis of new molecules; and

(C) compare the structures of viruses to cells, describe viral reproduction, and describe the role of viruses in causing diseases such as human immunodeficiency virus (HIV) and influenza.

(5) Science concepts. The student knows how an organism grows and the importance of cell differentiation. The student is expected to:

(A) describe the stages of the cell cycle, including deoxyribonucleic acid (DNA) replication and mitosis, and the importance of the cell cycle to the growth of organisms;

(B) examine specialized cells, including roots, stems, and leaves of plants; and animal cells such as blood, muscle, and epithelium;

(C) describe the roles of DNA, ribonucleic acid (RNA), and environmental factors in cell differentiation; and

(D) recognize that disruptions of the cell cycle lead to diseases such as cancer.

(6) Science concepts. The student knows the mechanisms of genetics, including the role of nucleic acids and the principles of Mendelian Genetics. The student is expected to:

(A) identify components of DNA, and describe how information for specifying the traits of an organism is carried in the DNA;

(B) recognize that components that make up the genetic code are common to all organisms;

(C) explain the purpose and process of transcription and translation using models of DNA and RNA;

(D) recognize that gene expression is a regulated process;

(E) identify and illustrate changes in DNA and evaluate the significance of these changes;

(F) predict possible outcomes of various genetic combinations such as monohybrid crosses, dihybrid crosses and non-Mendelian inheritance;

(G) recognize the significance of meiosis to sexual reproduction; and

(H) describe how techniques such as DNA fingerprinting, genetic modifications, and chromosomal analysis are used to study the genomes of organisms.

(7) Science concepts. The student knows evolutionary theory is a scientific explanation for the unity and diversity of life. The student is expected to:

(A) analyze and evaluate how evidence of common ancestry among groups is provided by the fossil record, biogeography, and homologies, including anatomical, molecular, and developmental;

(B) analyze and evaluate the sufficiency or insufficiency of common ancestry to explain the sudden appearance, stasis, and sequential nature of groups in the fossil record;

(C) analyze and evaluate how natural selection produces change in populations, not individuals;

(D) analyze and evaluate how the elements of natural selection, including inherited variation, the potential of a population to produce more offspring than can survive, and a finite supply of environmental resources, result in differential reproductive success;

(E) analyze and evaluate the relationship of natural selection to adaptation and to the development of diversity in and among species; and

(F) analyze and evaluate the effects of other evolutionary mechanisms, including genetic drift, gene flow, mutation, and recombination.

(8) Science concepts. The student knows that taxonomy is a branching classification based on the shared characteristics of organisms and can change as new discoveries are made. The student is expected to:

(A) define taxonomy and recognize the importance of a standardized taxonomic system to the scientific community;

(B) categorize organisms using a hierarchical classification system based on similarities and differences shared among groups; and

(C) compare characteristics of taxonomic groups, including archaea, bacteria, protists, fungi, plants, and animals.

(9) Science concepts. The student knows the significance of various molecules involved in metabolic processes and energy conversions that occur in living organisms. The student is expected to:

(A) compare the structures and functions of different types of biomolecules, including carbohydrates, lipids, proteins, and nucleic acids;

(B) compare the reactants and products of photosynthesis and cellular respiration in terms of energy and matter; and

(C) identify and investigate the role of enzymes.

(10) Science concepts. The student knows that biological systems are composed of multiple levels. The student is expected to:

(A) describe the interactions that occur among systems that perform the functions of regulation, nutrient absorption, reproduction, and defense from injury or illness in animals;

(B) describe the interactions that occur among systems that perform the functions of transport, reproduction, and response in plants; and

(C) analyze the levels of organization in biological systems and relate the levels to each other and to the whole system.

(11) Science concepts. The student knows that biological systems work to achieve and maintain balance. The student is expected to:

(A) describe the role of internal feedback mechanisms in the maintenance of homeostasis;

(B) investigate and analyze how organisms, populations, and communities respond to external factors;

(C) summarize the role of microorganisms in both maintaining and disrupting the health of both organisms and ecosystems; and

(D) describe how events and processes that occur during ecological succession can change populations and species diversity.

(12) Science concepts. The student knows that interdependence and interactions occur within an environmental system. The student is expected to:

(A) interpret relationships, including predation, parasitism, commensalism, mutualism, and competition among organisms;

(B) compare variations and adaptations of organisms in different ecosystems;

(C) analyze the flow of matter and energy through trophic levels using various models, including food chains, food webs, and ecological pyramids;

(D) recognize that long-term survival of species is dependent on changing resource bases that are limited;

(E) describe the flow of matter through the carbon and nitrogen cycles and explain the consequences of disrupting these cycles; and

(F) describe how environmental change can impact ecosystem stability.

§112.35. Chemistry, Beginning with School Year 2010-2011.

(a) General requirements. Students shall be awarded one credit for successful completion of this course. Required prerequisites: one unit of high school science and Algebra I. Suggested prerequisite: completion of or concurrent enrollment in a second year of math. This course is recommended for students in Grade 10, 11, or 12.

(b) Introduction.

(1) Chemistry. In Chemistry, students conduct laboratory and field investigations, use scientific methods during investigations,

and make informed decisions using critical thinking and scientific problem solving. Students study a variety of topics that include characteristics of matter, use of the Periodic Table, development of atomic theory and chemical bonding, chemical stoichiometry, gas laws, solution chemistry, thermochemistry, and nuclear chemistry. Students will investigate how chemistry is an integral part of our daily lives.

(2) Nature of Science. Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process." This vast body of changing and increasing knowledge is described by physical, mathematical, and conceptual models. Students should know that some questions are outside the realm of science because they deal with phenomena that are not scientifically testable.

(3) Scientific inquiry. Scientific inquiry is the planned and deliberate investigation of the natural world. Scientific methods of investigation can be experimental, descriptive, or comparative. The method chosen should be appropriate to the question being asked.

(4) Science and social ethics. Scientific decision making is a way of answering questions about the natural world. Students should be able to distinguish between scientific decision-making methods and ethical and social decisions that involve the application of scientific information.

(5) Scientific systems. A system is a collection of cycles, structures, and processes that interact. All systems have basic properties that can be described in terms of space, time, energy, and matter. Change and constancy occur in systems as patterns and can be observed, measured, and modeled. These patterns help to make predictions that can be scientifically tested. Students should analyze a system in terms of its components and how these components relate to each other, to the whole, and to the external environment.

(c) Knowledge and skills.

(1) Scientific processes. The student, for at least 40% of instructional time, conducts laboratory and field investigations using safe, environmentally appropriate, and ethical practices. The student is expected to:

(A) demonstrate safe practices during all investigations; including use of safety showers, eyewash fountains, safety goggles, and fire extinguishers;

(B) know specific hazards of chemical substances such as flammability, corrosiveness, and radioactivity as summarized on the Material Safety Data Sheets (MSDS); and

(C) demonstrate an understanding of the use and conservation of resources and the proper disposal or recycling of materials.

(2) Scientific processes. The student uses scientific methods to solve investigative questions. The student is expected to:

(A) know the definition of science and understand that it has limitations, as specified in subsection (b)(2) of this section;

(B) know that scientific hypotheses are tentative and testable statements that must be capable of being supported or not supported by observational evidence. Hypotheses of durable explanatory power which have been tested over a wide variety of conditions are incorporated into theories;

(C) know that scientific theories are based on natural and physical phenomena and are capable of being tested by multiple independent researchers. Unlike hypotheses, scientific theories are well-established and highly-reliable explanations, but may be subject to change as new areas of science and new technologies are developed;

(D) distinguish between scientific hypotheses and scientific theories;

(E) plan and implement investigative procedures, including asking questions, formulating testable hypotheses, and selecting equipment and technology, including graphing calculators, computers and probes, sufficient scientific glassware such as beakers, Erlenmeyer flasks, pipettes, graduated cylinders, volumetric flasks, safety goggles, and burettes, electronic balances, and an adequate supply of consumable chemicals;

(F) collect data and make measurements with accuracy and precision;

(G) express and manipulate chemical quantities using scientific conventions and mathematical procedures, including dimensional analysis, scientific notation, and significant figures;

(H) organize, analyze, evaluate, make inferences, and predict trends from data; and

(I) communicate valid conclusions supported by the data through methods such as lab reports, labeled drawings, graphs, journals, summaries, oral reports, and technology-based reports.

(3) Scientific processes. The student uses critical thinking, scientific reasoning, and problem solving to make informed decisions within and outside the classroom. The student is expected to:

(A) analyze and evaluate scientific explanations using empirical evidence, logical reasoning, and experimental and observational testing.

(B) make responsible choices in selecting everyday products and services using scientific information;

(C) evaluate the impact of research on scientific thought, society, and the environment;

(D) describe the connection between chemistry and future careers; and

(E) research and describe the history of chemistry and contributions of scientists.

(4) Science concepts. The student knows the characteristics of matter and can analyze the relationships between chemical and physical changes and properties. The student is expected to:

(A) differentiate between physical and chemical changes and properties;

(B) identify extensive and intensive properties;

(C) compare solids, liquids, and gases in terms of compressibility, structure, shape, and volume; and

(D) classify matter as pure substances or mixtures through investigation of their properties.

(5) Science concepts. The student understands the historical development of the Periodic Table and can apply its predictive power. The student is expected to:

(A) explain the use of chemical and physical properties in the historical development of the Periodic Table;

(B) use the Periodic Table to identify and explain the properties of chemical families, including alkali metals, alkaline earth metals, halogens, noble gases, and transition metals; and

(C) use the Periodic Table to identify and explain periodic trends, including atomic and ionic radii, electronegativity, and ionization energy.

(6) Science concepts. The student knows and understands the historical development of atomic theory. The student is expected to:

(A) understand the experimental design and conclusions used in the development of modern atomic theory, including Dalton's Postulates, Thomson's discovery of electron properties, Rutherford's nuclear atom, and Bohr's nuclear atom;

(B) understand the electromagnetic spectrum and the mathematical relationships between energy, frequency, and wavelength of light;

(C) calculate the wavelength, frequency, and energy of light using Planck's constant and the speed of light;

(D) use isotopic composition to calculate average atomic mass of an element; and

(E) express the arrangement of electrons in atoms through electron configurations and Lewis valence electron dot structures.

(7) Science concepts. The student knows how atoms form ionic, metallic, and covalent bonds. The student is expected to:

(A) name ionic compounds containing main group or transition metals, covalent compounds, acids, and bases, using International Union of Pure and Applied Chemistry (IUPAC) nomenclature rules;

(B) write the chemical formulas of common polyatomic ions, ionic compounds containing main group or transition metals, covalent compounds, acids, and bases;

(C) construct electron dot formulas to illustrate ionic and covalent bonds;

(D) describe the nature of metallic bonding and apply the theory to explain metallic properties such as thermal and electrical conductivity, malleability, and ductility; and

(E) predict molecular structure for molecules with linear, trigonal planar, or tetrahedral electron pair geometries using Valence Shell Electron Pair Repulsion (VSEPR) theory.

(8) Science concepts. The student can quantify the changes that occur during chemical reactions. The student is expected to:

(A) define and use the concept of a mole;

(B) use the mole concept to calculate the number of atoms, ions, or molecules in a sample of material;

(C) calculate percent composition and empirical and molecular formulas;

(D) use the law of conservation of mass to write and balance chemical equations; and

(E) perform stoichiometric calculations, including determination of mass relationships between reactants and products, calculation of limiting reagents, and percent yield.

(9) Science concepts. The student understands the principles of ideal gas behavior, kinetic molecular theory, and the conditions that influence the behavior of gases. The student is expected to:

(A) describe and calculate the relations between volume, pressure, number of moles, and temperature for an ideal gas as described by Boyle's law, Charles' law, Avogadro's law, Dalton's law of partial pressure, and the ideal gas law;

(B) perform stoichiometric calculations, including determination of mass and volume relationships between reactants and products for reactions involving gases; and

(C) describe the postulates of kinetic molecular theory.

(10) Science concepts. The student understands and can apply the factors that influence the behavior of solutions. The student is expected to:

(A) describe the unique role of water in chemical and biological systems;

(B) develop and use general rules regarding solubility through investigations with aqueous solutions;

(C) calculate the concentration of solutions in units of molarity;

(D) use molarity to calculate the dilutions of solutions;

(E) distinguish between types of solutions such as electrolytes and nonelectrolytes and unsaturated, saturated, and supersaturated solutions;

(F) investigate factors that influence solubilities and rates of dissolution such as temperature, agitation, and surface area;

(G) define acids and bases and distinguish between Arrhenius and Bronsted-Lowery definitions and predict products in acid base reactions that form water;

(H) understand and differentiate among acid-base reactions, precipitation reactions, and oxidation-reduction reactions;

(I) define pH and use the hydrogen or hydroxide ion concentrations to calculate the pH of a solution; and

(J) distinguish between degrees of dissociation for strong and weak acids and bases.

(11) Science concepts. The student understands the energy changes that occur in chemical reactions. The student is expected to:

(A) understand energy and its forms, including kinetic, potential, chemical, and thermal energies;

(B) understand the law of conservation of energy and the processes of heat transfer;

(C) use thermochemical equations to calculate energy changes that occur in chemical reactions and classify reactions as exothermic or endothermic;

(D) perform calculations involving heat, mass, temperature change, and specific heat; and

(E) use calorimetry to calculate the heat of a chemical process.

(12) Science concepts. The student understands the basic processes of nuclear chemistry. The student is expected to:

(A) describe the characteristics of alpha, beta, and gamma radiation;

(B) describe radioactive decay process in terms of balanced nuclear equations; and

(C) compare fission and fusion reactions.

§112.36. Earth and Space Science, Beginning with School Year 2010-2011.

(a) General requirements. Students shall be awarded one credit for successful completion of this course. Required prerequisites: three units of science, one of which may be taken concurrently, and

three units of mathematics, one of which may be taken concurrently. This course is recommended for students in Grade 12 but may be taken by students in Grade 11.

(b) Introduction.

(1) Earth and Space Science (ESS). ESS is a capstone course designed to build on students' prior scientific and academic knowledge and skills to develop understanding of Earth's system in space and time.

(2) Nature of science. Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process." This vast body of changing and increasing knowledge is described by physical, mathematical, and conceptual models. Students should know that some questions are outside the realm of science because they deal with phenomena that are not scientifically testable.

(3) Scientific inquiry. Scientific inquiry is the planned and deliberate investigation of the natural world. Scientific methods of investigation can be experimental, descriptive, or comparative. The method chosen should be appropriate to the question being asked.

(4) Science and social ethics. Scientific decision making is a way of answering questions about the natural world. Students should be able to distinguish between scientific decision-making methods and ethical and social decisions that involve the application of scientific information.

(5) ESS themes. An Earth systems approach to the themes of Earth in space and time, solid Earth, and fluid Earth defined the selection and development of the concepts described in this paragraph.

(A) Earth in space and time. Earth has a long, complex, and dynamic history. Advances in technologies continue to further our understanding of the origin, evolution, and properties of Earth and planetary systems within a chronological framework. The origin and distribution of resources that sustain life on Earth are the result of interactions among Earth's subsystems over billions of years.

(B) Solid Earth. The geosphere is a collection of complex, interacting, dynamic subsystems linking Earth's interior to its surface. The geosphere is composed of materials that move between subsystems at various rates driven by the uneven distribution of thermal energy. These dynamic processes are responsible for the origin and distribution of resources as well as geologic hazards that impact society.

(C) Fluid Earth. The fluid Earth consists of the hydrosphere, cryosphere, and atmosphere subsystems. These subsystems interact with the biosphere and geosphere resulting in complex biogeochemical and geochemical cycles. The global ocean is the thermal energy reservoir for surface processes and, through interactions with the atmosphere, influences climate. Understanding these interactions and cycles over time has implications for life on Earth.

(6) Earth and space science strands. ESS has three strands used throughout each of the three themes: systems, energy, and relevance.

(A) Systems. A system is a collection of interacting physical, chemical, and biological processes that involves the flow of matter and energy on different temporal and spatial scales. Earth's system is composed of interdependent and interacting subsystems of the geosphere, hydrosphere, atmosphere, cryosphere, and biosphere within a larger planetary and stellar system. Change and constancy occur in Earth's system and can be observed, measured as patterns and cycles, and described or presented in models used to predict how Earth's system changes over time.

(B) Energy. The uneven distribution of Earth's internal and external thermal energy is the driving force for complex, dynamic, and continuous interactions and cycles in Earth's subsystems. These interactions are responsible for the movement of matter within and between the subsystems resulting in, for example, plate motions and ocean-atmosphere circulation.

(C) Relevance. The interacting components of Earth's system change by both natural and human-influenced processes. Natural processes include hazards such as flooding, earthquakes, volcanoes, hurricanes, meteorite impacts, and climate change. Some human-influenced processes such as pollution and nonsustainable use of Earth's natural resources may damage Earth's system. Examples include climate change, soil erosion, air and water pollution, and biodiversity loss. The time scale of these changes and their impact on human society must be understood to make wise decisions concerning the use of the land, water, air, and natural resources. Proper stewardship of Earth will prevent unnecessary degradation and destruction of Earth's subsystems and diminish detrimental impacts to individuals and society.

(c) Knowledge and skills.

(1) Scientific processes. The student conducts laboratory and field investigations, for at least 40% of instructional time, using safe, environmentally appropriate, and ethical practices. The student is expected to:

(A) demonstrate safe practices during laboratory and field investigations;

(B) make wise choices in the use and conservation of resources and the disposal or recycling of materials; and

(C) use the school's technology and information systems in a wise and ethical manner.

(2) Scientific processes. The student uses scientific methods during laboratory and field investigations. The student is expected to:

(A) know the definition of science and understand that it has limitations, as specified in subsection (b)(2) of this section;

(B) know that scientific hypotheses are tentative and testable statements that must be capable of being supported or not supported by observational evidence. Hypotheses of durable explanatory power which have been tested over a wide variety of conditions are incorporated into theories;

(C) know that scientific theories are based on natural and physical phenomena and are capable of being tested by multiple independent researchers. Unlike hypotheses, scientific theories are well-established and highly-reliable explanations, but may be subject to change as new areas of science and new technologies are developed;

(D) distinguish between scientific hypotheses and scientific theories;

(E) demonstrate the use of course equipment, techniques, and procedures, including computers and web-based computer applications;

(F) use a wide variety of additional course apparatuses, equipment, techniques, and procedures as appropriate such as satellite imagery and other remote sensing data, Geographic Information Systems (GIS), Global Positioning System (GPS), scientific probes, microscopes, telescopes, modern video and image libraries, weather stations,

fossil and rock kits, bar magnets, coiled springs, wave simulators, tectonic plate models, and planetary globes;

(G) organize, analyze, evaluate, make inferences, and predict trends from data;

(H) use mathematical procedures such as algebra, statistics, scientific notation, and significant figures to analyze data using the International System (SI) units; and

(I) communicate valid conclusions supported by data using several formats such as technical reports, lab reports, labeled drawings, graphic organizers, journals, presentations, and technical posters.

(3) Scientific processes. The student uses critical thinking, scientific reasoning, and problem solving to make informed decisions within and outside the classroom. The student is expected to:

(A) analyze and evaluate scientific explanations using empirical evidence, logical reasoning, and experimental and observational testing;

(B) analyze, evaluate, communicate, and apply scientific information extracted from written text such as current events, news reports, published journal articles, and marketing materials;

(C) evaluate the impact of research on scientific thought, society, and public policy;

(D) explore careers and collaboration among scientists in Earth and space sciences; and

(E) learn and understand the contributions of scientists to the historical development of Earth and space sciences.

(4) Earth in space and time. The student knows how Earth-based and space-based astronomical observations reveal differing theories about the structure, scale, composition, origin, and history of the universe. The student is expected to:

(A) evaluate the evidence concerning the Big Bang model such as red shift and cosmic microwave background radiation and the concept of an expanding universe that originated about 14 billion years ago;

(B) explain how the Sun and other stars transform matter into energy through nuclear fusion; and

(C) investigate the process by which a supernova can lead to the formation of successive generation stars and planets.

(5) Earth in space and time. The student understands the solar nebular accretionary disk model. The student is expected to:

(A) analyze how gravitational condensation of solar nebular gas and dust can lead to the accretion of planetesimals and protoplanets;

(B) investigate sources of heat, including kinetic heat of impact accretion, gravitational compression, and radioactive decay, which are thought to allow protoplanet differentiation into layers;

(C) contrast the characteristics of comets, asteroids, and meteoroids and their positions in the solar system, including the orbital regions of the terrestrial planets, the asteroid belt, gas giants, Kuiper Belt, and Oort Cloud;

(D) explore the historical and current hypotheses for the origin of the Moon, including the collision of Earth with a Mars-sized planetesimal;

(E) compare terrestrial planets to gas-giant planets in the solar system, including structure, composition, size, density, orbit, surface features, tectonic activity, temperature, and suitability for life; and

(F) compare extra-solar planets with planets in our solar system and describe how such planets are detected.

(6) Earth in space and time. The student knows the evidence for how Earth's atmospheres, hydrosphere, and geosphere formed and changed through time. The student is expected to:

(A) analyze the changes of Earth's atmosphere through time from the original hydrogen-helium atmosphere, the carbon dioxide-water vapor-methane atmosphere, and the current nitrogen-oxygen atmosphere;

(B) evaluate the role of volcanic outgassing and impact of water-bearing comets in developing Earth's atmosphere and hydrosphere;

(C) investigate how the formation of atmospheric oxygen and the ozone layer impacted the formation of the geosphere and biosphere; and

(D) evaluate the evidence that Earth's cooling led to tectonic activity, resulting in continents and ocean basins.

(7) Earth in space and time. The student knows that scientific dating methods of fossils and rock sequences are used to construct a chronology of Earth's history expressed in the geologic time scale. The student is expected to:

(A) evaluate relative dating methods using original horizontality, rock superposition, lateral continuity, cross-cutting relationships, unconformities, index fossils, and biozones based on fossil succession to determine chronological order;

(B) apply radiometric dating methods that can be used to calculate the ages of igneous rocks from Earth and the Moon and meteorites; and

(C) understand how multiple dating methods are used to construct the geologic time scale, which represents Earth's approximate 4.6-billion-year history.

(8) Earth in space and time. The student knows that fossils provide evidence for geological and biological evolution. Students are expected to:

(A) evaluate a variety of fossil types, proposed transitional fossils, fossil lineages, and significant fossil deposits and assess the arguments for and against universal common descent in light of this fossil evidence;

(B) explain how sedimentation, fossilization, and speciation affect the degree of completeness of the fossil record; and

(C) evaluate the significance of the terminal Permian and Cretaceous mass extinction events, including adaptive radiations of organisms after the events.

(9) Solid Earth. The student knows Earth's interior is differentiated chemically, physically, and thermally. The student is expected to:

(A) evaluate heat transfer through Earth's subsystems by radiation, convection, and conduction and include its role in plate tectonics, volcanism, ocean circulation, weather, and climate;

(B) examine the chemical, physical, and thermal structure of Earth's crust, mantle, and core, including the lithosphere and asthenosphere;

(C) explain how scientists use geophysical methods such as seismic wave analysis, gravity, and magnetism to interpret Earth's structure; and

(D) describe the formation and structure of Earth's magnetic field, including its interaction with charged solar particles to form the Van Allen belts and auroras.

(10) Solid Earth. The student knows that plate tectonics is the global mechanism for major geologic processes and that heat transfer, governed by the principles of thermodynamics, is the driving force. The student is expected to:

(A) investigate how new conceptual interpretations of data and innovative geophysical technologies led to the current theory of plate tectonics;

(B) describe how heat and rock composition affect density within Earth's interior and how density influences the development and motion of Earth's tectonic plates;

(C) explain how plate tectonics accounts for geologic processes and features, including sea floor spreading, ocean ridges and rift valleys, subduction zones, earthquakes, volcanoes, mountain ranges, hot spots, and hydrothermal vents;

(D) calculate the motion history of tectonic plates using equations relating rate, time, and distance to predict future motions, locations, and resulting geologic features;

(E) distinguish the location, type, and relative motion of convergent, divergent, and transform plate boundaries using evidence from the distribution of earthquakes and volcanoes; and

(F) evaluate the role of plate tectonics with respect to long-term global changes in Earth's subsystems such as continental buildup, glaciation, sea level fluctuations, mass extinctions, and climate change.

(11) Solid Earth. The student knows that the geosphere continuously changes over a range of time scales involving dynamic and complex interactions among Earth's subsystems. The student is expected to:

(A) compare the roles of erosion and deposition through the actions of water, wind, ice, gravity, and igneous activity by lava in constantly reshaping Earth's surface;

(B) explain how plate tectonics accounts for geologic surface processes and features, including folds, faults, sedimentary basin formation, mountain building, and continental accretion;

(C) analyze changes in continental plate configurations such as Pangaea and their impact on the biosphere, atmosphere, and hydrosphere through time;

(D) interpret Earth surface features using a variety of methods such as satellite imagery, aerial photography, and topographic and geologic maps using appropriate technologies; and

(E) evaluate the impact of changes in Earth's subsystems on humans such as earthquakes, tsunamis, volcanic eruptions, hurricanes, flooding, and storm surges and the impact of humans on Earth's subsystems such as population growth, fossil fuel burning, and use of fresh water.

(12) Solid Earth. The student knows that Earth contains energy, water, mineral, and rock resources and that use of these resources impacts Earth's subsystems. The student is expected to:

(A) evaluate how the use of energy, water, mineral, and rock resources affects Earth's subsystems;

(B) describe the formation of fossil fuels, including petroleum and coal;

(C) discriminate between renewable and nonrenewable resources based upon rate of formation and use;

(D) analyze the economics of resources from discovery to disposal, including technological advances, resource type, concentration and location, waste disposal and recycling, and environmental costs; and

(E) explore careers that involve the exploration, extraction, production, use, and disposal of Earth's resources.

(13) Fluid Earth. The student knows that the fluid Earth is composed of the hydrosphere, cryosphere, and atmosphere subsystems that interact on various time scales with the biosphere and geosphere. The student is expected to:

(A) quantify the components and fluxes within the hydrosphere such as changes in polar ice caps and glaciers, salt water incursions, and groundwater levels in response to precipitation events or excessive pumping;

(B) analyze how global ocean circulation is the result of wind, tides, the Coriolis effect, water density differences, and the shape of the ocean basins;

(C) analyze the empirical relationship between the emissions of carbon dioxide, atmospheric carbon dioxide levels, and the average global temperature trends over the past 150 years;

(D) discuss mechanisms and causes such as selective absorbers, major volcanic eruptions, solar luminance, giant meteorite impacts, and human activities that result in significant changes in Earth's climate;

(E) investigate the causes and history of eustatic sea-level changes that result in transgressive and regressive sedimentary sequences; and

(F) discuss scientific hypotheses for the origin of life by abiotic chemical processes in an aqueous environment through complex geochemical cycles.

(14) Fluid Earth. The student knows that Earth's global ocean stores solar energy and is a major driving force for weather and climate through complex atmospheric interactions. The student is expected to:

(A) analyze the uneven distribution of solar energy on Earth's surface, including differences in atmospheric transparency, surface albedo, Earth's tilt, duration of insolation, and differences in atmospheric and surface absorption of energy;

(B) investigate how the atmosphere is heated from Earth's surface due to absorption of solar energy, which is re-radiated as thermal energy and trapped by selective absorbers; and

(C) explain how thermal energy transfer between the ocean and atmosphere drives surface currents, thermohaline currents, and evaporation that influence climate.

(15) Fluid Earth. The student knows that interactions among Earth's five subsystems influence climate and resource availability, which affect Earth's habitability. The student is expected to:

(A) describe how changing surface-ocean conditions, including El Niño-Southern Oscillation, affect global weather and climate patterns;

(B) investigate evidence such as ice cores, glacial striations, and fossils for climate variability and its use in developing computer models to explain present and predict future climates;

(C) quantify the dynamics of surface and groundwater movement such as recharge, discharge, evapotranspiration, storage, residence time, and sustainability;

(D) explain the global carbon cycle, including how carbon exists in different forms within the five subsystems and how these forms affect life; and

(E) analyze recent global ocean temperature data to predict the consequences of changing ocean temperature on evaporation, sea level, algal growth, coral bleaching, hurricane intensity, and biodiversity.

§112.37. Environmental Systems, Beginning with School Year 2010-2011.

(a) General requirements. Students shall be awarded one credit for successful completion of this course. Suggested prerequisite: one unit high school life science and one unit of high school physical science. This course is recommended for students in Grade 11 or 12.

(b) Introduction.

(1) Environmental Systems. In Environmental Systems, students conduct laboratory and field investigations, use scientific methods during investigations, and make informed decisions using critical thinking and scientific problem solving. Students study a variety of topics that include: biotic and abiotic factors in habitats, ecosystems and biomes, interrelationships among resources and an environmental system, sources and flow of energy through an environmental system, relationship between carrying capacity and changes in populations and ecosystems, and changes in environments.

(2) Nature of science. Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process." This vast body of changing and increasing knowledge is described by physical, mathematical, and conceptual models. Students should know that some questions are outside the realm of science because they deal with phenomena that are not scientifically testable.

(3) Scientific inquiry. Scientific inquiry is the planned and deliberate investigation of the natural world. Scientific methods of investigation can be experimental, descriptive, or comparative. The method chosen should be appropriate to the question being asked.

(4) Science and social ethics. Scientific decision making is a way of answering questions about the natural world. Students should be able to distinguish between scientific decision-making methods and ethical and social decisions that involve the application of scientific information.

(5) Scientific systems. A system is a collection of cycles, structures, and processes that interact. All systems have basic properties that can be described in terms of space, time, energy, and matter. Change and constancy occur in systems as patterns and can be observed, measured, and modeled. These patterns help to make predictions that can be scientifically tested. Students should analyze a system in terms of its components and how these components relate to each other, to the whole, and to the external environment.

(c) Knowledge and skills.

(1) Scientific processes. The student, for at least 40% of instructional time, conducts hands-on laboratory and field investigations using safe, environmentally appropriate, and ethical practices. The student is expected to:

(A) demonstrate safe practices during laboratory and field investigations, including appropriate first aid responses to accidents that could occur in the field such as insect stings, animal bites, overheating, sprains, and breaks; and

(B) make wise choices in the use and conservation of resources and the disposal or recycling of materials.

(2) Scientific processes. The student uses scientific methods during laboratory and field investigations. The student is expected to:

(A) know the definition of science and understand that it has limitations, as specified in subsection (b)(2) of this section;

(B) know that scientific hypotheses are tentative and testable statements that must be capable of being supported or not supported by observational evidence. Hypotheses of durable explanatory power which have been tested over a wide variety of conditions are incorporated into theories;

(C) know that scientific theories are based on natural and physical phenomena and are capable of being tested by multiple independent researchers. Unlike hypotheses, scientific theories are well-established and highly-reliable explanations, but may be subject to change as new areas of science and new technologies are developed;

(D) distinguish between scientific hypotheses and scientific theories;

(E) follow or plan and implement investigative procedures, including making observations, asking questions, formulating testable hypotheses, and selecting equipment and technology;

(F) collect data individually or collaboratively, make measurements with precision and accuracy, record values using appropriate units, and calculate statistically relevant quantities to describe data, including mean, median, and range;

(G) demonstrate the use of course apparatuses, equipment, techniques, and procedures, including meter sticks, rulers, pipettes, graduated cylinders, triple beam balances, timing devices, pH meters or probes, thermometers, calculators, computers, Internet access, turbidity testing devices, hand magnifiers, work and disposable gloves, compasses, first aid kits, binoculars, field guides, water quality test kits or probes, soil test kits or probes, 100-foot appraiser's tapes, tarps, shovels, trowels, screens, buckets, and rock and mineral samples;

(H) use a wide variety of additional course apparatuses, equipment, techniques, materials, and procedures as appropriate such as air quality testing devices, cameras, flow meters, Global Positioning System (GPS) units, Geographic Information System (GIS) software, computer models, densiometers, clinometers, and field journals;

(I) organize, analyze, evaluate, build models, make inferences, and predict trends from data;

(J) perform calculations using dimensional analysis, significant digits, and scientific notation; and

(K) communicate valid conclusions supported by the data through methods such as lab reports, labeled drawings, graphic organizers, journals, summaries, oral reports, and technology-based reports.

(3) Scientific processes. The student uses critical thinking, scientific reasoning, and problem solving to make informed decisions within and outside the classroom. The student is expected to:

(A) analyze and evaluate scientific explanations using empirical evidence, logical reasoning, and experimental and observational testing;

(B) communicate and apply scientific information extracted from written text;

(C) make responsible choices in selecting everyday products and services using scientific information;

(D) evaluate the impact of research on scientific thought, society, and the environment;

(E) describe the connection between environmental science and future careers; and

(F) research and describe the history of environmental science and contributions of scientists.

(4) Science concepts. The student knows the relationships of biotic and abiotic factors within habitats, ecosystems, and biomes. The student is expected to:

(A) identify native plants and animals using a dichotomous key;

(B) assess the role of native plants and animals within a local ecosystem and compare them to plants and animals in ecosystems within four other biomes;

(C) diagram abiotic cycles, including the rock, hydrologic, carbon, and nitrogen cycles;

(D) make observations and compile data about fluctuations in abiotic cycles and evaluate the effects of abiotic factors on local ecosystems and local biomes;

(E) measure the concentration of solute, solvent, and solubility of dissolved substances such as dissolved oxygen, chlorides, and nitrates and describe their impact on an ecosystem;

(F) predict how the introduction or removal of an invasive species may alter the food chain and affect existing populations in an ecosystem;

(G) predict how species extinction may alter the food chain and affect existing populations in an ecosystem; and

(H) research and explain the causes of species diversity and predict changes that may occur in an ecosystem if species and genetic diversity is increased or reduced.

(5) Science concepts. The student knows the interrelationships among the resources within the local environmental system. The student is expected to:

(A) summarize methods of land use and management and describe its effects on land fertility;

(B) identify source, use, quality, management, and conservation of water;

(C) document the use and conservation of both renewable and non-renewable resources as they pertain to sustainability;

(D) identify renewable and non-renewable resources that must come from outside an ecosystem such as food, water, lumber, and energy;

(E) analyze and evaluate the economic significance and interdependence of resources within the environmental system; and

(F) evaluate the impact of waste management methods such as reduction, reuse, recycling, and composting on resource availability.

(6) Science concepts. The student knows the sources and flow of energy through an environmental system. The student is expected to:

(A) define and identify the components of the geosphere, hydrosphere, cryosphere, atmosphere, and biosphere and the interactions among them;

(B) describe and compare renewable and non-renewable energy derived from natural and alternative sources such as oil, natural gas, coal, nuclear, solar, geothermal, hydroelectric, and wind;

(C) explain the flow of energy in an ecosystem, including conduction, convection, and radiation;

(D) investigate and explain the effects of energy transformations in terms of the laws of thermodynamics within an ecosystem; and

(E) investigate and identify energy interactions in an ecosystem.

(7) Science concepts. The student knows the relationship between carrying capacity and changes in populations and ecosystems. The student is expected to:

(A) relate carrying capacity to population dynamics;

(B) calculate birth rates and exponential growth of populations;

(C) analyze and predict the effects of non-renewable resource depletion; and

(D) analyze and make predictions about the impact on populations of geographic locales due to diseases, birth and death rates, urbanization, and natural events such as migration and seasonal changes.

(8) Science concepts. The student knows that environments change naturally. The student is expected to:

(A) analyze and describe the effects on areas impacted by natural events such as tectonic movement, volcanic events, fires, tornadoes, hurricanes, flooding, tsunamis, and population growth;

(B) explain how regional changes in the environment may have a global effect;

(C) examine how natural processes such as succession and feedback loops restore habitats and ecosystems;

(D) describe how temperature inversions impact weather conditions, including El Niño and La Niña oscillations; and

(E) analyze the impact of temperature inversions on global warming, ice cap and glacial melting, and changes in ocean currents and surface temperatures.

(9) Science concepts. The student knows the impact of human activities on the environment. The student is expected to:

(A) identify causes of air, soil, and water pollution, including point and nonpoint sources;

(B) investigate the types of air, soil, and water pollution such as chlorofluorocarbons, carbon dioxide, pH, pesticide runoff, thermal variations, metallic ions, heavy metals, and nuclear waste;

(C) examine the concentrations of air, soil, and water pollutants using appropriate units;

(D) describe the effect of pollution on global warming, glacial and ice cap melting, greenhouse effect, ozone layer, and aquatic viability;

(E) evaluate the effect of human activities, including habitat restoration projects, species preservation efforts, nature conservancy groups, hunting, fishing, ecotourism, all terrain vehicles, and small personal watercraft, on the environment;

(F) evaluate cost-benefit trade-offs of commercial activities such as municipal development, farming, deforestation, overharvesting, and mining;

(G) discuss the positive and negative influence of commonly held ethical beliefs on scientific practices such as methods used to increase food production or the existence of global warming;

(H) discuss the impact of research and technology on social ethics and legal practices in situations such as the design of new buildings, recycling, or emission standards;

(I) research the advantages and disadvantages of "going green" such as organic gardening and farming, natural methods of pest control, hydroponics, xeriscaping, energy-efficient homes and appliances, and hybrid cars;

(J) analyze past and present local, state, and national legislation, including Texas automobile emissions regulations, the National Park Service Act, the Clean Air Act, the Clean Water Act, the Soil and Water Resources Conservation Act, and the Endangered Species Act; and

(K) analyze past and present international treaties and protocols such as the environmental Antarctic Treaty System, Montreal Protocol, and Kyoto Protocol.

§112.38. Integrated Physics and Chemistry, Beginning with School Year 2010-2011.

(a) General requirements. Students shall be awarded one credit for successful completion of this course. Prerequisites: none. This course is recommended for students in Grade 9 or 10.

(b) Introduction.

(1) Integrated Physics and Chemistry. In Integrated Physics and Chemistry, students conduct laboratory and field investigations, use scientific methods during investigation, and make informed decisions using critical thinking and scientific problem solving. This course integrates the disciplines of physics and chemistry in the following topics: force, motion, energy, and matter.

(2) Nature of science. Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process." This vast body of changing and increasing knowledge is described by physical, mathematical, and conceptual models. Students should know that some questions are outside the realm of science because they deal with phenomena that are not scientifically testable.

(3) Scientific inquiry. Scientific inquiry is the planned and deliberate investigation of the natural world. Scientific methods of investigation are experimental, descriptive, or comparative. The method chosen should be appropriate to the question being asked.

(4) Science and social ethics. Scientific decision making is a way of answering questions about the natural world. Students should be able to distinguish between scientific decision-making methods (scientific methods) and ethical and social decisions that involve science (the application of scientific information).

(5) Science, systems, and models. A system is a collection of cycles, structures, and processes that interact. All systems have basic properties that can be described in space, time, energy, and matter. Change and constancy occur in systems as patterns and can be observed, measured, and modeled. These patterns help to make predictions that can be scientifically tested. Students should analyze a system in terms of its components and how these components relate to each other, to the whole, and to the external environment.

(c) Knowledge and skills.

(1) Scientific processes. The student, for at least 40% of instructional time, conducts laboratory and field investigations using safe, environmentally appropriate, and ethical practices. The student is expected to:

(A) demonstrate safe practices during laboratory and field investigations; and

(B) make wise choices in the use and conservation of resources and the disposal or recycling of materials.

(2) Scientific processes. The student uses scientific methods during laboratory and field investigations. The student is expected to:

(A) know the definition of science and understand that it has limitations, as specified in subsection (b)(2) of this section;

(B) plan and implement investigative procedures, including asking questions, formulating testable hypotheses, and selecting equipment and technology;

(C) collect data and make measurements with precision;

(D) organize, analyze, evaluate, make inferences, and predict trends from data; and

(E) communicate valid conclusions.

(3) Scientific processes. The student uses critical thinking, scientific reasoning, and problem solving to make informed decisions. The student is expected to:

(A) analyze and evaluate scientific explanations using empirical evidence, logical reasoning, and experimental and observational testing;

(B) draw inferences based on data related to promotional materials for products and services;

(C) evaluate the impact of research on scientific thought, society, and the environment;

(D) describe connections between physics and chemistry and future careers; and

(E) research and describe the history of physics and chemistry and contributions of scientists.

(4) Science concepts. The student knows concepts of force and motion evident in everyday life. The student is expected to:

(A) describe and calculate an object's motion in terms of position, displacement, speed, and acceleration;

(B) measure and graph distance and speed as a function of time using moving toys;

(C) investigate how an object's motion changes only when a net force is applied, including activities and equipment such as toy cars, vehicle restraints, sports activities, and classroom objects;

(D) assess the relationship between force, mass, and acceleration, noting the relationship is independent of the nature of the force, using equipment such as dynamic carts, moving toys, vehicles, and falling objects;

(E) apply the concept of conservation of momentum using action and reaction forces such as students on skateboards;

(F) describe the gravitational attraction between objects of different masses at different distances, including satellites; and

(G) examine electrical force as a universal force between any two charged objects and compare the relative strength of the electrical force and gravitational force.

(5) Science concepts. The student recognizes multiple forms of energy and knows the impact of energy transfer and energy conservation in everyday life. The student is expected to:

(A) recognize and demonstrate that objects and substances in motion have kinetic energy such as vibration of atoms, water flowing down a stream moving pebbles, and bowling balls knocking down pins;

(B) demonstrate common forms of potential energy, including gravitational, elastic, and chemical, such as a ball on an inclined plane, springs, and batteries;

(C) demonstrate that moving electric charges produce magnetic forces and moving magnets produce electric forces;

(D) investigate the law of conservation of energy;

(E) investigate and demonstrate the movement of thermal energy through solids, liquids, and gases by convection, conduction, and radiation such as in weather, living, and mechanical systems;

(F) evaluate the transfer of electrical energy in series and parallel circuits and conductive materials;

(G) explore the characteristics and behaviors of energy transferred by waves, including acoustic, seismic, light, and waves on water as they superpose on one another, bend around corners, reflect off surfaces, are absorbed by materials, and change direction when entering new materials;

(H) analyze energy conversions such as those from radiant, nuclear, and geothermal sources; fossil fuels such as coal, gas, oil; and the movement of water or wind; and

(I) critique the advantages and disadvantages of various energy sources and their impact on society and the environment.

(6) Science concepts. The student knows that relationships exist between the structure and properties of matter. The student is expected to:

(A) examine differences in physical properties of solids, liquids, and gases as explained by the arrangement and motion of atoms, ions, or molecules of the substances and the strength of the forces of attraction between those particles;

(B) relate chemical properties of substances to the arrangement of their atoms or molecules;

(C) analyze physical and chemical properties of elements and compounds such as color, density, viscosity, buoyancy, boiling point, freezing point, conductivity, and reactivity;

(D) relate the physical and chemical behavior of an element, including bonding and classification, to its placement on the Periodic Table; and

(E) relate the structure of water to its function as a solvent and investigate the properties of solutions and factors affecting gas and solid solubility, including nature of solute, temperature, pressure, pH, and concentration.

(7) Science concepts. The student knows that changes in matter affect everyday life. The student is expected to:

(A) investigate changes of state as it relates to the arrangement of particles of matter and energy transfer;

(B) recognize that chemical changes can occur when substances react to form different substances and that these interactions are largely determined by the valence electrons;

(C) demonstrate that mass is conserved when substances undergo chemical change and that the number and kind of atoms are the same in the reactants and products;

(D) analyze energy changes that accompany chemical reactions such as those occurring in heat packs, cold packs, and glow sticks and classify them as exothermic or endothermic reactions;

(E) describe types of nuclear reactions such as fission and fusion and their roles in applications such as medicine and energy production; and

(F) research and describe the environmental and economic impact of the end- products of chemical reactions such as those that may result in acid rain, degradation of water and air quality, and ozone depletion.

§112.39. Physics, Beginning with School Year 2010-2011.

(a) General requirements. Students shall be awarded one credit for successful completion of this course. Algebra I is suggested as a prerequisite or co-requisite. This course is recommended for students in Grade 9, 10, 11, or 12.

(b) Introduction.

(1) Physics. In Physics, students conduct laboratory and field investigations, use scientific methods during investigations, and make informed decisions using critical thinking and scientific problem solving. Students study a variety of topics that include: laws of motion; changes within physical systems and conservation of energy and momentum; forces; thermodynamics; characteristics and behavior of waves; and atomic, nuclear, and quantum physics. Students who successfully complete Physics will acquire factual knowledge within a conceptual framework, practice experimental design and interpretation, work collaboratively with colleagues, and develop critical thinking skills.

(2) Nature of science. Science, as defined by the National Academy of Sciences, is the "use of evidence to construct testable explanations and predictions of natural phenomena, as well as the knowledge generated through this process." This vast body of changing and increasing knowledge is described by physical, mathematical, and conceptual models. Students should know that some questions are outside the realm of science because they deal with phenomena that are not scientifically testable.

(3) Scientific inquiry. Scientific inquiry is the planned and deliberate investigation of the natural world. Scientific methods of investigation can be experimental, descriptive, or comparative. The method chosen should be appropriate to the question being asked.

(4) Science and social ethics. Scientific decision making is a way of answering questions about the natural world. Students should be able to distinguish between scientific decision-making methods and ethical and social decisions that involve the application of scientific information.

(5) Scientific systems. A system is a collection of cycles, structures, and processes that interact. All systems have basic properties that can be described in terms of space, time, energy, and matter. Change and constancy occur in systems as patterns and can be

observed, measured, and modeled. These patterns help to make predictions that can be scientifically tested. Students should analyze a system in terms of its components and how these components relate to each other, to the whole, and to the external environment.

(c) Knowledge and skills.

(1) Scientific processes. The student conducts investigations, for at least 40% of instructional time, using safe, environmentally appropriate, and ethical practices. These investigations must involve actively obtaining and analyzing data with physical equipment, but may also involve experimentation in a simulated environment as well as field observations that extend beyond the classroom. The student is expected to:

(A) demonstrate safe practices during laboratory and field investigations; and

(B) make informed choices in the use and conservation of resources, recycling of materials, and the safe disposal of science classroom or household chemicals.

(2) Scientific processes. The student uses a systematic approach to answer scientific laboratory and field investigative questions. The student is expected to:

(A) know the definition of science and understand that it has limitations, as specified in subsection (b)(2) of this section;

(B) know that scientific hypotheses are tentative and testable statements that must be capable of being supported or not supported by observational evidence. Hypotheses of durable explanatory power which have been tested over a wide variety of conditions are incorporated into theories;

(C) know that scientific theories are based on natural and physical phenomena and are capable of being tested by multiple independent researchers. Unlike hypotheses, scientific theories are well-established and highly-reliable explanations, but may be subject to change as new areas of science and new technologies are developed;

(D) distinguish between scientific hypotheses and scientific theories;

(E) design and implement investigative procedures, including making observations, asking well-defined questions, formulating testable hypotheses, identifying variables, selecting appropriate equipment and technology, and evaluating numerical answers for reasonableness;

(F) demonstrate the use of course apparatus, equipment, techniques, and procedures, including multimeters (current, voltage, resistance), triple beam balances, batteries, clamps, dynamics demonstration equipment, collision apparatus, data acquisition probes, discharge tubes with power supply (H, He, Ne, Ar), hand-held visual spectroscopes, hot plates, slotted and hooked lab masses, bar magnets, horseshoe magnets, plane mirrors, convex lenses, pendulum support, power supply, ring clamps, ring stands, stopwatches, trajectory apparatus, tuning forks, carbon paper, graph paper, magnetic compasses, polarized film, prisms, protractors, resistors, friction blocks, mini lamps (bulbs) and sockets, electrostatics kits, 90-degree rod clamps, metric rulers, spring scales, knife blade switches, Celsius thermometers, meter sticks, scientific calculators, graphing technology, computers, cathode ray tubes with horseshoe magnets, ballistic carts or equivalent, resonance tubes, spools of nylon thread or string, containers of iron filings, rolls of white craft paper, copper wire, Periodic Table, electromagnetic spectrum charts, slinky springs, wave motion ropes, and laser pointers;

(G) use a wide variety of additional course apparatus, equipment, techniques, materials, and procedures as appropriate such as ripple tank with wave generator, wave motion rope, micrometer, caliper, radiation monitor, computer, ballistic pendulum, electroscope, inclined plane, optics bench, optics kit, pulley with table clamp, resonance tube, ring stand screen, four inch ring, stroboscope, graduated cylinders, and ticker timer;

(H) make measurements with accuracy and precision and record data using scientific notation and International System (SI) units;

(I) identify and quantify causes and effects of uncertainties in measured data;

(J) organize and evaluate data and make inferences from data, including the use of tables, charts, and graphs;

(K) communicate valid conclusions supported by the data through various methods such as lab reports, labeled drawings, graphic organizers, journals, summaries, oral reports, and technology-based reports; and

(L) express and manipulate relationships among physical variables quantitatively, including the use of graphs, charts, and equations.

(3) Scientific processes. The student uses critical thinking, scientific reasoning, and problem solving to make informed decisions within and outside the classroom. The student is expected to:

(A) analyze and evaluate scientific explanations by using empirical evidence, logical reasoning, and experimental and observational testing;

(B) communicate and apply scientific information extracted from written text;

(C) evaluate promotional claims such as product labeling and advertisements;

(D) explain the impacts of the scientific contributions of a variety of historical and contemporary scientists on scientific thought and society;

(E) research and describe the connections between physics and future careers; and

(F) express and interpret relationships symbolically in accordance with accepted theories to make predictions and solve problems mathematically, including problems requiring proportional reasoning and graphical vector addition.

(4) Science concepts. The student knows and applies the laws governing motion in a variety of situations. The student is expected to:

(A) generate and interpret graphs and charts describing different types of motion, including the use of real-time technology such as motion detectors or photogates;

(B) describe and analyze motion in one dimension using equations with the concepts of distance, displacement, speed, average velocity, instantaneous velocity, and acceleration;

(C) analyze and describe accelerated motion in two dimensions using equations, including projectile and circular examples;

(D) calculate the effect of forces on objects, including the law of inertia, the relationship between force and acceleration, and the nature of force pairs between objects;

(E) develop and interpret free-body force diagrams; and

(F) identify and describe motion relative to different frames of reference.

(5) Science concepts. The student knows the nature of forces in the physical world. The student is expected to:

(A) research and describe the historical development of the concepts of gravitational, electromagnetic, weak nuclear, and strong nuclear forces;

(B) describe and calculate how the magnitude of the gravitational force between two objects depends on their masses and the distance between their centers;

(C) describe and calculate how the magnitude of the electrical force between two objects depends on their charges and the distance between their centers;

(D) identify examples of electric and magnetic forces in everyday life;

(E) characterize materials as conductors or insulators based on their electrical properties;

(F) design, construct, and calculate in terms of current through, potential difference across, resistance of, and power used by electric circuit elements connected in both series and parallel combinations;

(G) investigate and describe the relationship between electric and magnetic fields in applications such as generators, motors, and transformers; and

(H) describe evidence for and effects of the strong and weak nuclear forces in nature.

(6) Science concepts. The student knows that changes occur within a physical system and applies the laws of conservation of energy and momentum. The student is expected to:

(A) investigate and calculate quantities using the work-energy theorem in various situations;

(B) investigate examples of kinetic and potential energy and their transformations;

(C) calculate the mechanical energy of, power generated within, impulse applied to, and momentum of a physical system;

(D) demonstrate and apply the laws of conservation of energy and conservation of momentum in one dimension;

(E) describe how the macroscopic properties of a thermodynamic system such as temperature, specific heat, and pressure are related to the molecular level of matter, including kinetic or potential energy of atoms;

(F) contrast and give examples of different processes of thermal energy transfer, including conduction, convection, and radiation; and

(G) analyze and explain everyday examples that illustrate the laws of thermodynamics, including the law of conservation of energy and the law of entropy.

(7) Science concepts. The student knows the characteristics and behavior of waves. The student is expected to:

(A) examine and describe oscillatory motion and wave propagation in various types of media;

(B) investigate and analyze characteristics of waves, including velocity, frequency, amplitude, and wavelength, and calculate using the relationship between wavespeed, frequency, and wavelength;

(C) compare characteristics and behaviors of transverse waves, including electromagnetic waves and the electromagnetic spectrum, and characteristics and behaviors of longitudinal waves, including sound waves;

(D) investigate behaviors of waves, including reflection, refraction, diffraction, interference, resonance, and the Doppler effect;

(E) describe and predict image formation as a consequence of reflection from a plane mirror and refraction through a thin convex lens; and

(F) describe the role of wave characteristics and behaviors in medical and industrial applications.

(8) Science concepts. The student knows simple examples of atomic, nuclear, and quantum phenomena. The student is expected to:

(A) describe the photoelectric effect and the dual nature of light;

(B) compare and explain the emission spectra produced by various atoms;

(C) describe the significance of mass-energy equivalence and apply it in explanations of phenomena such as nuclear stability, fission, and fusion; and

(D) give examples of applications of atomic and nuclear phenomena such as radiation therapy, diagnostic imaging, and nuclear power and examples of applications of quantum phenomena such as digital cameras.

§112.41. Implementation of Texas Essential Knowledge and Skills for Science, High School.

The provisions of §§112.42 - 112.49 of this subchapter shall be superseded by §§112.32 - 112.39 of this subchapter beginning with the 2010-2011 school year [~~implemented by school districts beginning September 1, 1998, and at that time shall supersede §75.64 of this title (relating to Science)~~].

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

Filed with the Office of the Secretary of State on February 2, 2009.

TRD-200900389
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: March 15, 2009
For further information, please call: (512) 475-1497

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CHAPTER 129. STUDENT ATTENDANCE
SUBCHAPTER B. STUDENT ATTENDANCE ACCOUNTING

19 TAC §129.21

The State Board of Education (SBOE) proposes an amendment to §129.21, concerning student attendance accounting. The section provides requirements for student attendance accounting for state funding purposes. The proposed amendment would update the rule to reflect statutory changes and changes in other administrative rules that provide for an alternative attendance

accounting program. The proposed amendment would modify certain attendance accounting requirements that school districts must follow.

Section 129.21 provides the student attendance accounting requirements school districts must follow and describes the manner in which student attendance is earned. The rule also provides a list of conditions under which a student who is not actually on campus at the time attendance is taken may be considered in attendance. The proposed amendment would update the rule to reflect statutory changes and changes in other administrative rules that provide for an alternative attendance accounting program and would modify the rule in the following ways.

In subsection (i), exceptions to the stipulation that attendance for all grades must be determined by absences recorded at certain times of the school day would be added.

In subsection (i)(1), an explanation of how students enrolled on a full-day basis earn attendance would be added.

A new subsection (i)(2) would be added to provide an explanation of how students who are enrolled in and participating in an alternative attendance accounting program earn attendance. Existing subsections (i)(2) and (i)(3) would be renumbered accordingly.

In existing subsection (i)(3), to be renumbered (i)(4), an exception to the stipulation that students absent at the time attendance is taken are to be counted absent for the entire day would be added. Also, an exception to the stipulation that students present at the time attendance is taken are to be counted present for the entire day would be added.

In subsection (j), an exception to the stipulation that a student who is not in school at the time attendance is taken must not be counted in attendance would be added.

Subsection (k)(4) would be modified to clarify that not only are days for travel to and from the site where a student will observe holy days or attend a required court appearance to be counted as excused absences, but so are the days when the student is actually observing the holy days or attending the required court appearance.

A new subsection (k)(5), excusing absences for sounding "Taps" at a military honors funeral held in Texas for a deceased veteran, would be added. The existing subsection (k)(5) would be renumbered accordingly.

Existing subsection (k)(5), to be renumbered (k)(6), would be modified to stipulate that an absence for a documented appointment with a health care professional may be counted as excused only if the student begins classes or returns to school on the same day of the appointment.

Throughout the rule, corrections to word usage would be made. The proposed rule action would also update the name of a state agency referenced in the rule.

Shirley Beaulieu, associate commissioner for finance/chief financial officer, has determined that for the first five-year period the amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendment.

Ms. Beaulieu has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment would be updating the rule to reflect statutory changes and changes in other administrative rules. Specifically, the proposed amendment would update the rule to include requirements related to alternative attendance accounting programs. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

In addition, there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register.*

The amendment is proposed under the Texas Education Code, §42.004, which authorizes the commissioner of education, in accordance with the rules of the State Board of Education, to take such action and require such reports consistent with TEC, Chapter 42, as may be necessary to implement and administer the Foundation School Program.

The amendment implements the Texas Education Code, §42.004 and §25.087.

§129.21. Requirements for Student Attendance Accounting for State Funding Purposes.

(a) All public schools in Texas must [~~shall~~] maintain records to reflect the average daily attendance (ADA) for the allocation of Foundation School Program (FSP) funds and other funds allocated by the Texas Education Agency (TEA). Superintendents, principals, and teachers are [~~shall be~~] responsible to their school boards and to the state to maintain accurate, current attendance records.

(b) The commissioner of education is [~~shall be~~] responsible for providing guidelines for attendance accounting in accordance with state law.

(c) The commissioner of education is [~~shall be~~] responsible for providing all the necessary records and procedures required of school districts in preparation of a daily attendance register.

(d) Districts must [~~shall~~] maintain records and make reports concerning student attendance and participation in special programs as required by the commissioner of education. Effective January 1, 2001, before a district or charter school may count a student in attendance under this section or in attendance when the student was allowed to leave campus during any part of the school day, the district or charter must [~~shall~~] adopt a policy addressing parental consent for a student to leave campus and distribute the policy to staff and to all parents of students in the district or charter school.

(e) If a school district chooses to use a locally developed record or automated system, the record or automated system [~~it~~] must contain the minimum information required by the commissioner of education.

(f) The commissioner of education must [~~shall~~] provide for special circumstances regarding attendance accounting in accord with the provisions of law.

(g) When classroom instruction is organized on a departmentalized basis, a central attendance accounting system must be used.

(h) A student must be enrolled for at least two hours to be considered in membership for one half day [~~half-day~~], and for at least four hours to be considered in membership for one full day.

(i) Attendance for all grades must [~~shall~~] be determined by the absences recorded in the second or fifth period of the day, unless permission has been obtained from the TEA [~~Texas Education Agency~~] for an alternate period to record absences, unless the local school board adopts a district policy for recording absences in an alternate period or hour, or unless the students for which attendance is being taken are enrolled in and participating in an alternative attendance accounting program approved by the commissioner of education.

(1) Students enrolled on a half-day basis may earn only one half day [~~half-day~~] of attendance each school day. Attendance is determined for these pupils by recording absences in a period during the half day [~~half-day~~] that they are scheduled to be present. Students enrolled on a full-day basis may earn one full day of attendance each school day.

(2) Students who are enrolled in and participating in an alternative attendance accounting program approved by the commissioner of education will earn attendance according to the statutory and rule provisions applicable to that program.

(3) [~~(2)~~] The established period in which absences are recorded may not be changed during the school year.

(4) [~~(3)~~] Students absent at the time the attendance roll is taken, during the daily period selected, are counted absent for the entire day, unless the students are enrolled in and participating in an alternative attendance accounting program approved by the commissioner of education. Students present at the time the attendance roll is taken, during the daily period selected, are counted present for the entire day, unless the students are enrolled in and participating in an alternative attendance accounting program approved by the commissioner of education.

(j) A student who is not actually in school at the time attendance is taken must [~~shall~~] not be counted in attendance for FSP [~~Foundation School Program~~] funding purposes, unless the student is participating in an activity that [~~which~~] meets the conditions set out in subsection (k) of this section, or unless the student is enrolled in and participating in an alternative attendance accounting program approved by the commissioner of education.

(k) A student not actually on campus at the time attendance is taken may be considered in attendance for FSP funding [~~Foundation School Program~~] purposes under the following conditions.

(1) The student is participating in an activity that [~~which~~] is approved by the local board of school trustees and is under the direction of a member of the professional staff of the school district, or an adjunct staff member who:

(A) has a minimum of a bachelor's degree; and

(B) is eligible for participation in the Teacher Retirement System of Texas.

(2) The student is participating in a mentorship approved by district personnel to serve as one or more of the advanced measures needed to complete the Distinguished Achievement Program outlined in Chapter 74 of this title (relating to Curriculum Requirements) [~~§74.13(a)(3) of this title (relating to Distinguished Achievement Program--Advanced High School Program)~~].

(3) The student is a Medicaid-eligible child participating in the Early and Periodic Screening, Diagnosis, and Treatment Program [~~(EPSDT)~~] implemented by the Texas Health and Human Services Commission [~~Department of Human Services with contractual cooperation of the Texas Department of Health~~]. Such students may be excused for up to one day at any time without loss of ADA.

(4) The student is observing holy days or attending a required court appearance as described in the Texas Education Code (TEC), §25.087. A student who is observing holy days or attending a required court appearance is allowed up to one day of excused travel for traveling to the site where the student will observe the holy days or attend the required court appearance and up to one day of excused travel for traveling from that site.

(5) The student is sounding "Taps" at a military honors funeral held in Texas for a deceased veteran as described in the TEC, §25.087.

~~[(4) Excused days for travel under the Texas Education Code, §25.087, shall be limited to not more than one day for travel to and one day for travel from the site where the student will observe the holy days.]~~

(6) [~~(5)~~] The student has a documented appointment with a health care professional during regular school hours, if the student begins classes or returns to school on the same day of the appointment, as described in the TEC, §25.087. The appointment should be supported by a document such as a note from the health care professional.

(l) In accordance with the TEC [~~Texas Education Code~~], §25.087, students may be excused for medical, dental, and psychological appointments; for special education assessment procedures; and for special education related services.

(m) The superintendent of schools is responsible for the safekeeping of all attendance records and reports. The superintendent of schools may determine whether the properly certified attendance records or reports for the school year are to be filed in the central office or properly stored on the respective school campuses of the district. Regardless of where such records are filed or stored, they must be readily available for audit by the TEA division responsible for performing audits [~~Division of Audits of the Texas Education Agency~~].

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

Filed with the Office of the Secretary of State on February 2, 2009.

TRD-200900390
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 27. BOARD OF TAX PROFESSIONAL EXAMINERS

CHAPTER 623. REGISTRATION AND CERTIFICATION

22 TAC §623.2

The Board of Tax Professional Examiners proposes an amendment to §623.2, concerning Eligibility To Register. This amendment will allow residents in bordering states to be registered with the Board.

Mr. David Montoya, Executive Director for the Board of Tax Professional Examiners, has determined the probable economic cost to persons required to comply with the amendment for the first five years will be zero because the amendment merely provides for a more thorough review of the reinstatement application.

Mr. Montoya also has determined that for each year of the first five years the amendment as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to conform the board rule to better protect the public. There will be no effect on small or micro businesses.

The Board requests comments on the substance and effect of the proposed amendment from any interested person. Comments must be received at the Board no later than noon on March 29, 2009. Comments should be addressed to David E. Montoya, Executive Director, Texas State Board of Tax Professional Examiners, 333 Guadalupe, Tower II, Suite 520, Austin, Texas 78701 or faxed to his attention at (512) 305-7304.

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 business; if the amendment is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendment is to be adopted; and if the amendment is believed to have such an effect.

The amendment is proposed under the authority of Texas Civil Statutes, Occupations Code, Chapter 1151, Property Taxation Professional Certification Act, which provide the Board of Tax Professional Examiners with the authority to promulgate rules consistent with the statute.

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

§623.2. Eligibility To Register.

To be registered an applicant must be:

(1) at least 18 years of age;

(2) a resident of the United States [~~State of Texas~~];

(3) a person of good moral character;

(4) a graduate of an accredited high school or holder of high school graduation equivalency;

(5) actively engaged in appraisal, assessing/collecting, or collecting for an appraisal district, tax office, or private firm working for an appraisal district or tax office.

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

Filed with the Office of the Secretary of State on January 26, 2009.

TRD-200900306

David E. Montoya
Executive Director
Board of Tax Professional Examiners
Earliest possible date of adoption: March 15, 2009
For further information, please call: (512) 305-7300

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 9. TITLE INSURANCE
SUBCHAPTER A. BASIC MANUAL OF RULES, RATES AND FORMS FOR THE WRITING OF TITLE INSURANCE IN THE STATE OF TEXAS

28 TAC §9.40

The Texas Department of Insurance proposes new §9.40, concerning the adoption by reference of certain amendments to the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* (Basic Manual). The proposed Basic Manual amendments address procedural rules, rates, and forms relating to mineral interests. These proposed amendments are separate from the additions or amendments proposed to the Basic Manual that were considered at the rulemaking phase of the 2008 Texas Title Insurance Biennial Public Hearing held on October 2, 2008, Docket Number 2690.

This proposal is necessary to adopt new rules, rates, and forms that will ensure that the title insurance coverage for mineral interests, if any, will be uniformly handled throughout the state and across varying types of transactions. The Department became aware that despite a uniform premium and title insurance policy, coverage for mineral interests was being handled differently depending on the type of transaction, location of the transaction, local historical custom, and even the type of plant maintained by the title agent.

The Commissioner investigated mineral coverage issues through a work group convened May 22, 2008 that met with Department staff; and at a July 15, 2008 public hearing, Docket Number 2684. Additionally, a public meeting was held December 16, 2008. At the public meeting, the Texas Land Title Association presented on behalf of industry and other concerned persons a *Minerals Agreed Resolution.* The *Minerals Agreed Resolution* consisted of eight documents, including a proposed amended consumer notice, and new and amended procedural rules, rate rules, and endorsement forms that were reported to the Commissioner to be the consensus agreement of the persons involved as a means to uniformly handle and provide title insurance coverage for mineral interests, if any, throughout the state and across varying types of transactions. The Department is proposing these items to the entire title industry and public for formal consideration to be adopted as amendments to the Basic Manual.

For the purposes of this proposal, the Department has assigned the proposed amendments and additions to the Basic Manual, as revised, item numbers 1 - 8 followed by the suffix MAR. Each of these eight items are proposed to be adopted by reference and

incorporated into the Basic Manual. The Department has created a brief summary of the substance of each item proposed for adoption and included that summary in this proposal. As indicated in the Item 1-MAR summary, the proposed amendment to the *Texas Title Insurance Information* disclosure form was amended from the proposal submitted in the *Minerals Agreed Resolution* based on comments received after the December 16, 2008 public meeting from the Office of Public Insurance Counsel. The proposals also reflect non-substantive changes that resulted from converting the format of the submitted proposals and preparing and identifying them for this proposal.

This proposal combines both rulemaking and ratemaking elements. The ratemaking element will not be conducted as a contested case because the Insurance Code Chapter 40 does not specifically apply to proceedings under Chapter 2703, with the exception of the biennial hearings under the Insurance Code §2703.205. Interested persons may submit either written comments, oral comments at the public hearing, or both. The comment period for both written and oral comments will close at the end of the public hearing, unless extended by the Commissioner.

Proposed item 7-MAR would amend an existing rate in Rate Rule R-29. The Insurance Code §2703.202(a) requires the Commissioner to hold a public hearing before the Commissioner may change a premium rate that has been previously fixed by the Commissioner. Similarly, proposed item 8-MAR adds new Rate Rule R-29.1. Pursuant to the Insurance Code §2703.201, the Commissioner can fix a premium rate following reasonable notice and opportunity for a hearing being afforded to title insurance companies, title insurance agents, and the public. The Insurance Code §2703.206 authorizes the Commissioner to order a public hearing to consider adoption of premium rates and other matters relating to regulating the business of title insurance as the Commissioner determines necessary or proper. Additionally, the Department has received a request from Sierra Title Guaranty Company to hold a public hearing for the purpose of considering amending the existing rate in Rate Rule R-29 under the Insurance Code §2703.202(b). Thus, the Commissioner will hold a public hearing for this proposal, including the amended and new rates as proposed in Item 7-MAR and Item 8-MAR , to occur on April 23, 2009, and continue thereafter at dates, times, and places designated by the Commissioner until conclusion.

The rates indicated in proposed Item 7-MAR and Item 8-MAR have not been determined to be accurate or lawful by the Department. The rates indicated are simply those that were submitted in the *Minerals Agreed Resolution.* The final rates, if any, for proposed Item 7-MAR and Item 8-MAR shall be determined by the Commissioner based on written and oral comments received through the end of the April 23, 2009 public hearing, or as extended by the Commissioner. Therefore, title insurance companies, title insurance agents and members of the public having an interest in such rates must submit through written comments, or orally at the public hearing, all relevant income and expense information in support of, in opposition to, or for a change in, the proposed items, including the proposed rates in proposed Item 7-MAR and proposed Item 8-MAR.

The following items are proposed for approval:

Item 1-MAR--Submission by Texas Land Title Insurance Association (TLTA) that has been amended by the Office of Public Insurance Counsel (OPIC). The proposal would amend the Texas Title Insurance Information page by adding information stating the title insurance policy is not intended to be an abstract of title; that the Title Insurance Company is not obligated to determine the ownership of any mineral interests; a general statement that while the Title Insurance Company may refuse to issue the policy without an exclusion or an exception as to Minerals and Mineral Rights in the Policy, optional endorsements are available for purchase; and updated references to the Department.

The OPIC amendment added additional information concerning the optional endorsements available for purchase and the last sentence concerning coverage.

Item 2-MAR--Submission by TLTA proposing to add Procedural Rule P-5.1 authorizing a Company to insert into a Policy or any other title insuring form a prescribed exception or a prescribed exclusion for minerals in either Schedule A or Schedule B respectively.

Item 3-MAR--Submission By TLTA proposing to amend Procedural Rule P-50 concerning the use of the *Restrictions, Encroachments, Minerals Endorsement* with Loan and Owner policies (Forms T-19 or T-19.1 respectively.) by removing the distinction between the use of a Form T-19 with respect to residential and non-residential property, eliminating language concerning receipt of premium, and conforming the policy names.

Item 4-MAR--Submission By TLTA proposing to add Procedural Rule P-50.1 concerning the use of the *Minerals and Surface Damage Endorsement* in conjunction with Loan and Owner policies issued on described residential and improved or intended to be improved real property (Form T-19.2) and Loan and Owner policies issued on other types of real property not described for use with Form T-19.2 (Form T-19.3.).

Item 5-MAR--Submission by TLTA proposing to add the *Minerals and Surface Damage Endorsement* Form T-19.2 providing coverage for improvements due to mineral exploration or development for use under Procedural Rule P50.1 in conjunction with Loan and Owner policies.

Item 6-MAR--Submission by TLTA proposing to add the *Minerals and Surface Damage Endorsement* Form T-19.3 providing coverage for damage to permanent buildings due to mineral exploration or development for use under Procedural Rule P50.1 in conjunction with Loan and Owner policies.

Item 7-MAR--Submission By TLTA proposing to amend Rate Rule R-29 and raise the minimum premium rate for the issuance of the Restrictions, Encroachments, Minerals Endorsement (Form T-19) and the Restrictions, Encroachments, Minerals Endorsement - Owner Policy (Form T-19.1) from $25.00 to $50.00. Determination of the final rate is subject to the public hearing noticed for April 23, 2009. The proposal also removes references to procedures and forms that should be evident from Procedural Rule P-50.

Item 8-MAR--Submission by TLTA proposing to add Rate Rule R-29.1 and fix the premium rate for the issuance of the *Minerals and Surface Damage Endorsement* (Forms T-19.2 and T-19.3) at $50.00. Determination of the final rate is subject to the public hearing noticed for April 23, 2009.

The Department has filed a copy of each of the proposed items with the Secretary of State's Texas Register Section. Persons desiring copies of the proposed items may obtain them from the Office of the Chief Clerk, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas, 78701-3938. To request copies, please contact Sylvia Gutierrez at (512) 463-6327.

FISCAL NOTE. Robert R. Carter, Jr., Deputy Commissioner for the Title Division, has determined that, for each year of the first five years the proposal is in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the new section. Mr. Carter has also determined that there will be no measurable effect on local employment or the local economy.

PUBLIC BENEFIT/COST NOTE. Mr. Carter has also determined that for each year of the first five years the new section is in effect there are a number of public benefits anticipated as a result of the amendments to the Basic Manual. The updating and revising of the procedural rules, rates and forms relating to mineral interests will allow for consistent administration and the closing of title transactions. The proposal further offers title insurance consumers with the opportunity to obtain new coverage endorsements for improvements under proposed Form T-19.2 (Item 5) or permanent buildings under proposed Form T-19.3 (Item 6).

The new and amended promulgated forms will impose no additional regulatory costs on companies participating in the title insurance market, and the costs of reproducing forms, estimated to be no more than $.15 per page for the cost of a photocopy, should be fully compensated by the existing premium schedule.

Additional costs will be related to the issuance of and potential losses resulting from the proposed endorsements Form T-19.2 or proposed Form T-19.3 (Items 5-MAR and 6-MAR, respectively). These additional costs are based on the proposed Procedural Rules P-5.1 and P-50.1 (Items 2-MAR and 3-MAR, respectively) that require the issuance of the endorsements. It is anticipated that any additional costs for research and issuance related to the endorsements will be minimal because the costs for determining the status of title, determining whether a title insurance company will agree to issue a title insurance policy, and closing the transaction and issuing the policy are already included in the existing premium schedule. Losses resulting from the endorsement, if any, will vary from hundreds of dollars to several hundreds of thousands of dollars or more. Further, because the proposed endorsements provide coverage for improvements and permanent buildings that differs from the coverage currently provided under the title insurance policy, losses under these endorsements are not covered in the existing premium schedule.

While a title insurance company may decline to insure the property, those that decide to issue coverage are entitled to a rate structure that provides adequate and reasonable rates of return for title insurance companies and title insurance. A purpose of this proposal is to establish such rates, if any, for these proposed endorsements. Therefore, these costs will result from a title insurance company making a voluntary business decision to insure certain real property risks based on the payment of the fee, if any, to be determined and adopted by the Commissioner pursuant to this proposal and the public hearing

On a per transaction basis, there will be no difference in the cost of compliance between a large and small business as a result of the proposal since the costs associated with research and issuance of the policy as well as the risk being assumed will be related to the location of the real estate, the location of the agent, and the available title records. Even if the proposal results in some adverse effect on small or micro businesses, the Department has considered the purpose of the applicable statutes, which is to maintain effective regulation of the title insurance industry, including the ensuring protection of consumers and that title insurance companies and title insurance agents receive adequate and reasonable rates of return. As the costs in the proposal arise from a proposed requirement to issue certain endorsements following a decision of the title insurance company and agent to exclude from, or except to, coverage for minerals under the policy, the Department has determined that it is neither legal nor feasible to waive the provisions of the proposal for small or micro businesses.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The Government Code §2006.002(c) requires that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The Government Code §2006.001(a)(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts. The Government Code §2006.001(a)(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. The Government Code §2006.001(a)(1) does not specify a maximum level of gross receipts for a "micro business."

The Department's analysis of any possible costs for compliance with the proposal that are detailed in the Public Benefit/Cost Note section of this proposal are also applicable for small and micro businesses that opt to write title insurance. Additionally, the proposed rules and forms provide an economic opportunity for title insurance companies and title insurance agents to obtain reasonable and adequate rates of return.

Small and micro businesses will each incur the same costs as large business to comply with the proposed requirements to prepare copies of forms and issue the proposed endorsements Form T-19.2 or proposed Form T-19.3 (Items 5-MAR and 6-MAR, respectively). Should it be shown through comments or at the public hearing for this proposal that small and micro businesses do have greater costs as a group, setting a greater rate solely for small or micro business might tend to place them in an uncompetitive position and be counterproductive. Further, consumers would be charged different rates for the same rate regulated product. An alternative, however, is that to the extent greater costs do exist, small and micro businesses can present those costs for consideration under this proposal such that they can be accounted for in determining the charge that will be established for these endorsements. This alternative is already incorporated in the procedure for this proposal. Finally, considering that the requirement to issue the proposed endorsements is limited to use of the exception of exclusion as provided in Proposed Procedural Rule P-5.1, removing the requirement to issue the endorsements for small and micro businesses would adversely impact consumers and purchasers of title insurance contrary to the provisions of the Insurance Code §2501.002.

In accordance with the Government Code §2006.002(c), the Department has determined the proposal will not have an adverse impact on small or micro businesses resulting from greater costs. However, even if the proposal did result in greater costs, the Department believes that small and micro businesses would, if possible, be ill-served by simply establishing a greater charge for them for the proposed endorsements. Alternatively, the proposal does allow small and micro businesses the opportunity to address that impact though presenting at the public hearing

and by comments to this proposal their actual costs for consideration such that those costs can be accounted for in determining the charge that will be established for the proposed endorsements. Finally, in accordance with the Government Code §2006.002(c-1), the Department cannot exempt small and micro businesses from issuing the proposed endorsements because that would adversely impact consumers and purchasers of title insurance by denying them the option to purchase the endorsements contrary to the provisions of the Insurance Code §2501.002.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR COMMENTS. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on April 23, 2009, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. An additional copy of the comments must be submitted simultaneously to Robert R. Carter, Jr., Deputy Commissioner, Title Division, Mail Code 106-2T, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The Commissioner will consider the adoption of the proposed new section and additions to the Basic Manual, including rates, in a public hearing under Docket No. 2704 scheduled for April 23, 2009, at 9:30 a.m. in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas. Written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The new section is proposed pursuant to the Insurance Code §§2551.003, 2703.151, 2703.152, 2703.201, 2703.202, 2703.206, 2703.207, 2703.208, and 36.001. Section 2551.003 authorizes the Commissioner to adopt and enforce rules that prescribe underwriting standards and practices on which a title insurance contract must be issued, that define risks that may not be assumed under a title insurance contract, including risks that may not be assumed because of the insolvency of the parties to the transaction, and that the Commissioner determines are necessary to accomplish the purposes Insurance Code Title 11, which concerns the regulation of title insurance. Section 2703.151 authorizes and requires the Commissioner to fix and promulgate the premium rates to be charged by a title insurance company or by a title insurance agent for title insurance policies or for other forms prescribed or approved by the Commissioner. Section 2703.152 authorizes and requires the Commissioner to consider all relevant income and expense information attributable to engaging in the business of title insurance in this state. Section 2703.201 requires that before a premium may be fixed and a rate may be charged, the Department must provide reasonable notice and a hearing must be afforded to title insurance companies, title insurance agents and the public. Section 2703.202(a) provides that the Commissioner can change a premium rate that has been previously fixed by the Commissioner following notice and a public hearing. Section 2703.202(b) provides that a title insurance company or the Office of Public Insurance Counsel, may request a hearing under §2703.202(a). Section 2703.206 authorizes the Commissioner to order a public hearing to consider adoption premium rates and other matters relating to regulating the business of title insurance as the commissioner determines necessary of proper. Section 2703.207 requires notice of a public hearing under §§2703.201, 2703.202 and 2703.206 and of each item to be considered at the public hearing, must provide 60 days notice of the hearing and be sent directly to each title insurance company and title insurance agent and provided to the public in a manner that gives fair notice concerning the hearing. Section 2703.208 provides that an addition or amendment to Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas may be proposed or adopted by reference by publishing notice of the proposal or adoption by reference in the Texas Register. Notice of the proposal under §2703.208 must include a brief summary of the substance of the matter to be amended or added, and a statement that the full text of the matter is available for review in the Office of the Chief Clerk of the Department. Section 36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTES. The following statutes are affected by this proposal: Insurance Code Chapters 2551 and 2703.

§9.40. Procedural Rules, Rates and Forms Relating to Mineral Interests.

In addition to material adopted by reference under §9.1 of this title (relating to Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas) the Texas Department of Insurance adopts by reference as part of the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas:* amended Texas Title Insurance Information page; new Procedural Rule P-5.1; amended Procedural Rule P-50; new Procedural Rule P-50.1; new *Minerals and Surface Damage Endorsement* Form T-19.2; new *Minerals and Surface Damage Endorsement* Form T-19.3; amended Rate Rule R-29; and new Rate Rule R-29.1; as amended effective June 1, 2009. This document is available from and on file at the Texas Department of Insurance, Title Division, Mail Code 106-2T, 333 Guadalupe Street, Austin, Texas 78701-3938.

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

Filed with the Office of the Secretary of State on February 2, 2009.

TRD-200900396
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: March 15, 2009
For further information, please call: (512) 463-6327

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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 §15.13

The General Land Office (GLO) proposes new §15.13 concerning Disaster Recovery Orders to provide procedures for the use of temporary standards for dune restoration and structure stabilization and repair after a disaster and to assist local governments in restoring beach access and dune protection during such a period. The coastal destruction caused by Hurricane Ike in September 2008 demonstrates the need for long-term procedures that can be implemented when certain disaster conditions exist. These procedures will enable local governments and their citizens to better respond to coastal disasters and allow these areas to protect and rebuild in the most efficient and safe manner possible, while still protecting coastal areas and the public's right to use and access the public beach.

ANALYSIS OF PROPOSED RULE

The proposed new rule applies only to a local government with a local dune protection and beach access plan within a coastal county that has been included in a disaster declaration made by the governor or in which a natural disaster has occurred, as determined by the commissioner. A disaster recovery order issued by the commissioner pursuant to the proposed new rule will be effective for a period of two years unless a shorter period of recovery is specified.

Pursuant to a disaster recovery order issued under the proposed new rule, local governments may authorize repairs necessary to render a structure habitable or to prevent further damage or to stabilize a residential structure that is subject to collapse or substantial further damage as a result of erosion or undermining. For structures with intact foundations after a disaster, local governments may also authorize enclosed spaces with breakaway or louvered walls at ground level, if such authorization would be consistent with the local dune protection and beach access plan and the National Flood Insurance Program. A local government may grant authorization for recovery repairs of a residential structure that encroaches or may encroach on the public beach if the structure is eligible under §15.11, relating to Repairs to Certain Houses Located Seaward of the Boundary of the Public Beach, and is not subject to a pending enforcement action. Authorized repairs may include construction underneath, outside, or around the house that includes fibercrete or other materials necessary to restore reasonable access to a house for disabled persons that existed prior to the disaster. Finally, a local government may authorize the placement of beach-quality sand and, in certain instances, clay or sandy clay, on a lot if certain conditions are met and only if the placement is necessary to prevent further erosion due to wind and water.

The proposed new rule also authorizes local governments to permit persons to construct dunes in an area no more than 30 feet seaward of the post-disaster landward boundary of the public beach if certain conditions are met. The proposed new rule authorizes the use of additional types of materials for restored dunes to provide additional stability for restored dunes and to encourage dune restoration activities by local governments and property owners. In accordance with the Beach/Dune rules, restoration of dunes may not result in increased flooding to the site or adjacent property, aggravate erosion, result in adverse effects to dune hydrology, increase the vulnerability to washouts or blowouts, or interfere with the public's right of access to the beach at normal high tide. The proposed new rule allows a local government to defer the review of the dune protection line up to one year from the date of the disaster recovery order rather than 90 days required under §15.3(k).

The proposed new rule provides guidelines for the continuation of authorized beach access and dune protection measures, including variances that permit the use of fibercrete within 200 feet of the line of vegetation in an eroding area. For a local government with a fibercrete variance, authorized repairs may include 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, including a house that has become located on the beach or where there is no dune.

The proposed new rule allows a local government to temporarily close beach access points damaged beyond repair or temporarily blocked by emergency shore protection projects to prevent damage to infrastructure without a formal plan amendment with notice to the commissioner. 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.

The proposed new rule also outlines the specific situations that must exist before a local government may authorize repairs to an existing shoreline protection project in order to minimize impacts to adjacent property. The proposed new rule prohibits the use of materials such as bulkheads, riprap, concrete, asphalt rubble, building construction materials, non-biodegradable items, sediments containing certain hazardous substances, and sand obtained by scraping or grading dunes or from beaches in eroding areas when making approved repairs or conducting dune restoration activities.

The proposed new rule allows the commissioner to require that a local government suspend the authority of a permittee to scrape a beach under a previously issued permit for beach maintenance practices that include scraping of the beach based on a material change in circumstances. The local government may require that a permittee apply for a new permit or certificate for beach maintenance practices with an opportunity for comment by the commissioner.

The proposed new rule requires a local government or other governmental entity authorized by law to clean, maintain, and clear debris from the public beach to coordinate with property owners to remove debris from the public beach as soon as possible to minimize the threat of damage to public health, safety, welfare, and property.

Finally, the proposed new rule provides for review of permit applications by the GLO and requires local governments to monitor permitted actions, including dune restoration projects. The proposed new rule does not create a property right of any kind in a littoral property owner and removal actions may still be commenced against the owner of a structure regardless of whether the structure is eligible for repairs pursuant to the new rule.

FISCAL AND EMPLOYMENT IMPACTS

Ms. Jodena Henneke, Deputy Commissioner for the GLO's Coastal Resources Program Area, has determined that for each year of the first five years the amended sections as proposed are in effect there will be no additional cost to state government as a result of enforcing or administering the new section.

Ms. Henneke has determined that for each year of the first five years the new section as proposed is in effect there could be fiscal implications for local governments as a result of enforcing

or administering the amended section. In areas affected by an order issued under the proposed new rule, Ms. Henneke estimates that local governments may incur between $50,000 and $60,000 in costs each year attributed to staff time devoted to the monitoring requirements contained in §15.13(q). Some of the fiscal implications attributed to local governments may be mitigated through reimbursement programs administered by the GLO, including the Coastal Management Program, the Coastal Erosion Planning and Response Act, and beach maintenance reimbursement.

Ms. Henneke has also determined that the proposed new section will not have adverse economic impacts or increase the costs of compliance for small or large businesses and individuals required to comply with the new section. Thousands of small businesses and micro-businesses are located in coastal counties, and the projected economic impact of this new rule on these small businesses will be neutral to positive in that businesses will be able to more efficiently conduct repairs after a disaster.

Ms. Henneke has determined that the proposed rulemaking will have no adverse local employment impact that requires an impact statement pursuant to Texas Government Code §2001.022.

PUBLIC BENEFIT

Ms. Henneke has also determined that each year for the first five year period the new section is in effect the public will benefit from the proposed regulations because they will provide more certainty of recovery measures allowed in the wake of a coastal disaster. In addition, property owners and business owners will be able to more efficiently repair structures and protect their property because the new rule provides clear standards by which repairs may be made and dunes may be restored.

The proposed new rule provides additional types of materials for stabilization underneath structures and for restored dunes, providing additional defenses and stability for restored dunes and to encourage dune restoration activities by local governments and property owners. The GLO has determined that when dunes are obliterated, more than one season is generally required before dune vegetation can grow enough to stabilize the replacement dune. Therefore, the proposed new rule authorizes the use of clay material to provide strength and integrity to the dune and to stabilize structures until the natural vegetation recovers. In addition, the proposed new rule allows for an additional ten feet for the dune restoration area, provided that the project does not interfere with beach access or result in other adverse effects as listed in §15.13(h)(5). This larger area will facilitate a larger dune, thus providing better protection for property landward of the dune restoration project. Furthermore, recovery of the beach through natural processes will ultimately result in a dune no further seaward than if the normal 20 foot restoration area had been utilized.

The public will benefit from the provisions pertaining to the use of fibercrete because it provides certainty for those jurisdictions that have a variance allowing the use of fibercrete and encourages dune restoration activities to provide protection from flooding and erosion. The public will also benefit from allowing restoration of access for disabled persons to eligible structures, including the use of fibercrete under the house.

The public will benefit from the provision allowing a local government to delay reviewing the dune protection line up to a year, because it allows the local government to focus on recovery efforts before undertaking the technical review of the dune protection line, while at the same time requiring a time table for the required reevaluation.

The provisions allowing a local government to temporarily close beach access points damaged beyond repair or temporarily blocked by emergency shore protection projects to prevent damage to infrastructure benefits the public by allowing a local government to address threats to public safety in its exercise of its police power. The provision limits the duration of the closure to the recovery period, and requires a timeline for restoration of access or formal amendment to the beach access plan.

Finally, the public will benefit from the increased scrutiny of beach maintenance practices, including those previously permitted by a local government. The damage to the beach/dune system caused by Hurricane Ike and resulting loss to the sediment budget left the beaches and dunes more vulnerable than ever to imprudent practices that do not protect these valuable resources. The abundance of seaweed in the spring, followed closely by the summer tourist season and the hurricane season necessitates a closer look at any beach maintenance practices in areas subject to a disaster recovery order to ensure that adverse impacts to the beach/dune system are minimized and that beach maintenance practices facilitate dune restoration.

CONSISTENCY WITH CMP

The proposal to add §15.13 is subject to the Coastal Management Program (CMP), 31 TAC §505.11(c), relating to the Actions and Rules subject to the CMP. The GLO has reviewed these proposed actions for consistency with the CMP's goals and policies in accordance with regulations of the Coastal Coordination Council (Council). The applicable goals and policies are found at §501.26, relating to Policies for Construction in the Beach/Dune System and §501.27, relating to Policies for Development in Coastal Hazard Areas.

The proposed action is consistent with the policy in §501.26 in that the new rule encourages practices including dune restoration and measures other than structural erosion response measures. Although the new rule allows repair of certain structures located on the public beach, the practices allowed do not increase the impact to the right of the public to use and access the public beach. An existing erosion response structure that may be repaired under the rule must comply with the standards for shore protection projects found in §501.26(b). Further, the provisions of the new rule that allow ground level enclosures are consistent with the policies in §501.27 in that such enclosures must comply with the requirements of the National Flood Insurance Program.

Consequently, the GLO has determined that the proposed action is consistent with the applicable CMP goals and policies. The proposed new section will be distributed to Council members in order to provide an opportunity for comment on its consistency with the CMP.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the proposed rulemaking in accordance with Texas Government Code §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines to determine whether a detailed takings impact assessment is required. The GLO has determined that the proposed rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19 of the Texas Constitution. Furthermore, the GLO has determined that the proposed rulemaking would not affect any private real property in a

manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the new rule.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not exceed express requirements of state law and does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule of which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The proposed amendments are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

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, TX 78711, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The new rule is proposed under Texas Natural Resources Code §§61.011(d), 61.015(b) and 63.121, which provide the GLO with the authority to adopt rules: to preserve and enhance the public's right to use and have access to and from Texas's public beaches; to protect the public easement from erosion or reduction caused by development or other activities on adjacent land and beach cleanup and maintenance; for other minimum measures needed to mitigate for adverse effects on access to public beaches and the beach/dune system; for the reasonable exercise of the police power by local governments with respect to the public beaches; for determination of the line of vegetation and structures located near or on the public beach; and to identify and protect critical dune areas. The new section is also adopted pursuant to Texas Water Code §16.321, which provides the GLO with the authority to adopt rules on coastal flood protection.

§15.13. Disaster Recovery Orders.

(a) Purpose. This section is intended to provide procedures for the commissioner to implement by order the use by a local government of temporary standards for stabilization and repair of structures and dune restoration during a period of recovery following a severely damaging declared or natural disaster and to assist local governments in restoring beach access and dune protection.

(b) Applicability. This section applies only to a local government with a local dune protection and beach access plan within a coastal county that has been included in a disaster declaration made by the governor under §418.014, Texas Government Code or in which a natural disaster has occurred, as determined by the commissioner. The temporary standards authorized by this section shall be effective for a period of two years from the date of the issuance of disaster recovery order by the commissioner, unless a shorter period of recovery is specified in the order.

(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 public access 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 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) posted on the General Land Office's (GLO) Internet website;

(2) published by the GLO as a miscellaneous document in the *Texas Register;* and

(3) sent to the governing body of a local government to which the order applies.

(d) Conflict. The provisions of this section supplement the Beach/Dune Rules (§§15.1 - 15.12 of this title). However, if there is a conflict between this section and the provisions of the Beach/Dune Rules, this section applies.

(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) 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, septic systems, and other objects, that may pose a hazard to public health and safety and/or no longer serve the purpose for which they were 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). 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) Coastal county--Any Texas county with a Gulf-facing beach within its boundaries.

(4) Code--The Texas Natural Resources Code.

(5) Declared disaster--An event declared to be a disaster by the governor under §418.014, Texas Government Code.

(6) Fibercrete--Unreinforced concrete, consisting of a combination of pulped paper, or other cellulose-based raw material, and binders such as lime, cement, and/or clay in 4 feet by 4 feet sections, which shall be a maximum of four inches thick with sections separated by expansion joints.

(7) Habitable--The condition of the premises that permits the inhabitants to live free of serious hazards to health and safety.

(8) House--A single or multi-family structure that serves as permanent, temporary or occasional living quarters for one or more persons or families.

(9) Natural disaster--An event or force of nature that has catastrophic consequences, including, but not limited to, tropical

storms, hurricanes, extreme high tides, tsunamis, earthquakes, tornadoes, and floods.

(10) Recovery dune restoration--Those response measures that must be undertaken during a recovery period to construct a dune, repair a damaged dune, or stabilize an existing dune in order to minimize further threat or damage to coastal residents and littoral property. A local government shall require persons restoring dunes to use dune vegetation that will achieve the same protective capability as natural dunes in the area.

(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) Recovery repair--Those actions that must be undertaken to render a structure habitable or to prevent further damage during the recovery period. The term "recovery repair" does not include reconnecting a house to utilities such as sewer, water, and electricity. Reconnection to such utilities may only be made in accordance with other applicable law or local ordinances.

(13) Recovery stabilization--Those actions that must be undertaken to stabilize a residential structure that is subject to collapse or substantial further damage as a result of erosion or undermining caused by waves or currents of water exceeding normally anticipated cyclical levels during a period of recovery from a disaster.

(14) Restoration Area--With respect to a dune restoration project on the public beach, an area extending no more than 30 feet seaward of the post-storm landward boundary of the public beach.

(15) Shoreline protection project repairs--Those response measures that must be undertaken during a period of recovery from a disaster to restore an existing shoreline protection project to a condition that affords protection from subsequent storms or tidal events or prevents accelerated damage to littoral property.

(f) Recovery repair and recovery stabilization of structures on the public beach.

(1) A local government may issue a certificate or permit in accordance with this section for recovery repair and recovery stabilization of a structure that encroaches or may encroach on the public beach to the extent necessary to prevent an immediate threat to public health, safety, and welfare.

(2) A local government may authorize construction of an enclosed space with breakaway or louvered walls at ground level that is consistent with the local dune protection and beach access plan and National Flood Insurance Program, if the foundation of the structure is intact.

(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 or the issuance of a citation by a local government for a violation of its dune protection and beach access plan.

(4) A local government may authorize the placement of beach-quality sand underneath the footprint of an eligible house and in the area up to a distance of not more than five feet from the structure's footprint where necessary to prevent further erosion due to wind or water. The beach-quality sand must remain loose and cannot be placed in bags.

(5) Clay or sandy clay may be placed to fill voids under the footprint of a residential structure seaward of the line of vegetation and beyond the footprint to the extent necessary to restore a natural angle of repose up to a distance of not more than five feet from the structure's footprint; provided, however, that clay or sandy clay used for this purpose must be covered with beach quality sand, where practicable, to a depth of at least 12 inches. Such actions are authorized in situations where protection of the land immediately seaward of a structure is required to prevent foreseeable undermining of habitable structures in the event of such erosion.

(6) A local government may authorize the use of clay or sandy clay to fill voids in order to protect public infrastructure; provided, however, that clay or sandy clay sand used for this purpose must be covered with beach quality sand, where practicable, to a depth of at least 12 inches.

(7) Beach-quality sand, clay, or sandy clay must not be placed seaward of mean high tide without the consent of the commissioner.

(g) Authorized recovery dune restoration.

(1) A local government may issue a certificate or permit for persons to construct clay core dunes and dunes created solely with beach quality sand landward of the public beach and seaward of the boundary of the public beach in the restoration area. A local government shall ensure that the restoration area shall follow the natural meander or migration of the post-storm boundary of the public beach. A local government may issue permits and certification to allow the restoration of dunes on the public beach only under the following conditions:

(A) Restored dunes may be located farther seaward than the restoration area only to the limited extent necessary to minimize further damage to coastal residents and littoral property, provided such dunes shall not substantially restrict or interfere with the public use of the beach at normal high tide.

(B) A local government shall not allow any person to restore dunes, even within the restoration area, if such dunes would effectively prohibit access to or use of the public beach at normal high tide.

(2) Under no circumstances may sand or other materials be placed below mean high tide without the consent of the commissioner.

(h) Authorized methods and materials for recovery dune restoration. A local government may allow the following methods or materials for recovery dune restoration:

(1) Dune restoration methods or materials allowed in §15.7(e)(6) of this title (relating to Local Government Management of the Public Beach);

(2) Clay core dunes; provided, that clay or sandy clay used for this purpose must be covered with beach-quality sand, to a depth of at least 24 inches, and such sand cover must be maintained; provided, if clay is exposed, it must be recovered with sand to maintain the minimum 24-inch cover; and

(3) Recovery dunes constructed under this section must not:

(A) result in increased flooding to the site or adjacent property;

(B) aggravate erosion;

(C) result in adverse effects to dune hydrology;

(D) increase the vulnerability to washouts or blowouts; or

(E) interfere with the public's access to the beach at normal high tide.

(i) Review of dune protection line. A local government having the authority to set the dune protection line shall review the dune protection line within one year from the date of the disaster recovery order issued under this section rather than 90 days required under §15.3(k) of this title. All other requirements of §15.3(k) of this title shall apply.

(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, 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.

(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.

(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 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) Shoreline protection project repairs. Notwithstanding the general prohibition on maintaining or repairing erosion response structures in §15.6(d) of this title, a local government may authorize repairs to an existing shoreline protection project, subject to the following limitations:

(1) Repairs to existing shoreline protection projects may be permitted to minimize further damage to coastal residences and littoral property, provided the existing shoreline protection project does not substantially restrict or interfere with the public use and access of the beach at normal high tide;

(2) A local government shall not authorize any person to repair a shoreline protection project that is located below mean high water; and

(3) The existing shoreline protection project must conform to the policies of the Coastal Coordination Council promulgated in §501.26(b) of this title (relating to Policies for Construction in the Beach/Dune System).

(l) Prohibition on certain materials. A local government shall not allow any person to undertake dune restoration projects or temporary shoreline protection projects using any of the following methods or materials:

(1) Materials such as bulkheads, riprap, concrete (including sprayed concrete), or asphalt rubble, building construction materials, and any non-biodegradable items;

(2) Sediments containing the hazardous substances listed in Appendix A to §302.4 in Volume 40 of the Code of Federal Regulations, Part 302 in concentrations which are harmful to people, flora, and fauna as determined by applicable, relevant, and appropriate requirements for toxicity standards established by the local, state, and federal governments; or

(3) Sand obtained by scraping or grading dunes, or from beaches in eroding areas.

(m) Repair of sewage or septic systems. If the Texas Commission on Environmental Quality or its designated local authority, the Texas Department of State Health Services, or a local health department has made a determination that a sewage or septic system located on or adjacent to the public beach poses a threat to the health of the occupants of the property or public health, safety or welfare, and requires removal of the sewage or septic system, the sewage or septic system shall be located in accordance with §15.5(b)(1) of this title (relating to Beachfront Construction Standards) and §15.6(b) and (e)(1) of this title.

(n) Authorized beach maintenance practices. If a material change in conditions occurs, such as significant beach erosion caused by a declared or natural disaster, the commissioner may require a local government affected by an order issued under this section to suspend the authority of a permittee to scrape a beach under a previously issued beach maintenance permit. The local government may require a permittee to obtain a new permit incorporating beach maintenance practices consistent with the changed conditions. The commissioner shall be given an opportunity to comment on any such new permit application

(o) Removal of beach debris. A local government or other authorized governmental entity with the duty to clean, maintain and clear debris from the public beach as provided by law shall coordinate with property owners to remove debris, including, but not limited to, pilings, concrete, fibercrete, pavers, and garbage from the public beach as soon as possible to minimize the threat of damage to public health, safety, welfare, and property.

(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) 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;

(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; and

(F) if the proposed action includes a recovery dune restoration project, grading and layout plan identifying all elevations (in reference to the National Oceanic and Atmospheric Administration datum), existing contours of the project area (including the location of dunes and swales), and proposed contours for final grade.

(6) the source of any sand and vegetation used for a recovery dune restoration project; and

(7) any other information requested by the local government or the GLO that is necessary to determine whether the application is consistent with this section.

(q) Monitoring. A local government is responsible for monitoring a recovery stabilization, recovery repair, recovery dune restoration project, or shoreline protection project repair under this section. A local government may conduct a monitoring program to study the effects of such projects on the public's access to and use of the public beach. Expenses related to the monitoring program are considered beach-related services for the purpose of this subchapter.

(r) Effect on actions for removal. This section does not create a property right of any kind in the littoral property owner. Houses eligible for repairs to maintain habitability under this section may also be encroachments on and interferences with the public beach easement. Except as provided in an unexpired temporary order issued by the commissioner under §61.0185 of the Texas Natural Resources Code, the commissioner, the attorney general, a county attorney, district attorney, or criminal district attorney may file suit under Texas Natural Resources Code §61.018(a) to obtain a temporary or permanent injunction, either prohibitory or mandatory, to remove a house from the public beach without regard to whether the house is eligible for repairs under this section.

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

Filed with the Office of the Secretary of State on February 2, 2009.

TRD-200900379
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Earliest possible date of adoption: March 15, 2009
For further information, please call: (512) 475-1859

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 5. TEXAS VETERANS LAND BOARD

CHAPTER 175. GENERAL RULES OF THE VETERANS LAND BOARD
SUBCHAPTER C. PROCEDURES FOR ALTERNATIVE DISPUTE RESOLUTION

40 TAC §§175.100 - 175.111

The Veterans Land Board (VLB) proposes new §§175.100 - 175.111 in order to provide the availability of Alternative Dispute Resolution procedures for parties of internal and external disputes pending before the VLB.

INTRODUCTION AND BACKGROUND

Chapter 2009 of the Texas Government Code, which was enacted by the 75th Legislature in 1997 and is known as the Governmental Dispute Resolution Act, established the policy of this state that disputes before governmental bodies be resolved as fairly and expeditiously as possible and that each governmental body support this policy by developing and using alternative dispute resolution (ADR) procedures in appropriate aspects of the governmental body's operation and programs. The 80th Legislature in 2007 enacted §161.036 of the Texas Natural Resource Code to further encourage the use of alternative dispute resolution rules to assist in the resolution of internal and external disputes under the Board's jurisdiction, other than disputes governed by §161.311. In order to adhere to and to adopt this legislatively mandated policy, the VLB is proposing a body of new rules that provide ADR procedures as an option for resolving disputes pending before the VLB.

FISCAL AND EMPLOYMENT IMPACTS

Mr. Paul E. Moore, Executive Secretary of the Veterans Land Board, has determined that for each year of the first five years that the new sections as proposed will be in effect, there will be no significant fiscal implication to state or local government as a result of enforcing or administering these new sections.

Mr. Moore has also determined that for each year of the first five years that the proposed new sections will be in effect, the anticipated impact on local employment will be insignificant.

PUBLIC BENEFIT

Mr. Moore has determined that for each year of the first five years that the new sections as proposed will be in effect, the public will benefit because the proposed new sections will allow the public the opportunity to use alternative dispute resolution as a new method in which to solve contested matters with the VLB fairly and expeditiously.

Mr. Moore has also determined that for each year of the first five years that the new sections as proposed will be in effect, the anticipated economic costs to persons who elect to use alternative dispute resolution will be minimal because the costs will be apportioned pro rata between both parties wanting to settle the pending dispute.

SMALL BUSINESS ANALYSIS

Mr. Moore has determined that the proposed new sections will have no significant effect on small businesses during each year of the first five years these sections are in effect.

REQUEST FOR COMMENTS

To comment on the proposed rulemaking, please send a written comment to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, TX 78711, facsimile number (512) 463-6311 or e-mail to walter.talley@glo.state.tx.us. 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

Chapter 2009 of the Texas Government Code establishes the policy of this state that disputes before governmental bodies be resolved as fairly and expeditiously as possible and that each governmental body support this policy by developing and using alternative dispute resolution procedures in appropriate aspects of the governmental body's operation and programs. Chapter 2009 provides authority for the VLB to adopt alternative dispute resolution rules necessary to implement this policy.

CROSS REFERENCE TO STATUTE

Section 161.036 of the Texas Natural Resources Code provides further authority for the VLB to adopt alternative dispute resolution rules necessary to implement this policy.

§175.100. Applicability.

(a) This subchapter applies to internal and external disputes before the Texas Veterans Land Board (VLB), including those referred by the State Office of Administrative Hearings (SOAH), which is subject to the Administrative Procedures Act (APA), Chapter 2001, Texas Government Code.

(b) Sections 175.100 - 175.111 of this subchapter supplement the procedures required by the APA, Chapter 2001, Texas Government Code.

(c) In accordance with Chapter 2009 of the Texas Government Code and it is the VLB's policy that disputes with the VLB be resolved as fairly and expeditiously as possible. To encourage this policy, the VLB has adopted the use of Alternative Dispute Resolution (ADR).

(d) All ADR procedures shall be consistent with Chapters 2001 and 2009 of the Texas Government Code and Chapter 154 of the Civil Practice and Remedies Code. Chapter 2009 of the Texas Government Code is referred to as the Governmental Dispute Resolution Act or "GDRA".

(e) ADR procedures developed and used by the VLB do not limit other dispute resolution procedures available for the VLB.

(f) Consistent with this ADR policy, the VLB shall endeavor to educate its staff and persons who are subject to the VLB's jurisdiction concerning the availability of ADR to resolve disputes.

(g) The use of ADR may not be applied in a manner that denies a person a right granted under other state or federal law including a right to an administrative or judicial hearing that is allowed or mandated by the VLB or by laws of more general application.

(h) Any resolution reached as a result of the ADR procedure should be achieved through the voluntary agreement of the parties.

§175.101. Definitions.

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

(1) Alternative Dispute Resolution (ADR)--A procedure or combination of procedures that uses an impartial third party to assist individuals in voluntarily resolving disputes, including procedures described in §§154.023 - 154.027, Civil Practice and Remedies Code. The GDRA does not grant the GLO authority to engage in binding arbitration.

(2) Board (VLB)--The Veterans Land Board of the State of Texas.

(3) Commissioner--The Commissioner and also chairman of the Veterans Land Board.

(4) Contested case--Shall have the same meaning as such term is defined in the Administrative Procedure Act (Texas Government Code, Chapter 2001).

(5) Executive Secretary--The executive secretary of the board.

(6) GDRA--The Governmental Dispute Resolution Act, Texas Government Code, Chapter 2009.

(7) Impartial Third Party (ITP)--A person who meets the qualifications and conditions of Texas Government Code §2009.053, GDRA.

(8) Party--Shall have the same meaning as such term is defined in the Administrative Procedure Act (Texas Government Code, Chapter 2001).

(9) Person--Shall have the same meaning as such term is defined in the Administrative Procedure Act (Texas Government Code, Chapter 2001).

(10) Rule--Shall have the same meaning as such term is defined in the Administrative Procedure Act (Texas Government Code, Chapter 2001).

(11) State Agency--Shall have the same meaning as such term is defined in the Administrative Procedure Act (Texas Government Code, Chapter 2001).

§175.102. Referral of Pending Disputes for ADR.

The Commissioner, the ADR Coordinator, a Texas veteran or an assignee of VLB land may seek to resolve an internal or external dispute through any ADR procedure. Such procedures may include, but are not limited to, those applied to resolve matters pending in the state's district courts.

§175.103. Required Training for ADR Coordinator and Impartial Third Party.

Eligibility for designation as an ADR Coordinator or appointment as an ITP depends upon the following qualifications being met:

(1) completion of a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by an alternative dispute resolution system or other dispute resolution approved by the VLB; and

(2) in appropriate circumstances the VLB may waive the training required in this section if a person has professional training or experience in dispute resolution processes related to a particular matter.

§175.104. Appointment of ADR Coordinator.

(a) The Commissioner shall appoint an ADR Coordinator as soon as practicable following:

(1) initial adoption of this subchapter; or

(2) an ADR Coordinator's vacation of this office.

(b) The ADR Coordinator shall, as soon as practicable after appointment, complete the minimum training standards set forth in §154.052 of the GDRA.

§175.105. Responsibilities of ADR Coordinator.

The ADR Coordinator shall have the following responsibilities:

(1) Establish a method of choosing ITPs who possess the minimum qualifications described in §154.052 of the GDRA;

(2) Establish a pool of ITPs to resolve contested matters through ADR procedures;

(3) Coordinate the implementation of the ADR policies and procedures;

(4) Provide information about available ADR processes to agency employees, and to both potential and current users of the ADR program;

(5) Serve as a resource for any training and education needed to implement procedures and processes for the ADR program;

(6) Establish a system and collect data concerning the effectiveness of the ADR program in order to evaluate the ADR program and the ITPs that the VLB has used; and

(7) Maintain necessary agency records while maintaining the confidentiality of participants.

§175.106. Selection and Payment of Impartial Third Parties.

(a) For each matter referred for ADR procedures, the ADR Coordinator shall assign an ITP selected by the parties from the GLO's list of potential ITPs unless the parties agree upon the use of a private ITP.

(b) A private ITP may be hired for commission of ADR procedures provided that:

(1) the parties unanimously agree to the selection and use of a private ITP; and

(2) the private ITP agrees to be subject to the direction of the GLO's ADR Coordinator and to all time limits imposed by the Commissioner, the ADR Coordinator, the judge, or by statute or agency rule.

(c) If a private ITP is used, the costs for the services of the ITP shall be apportioned pro rata among the parties, unless otherwise agreed upon by the parties, and shall be paid directly to the ITP.

(d) If the parties select a GLO ITP for ADR procedures, the costs for the services of the ITP shall be apportioned pro rata among the parties, unless otherwise agreed upon by the parties, and shall be paid directly to the ITP.

§175.107. Responsibilities of Impartial Third Parties.

(a) The ITP shall complete the minimum training standards set forth in §154.052 of the GDRA, prior to starting any ADR procedure for the VLB through programs approved by the ADR Coordinator, unless the required training is waived by the ADR Coordinator.

(b) The ITP shall have the following responsibilities:

(1) to facilitate the ADR procedure; and

(2) to encourage and assist the parties in reaching a voluntary settlement of their dispute.

§175.108. Commencement of the ADR Process and ADR Procedures.

(a) To initiate the ADR process, a party to a contested matter must submit a written ADR proposal form to the ADR Coordinator. The ADR proposal form can be found on the VLB's website at www.glo.state.tx.us/vlb/. Upon completion of the form, it should be submitted to the ADR Coordinator at the website address or fax number listed with copies sent to any other parties to the dispute.

(b) ADR procedures under this subchapter may begin, at the discretion of the ADR Coordinator, anytime after a party to a contested matter submits a written ADR proposal requesting the use of ADR procedures to resolve a dispute with the VLB.

(c) The ADR Coordinator shall provide the Commissioner a copy of the ADR proposal for review, discuss it with the interested parties, as appropriate, and assess whether ADR would assist in fairly and expeditiously resolving the dispute.

(d) If the parties, including the Commissioner and the ADR Coordinator, cannot agree on whether the ADR procedure should be used or on the particulars of the ADR procedure, the ADR Coordinator will notify the affected parties of that outcome and the proposal will be dismissed without opportunity for resubmission to the ADR Coordinator in the future.

(e) The ADR Coordinator will promptly notify all affected parties within ten (10) business days of receiving the ADR proposal, or as soon as reasonably possible if a pertinent or impending deadline is indicated in the ADR proposal, whether or not the dispute will be referred for the ADR process. If the ADR Coordinator determines not to refer the dispute to ADR, the notice shall include the reasons that the dispute was not referred. If the ADR Coordinator determines to refer the dispute to ADR, the notice shall include the starting date for the selected ADR.

§175.109. Partial Settlement Agreements through ADR.

When ADR procedures do not result in the full settlement of a contested matter, the parties, in conjunction with the ITP, shall limit the contested issues through the entry of written stipulations. Such stipulations shall be forwarded or formally presented to the judge assigned to conduct the hearing on the merits and shall be included in the hearing record.

§175.110. Complete Settlement Agreements through ADR.

(a) All parties participating in an ADR procedure are expected to make a good faith effort to reach agreement.

(b) All parties participating must have the authority to reach an agreement to make a final recommendation to resolve the dispute.

(c) The Commissioner will abide by an agreed upon resolution to the dispute and either approve the agreement or offer the recommendation to the VLB, if Board authorization is needed.

(d) The decision to reach an agreement by all parties is voluntary.

(e) Each party to a resolution resulting from ADR must execute a written agreement reflecting the resolution. The agreement is enforceable in the same manner as any other written agreement of the same nature with the State.

(f) The Commissioner must approve a written agreement, to which the VLB Executive Secretary or the VLB Board members are signatories resulting from the ADR procedure and it is subject to the Public Information Act, Chapter 552, Texas Government Code.

§175.111. Confidentiality of Communications in ADR Procedures.

(a) Except as provided in subsections (c) and (d) of this section, communications, records, conduct and demeanor of an ITP and parties relating to the subject matter made by a party in an ADR procedure, whether before or after the initiation of formal proceedings, is confidential, is not subject to disclosure, and may not be used as evidence in any further proceeding.

(b) Any notes or record made of an ADR procedure are confidential, and parties, including the ITP, may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to processes requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an ADR procedure is admissible or discoverable only if it is admissible or discoverable independent of the procedure.

(d) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the judge to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order or whether the communications or materials are subject to disclosure.

(e) The ITP may not, directly or indirectly, communicate with anyone on any aspect of ADR negotiations made confidential by this section unless all the parties consent to the disclosure, or upon issuance of an opinion from the Office of the Attorney General that the evidence is subject to the Public Information Act.

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

Filed with the Office of the Secretary of State on January 29, 2009.

TRD-200900346

Trace Finley

Deputy Commissioner, Policy and Governmental Affairs, General Land Office

Texas Veterans Land Board

Earliest possible date of adoption: March 15, 2009

For further information, please call: (512) 475-1859

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 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 49. 2007 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§49.1 - 49.23

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of 10 TAC Chapter 49, §§49.1 - 49.23, concerning the 2007 Housing Tax Credit Program Qualified Allocation Plan and Rules. The repeal is adopted without changes to the proposal as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7865) and will not be republished.

The repeal is adopted in order to promulgate new sections conforming to the requirements of laws enacted under the Internal Revenue Code of 1986, §42, as amended, which provides for credits against federal income taxes for owners of qualified low income rental housing.

Public hearings on the repeal were held in El Paso, Lubbock, Brownsville, Houston, Fort Worth, and Austin. Additionally, written comments on the proposed repeal were accepted by mail, e-mail, and facsimile through October 20, 2008. No comments were received regarding the repeal.

The Board approved the final order adopting this repeal on December 18, 2008.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306 and the Internal Revenue Code of 1986, §42, as amended, which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

No other statutes, articles, or codes are affected by this repeal.

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

Filed with the Office of the Secretary of State on January 26, 2009.

TRD-200900307

Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: February 15, 2009
Proposal publication date: September 19, 2008
For further information, please call: (512) 475-3916

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CHAPTER 49. 2009 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§49.1 - 49.23

The Texas Department of Housing and Community Affairs (the Department) adopts new Chapter 49, §§49.1 - 49.23, concerning the 2009 Housing Tax Credit Program Qualified Allocation Plan and Rules. Sections 49.1, 49.3 - 49.17 and §§49.19 - 49.23 are adopted with changes to the proposed text as published in the September 19, 2008, issue of the *Texas Register* (33 TexReg 7866). Section 49.2 and §49.18 are adopted without changes and will not be republished.

The new sections are necessary to implement changes and provide procedures for and limits on the allocation by the Department of certain housing tax credits available under federal income tax laws to owners of qualified rental housing developments.

Public hearings on the new rules were held in El Paso (September 24, 2008), Lubbock (September 28, 2008), Brownsville (October 3, 2008), Houston (September 26, 2008), Dallas (October 1, 2008), and Austin (October 4, 2008). Additionally, written comments on the new rules were accepted by mail, e-mail, and facsimile through October 20, 2008.

The adoption of the rules is subject to a statutory requirement that the Governor "approve, reject, or modify and approve the Qualified Allocation Plan (QAP) not later than December 1" as provided in Texas Government Code §2306.6724(c). The Governor approved the QAP on November 26, 2008.

REASONED RESPONSE TO PUBLIC COMMENT ON THE 2009 DRAFT QUALIFIED ALLOCATION PLAN AND RULES.

The Department received the majority of comments to the 2009 Draft Qualified Allocation Plan and Rules (QAP) in writing by e-mail, fax and mail. The comments and responses include both administrative clarifications and corrections made to the QAP by staff, as well as substantive comments on the QAP and the corresponding Departmental response. Comments and responses are presented in the order they appear in the QAP. After each comment title, numbers are shown in parentheses. These numbers refer to the person or entity that made the comment. Copies

of the exact comment letters provided are available on the Department's website.

Public comments on the new rules were received by (15) Kathy Tyler, Housing Services Director, Motivation Education & Training, Inc.; (16) Cyrus Reed, PhD, Conservation Director, Lone Star Chapter of Sierra Club; (17) Dennis Hoover; (18) Matt Hull, Executive Director, Habitat Texas; (19) Albert Joseph, Ysleta del Sur Pueblo; (20) Apolonio (nono) Flores, Flores Residential, LC; (21) Bryan C. Schuler, Travois, Inc.; (22) Charles Holcomb; (23) Charlie Price, Housing Program Manager, City of Ft. Worth; (24) Christopher C Finlay, President/CEO, Finlay Development, LLC; (25) Cynthia L. Bast, Partner, Locke Lord Bissell & Liddell LLP; (26) David Mark Koogler, President, Mark-Dana Corporation; (27) Debra Guerrero, NRP Group; (28) Elizabeth Julian, Inclusive Communities Project; (29) Fei Dai, Catellus Development Group; (30) J. Fernando Lopez, Interim Executive Director, Pharr Housing Authority; (31) Jack D. Burleson, Regional Manager, Government Relations, International Code Council-Texas Field Office; (32) Jennifer Daughtrey Hicks, Development Project Manager, Foundation Communities; (33) Jim Johnson, Development Director, Downtown Ft Worth, Inc.; (34) Joe Saenz, McAllen Housing Authority; (35) Joseph W. Bishop, Capital Consultants; (36) Joy Horack-Brown, Executive Director, New Hope Housing; (37) Linda Bryant, Executive Director, Texas Housing Association; (38) Mary Lawler, Executive Director, Avenue Community Development Corporation; (39) Mary Luevano, Policy and Legislative Affairs Director, Global Green USA; (40) Matt Whelan, Sr. VP, Catellus Development Group; (41) Michael A. Hartman, Roundstone Development, LLC; (42) Ramon Guajardo, Consultant, Ft. Worth Housing Authority; (43) State Representative Lon Burnam; (44) Richard Franco, CEO, Corpus Christi Housing Authority; (45) Richard Herrington, Jr., Executive Director, Housing Authority of the City of Texarkana; (46) Robert H. (Bob) Sherman, SBG Development Services, L.P.; (47) Robert Waggoner, SAHA; (48) Ronnie Linden, Port Arthur Housing Authority; (49) Scott Marks, Coats/Rose; (50) State Senator Chris Harris; (51) Steve Shorts and Richard Herrington, NAHRO; (52) Tamea A. Dula, Esq., Coats/Rose; (53) V.A. Stephens, Global Green USA; (54) Walter Moreau, Executive Director, Foundation Communities; (55) Esiquio (ZEKE) Luna, Housing Authority of the City of Brownsville; (56) Demetrio Jemenez, Tropicana Properties; (57) Bobby Bowling; (58) Frank Fernandez, Executive Director, Community Partnership for the Homeless; (59) Eric Chrisophe, EFC Builders, Ltd. Co.; (60) Sarah Andre, S2A Development Consulting; (61) Barry Kahn; (62) Jill Moody, Gonzalez Newell Bender, Inc. Architects; (63) Dennis Barnes; (64) Jack Drake, Greenspoint; (65) Doak Brown, Campbell & Riggs; (66) Sarah Anderson, S. Anderson Consulting; (67) Mike Sugrue, TAAHP; (68) Gilbert M. Piette, Housing and Community Services, Inc.

Chapter 49. General Comments. (No specific section of the QAP provided in comment.) (19, 21, 23, 26, 27, 28, 29, 32, 33, 35, 40, 41, 46, 50, 52, 53, 54, 56, 58, 66, 67)

COMMENT: Commenter states that the QAP fails to recognize the unique existence of the three Federally Recognized Indian Tribes. Commenter briefly summarizes the history of the self-governing Indian Tribes, and also mentions that although the tribes are self-governing they do have the right to receive federal assistance. According to the comment, Tribes across the country have begun to seek low Income Housing Tax Credits, and the subsequent comments will pertain to their request to include Federally Recognized Indian Tribes in the QAP. (19, 21)

STAFF RESPONSE: According to Internal Revenue Code of 1986, §42, Indian Tribes have historically had the ability to apply for tax credits and §42(i) specifically references considerations for tax credit buildings receiving Native American Housing Assistance. With the passage of the Housing and Economic Recovery Act of 2008, H.R 3221 (the "Act"), the General Use Provision in §42 was further clarified. The legislation states "A project does not fail to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants (A) with special needs (B) who are members of a specified group under a Federal program or State program or policy that supports housing for such a specified group and (C) who are involved in artistic or literary activities." The Department does not explicitly reference Indian Tribes in the QAP because they are not restricted from the program and are eligible to apply under the same requirements of any other applicant. Staff recommends all applications be reviewed individually and on their own merit. Any issues of eligibility, selection or threshold will be considered by the Board individually. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Commenter asked the Department to include a more detailed Table of Contents and that all sections, subsection numbers and headings be in bold, italics, and/or underlined. Commenter also would like to add spaces between subsections. In regards to the application, comment suggested streamlining the application, including auto-fill capabilities for duplicate information, allowing additional page capability for redundant forms and one certification. (26)(66)

STAFF RESPONSE: Staff made every effort to make the QAP and Uniform Application Materials more user-friendly.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Commenter indicated that the current and proposed QAPs fail to remedy the over-concentration and segregation of TDHCA supported projects in the low income and minority concentrated census tracts of the Dallas area. The commenter also noted that the QAP has not addressed the problem of disproportionately allocating federal low income housing tax credits and tax-exempt bond funds to developments in impacted areas (above average minority concentration and below average income levels). (28)

STAFF RESPONSE: The Department has instituted rules that address the issues of concentration and has provided incentives for applicants to consider in site selection. QAP §49.6(f), (g), and (h) provide limitations on the location of developments, and §49.9(i)(12), (13), (15), (16), (19), and (22) provide incentives for applicants to consider the location of the site when selecting a site for development. The proposed QAP provides the 30% increase in eligible basis as incentive to locate Developments in higher income and educational quality. State statutes block building within close distances. Given that the program allows third party developers to choose locations, it would not be feasible to further restrict the Development selection process under state and federal laws. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Comment made that the Department fails to create standards for its projects that protect against developing in neighborhoods of blight. Commenter stated that the Department does not make projects adjacent to or near environmental factors more costly in threshold criteria, and suggests losing more points for noxious environmental issues. Commenter also sug-

gested that tax credit units be subject to site and neighborhood standards. (28)

STAFF RESPONSE: The QAP does provide incentive points for locating in locations that would generally not have blight. The Department requires an environmental site assessment (ESA) for all application requesting issuance of housing tax credits or tax-exempt bond financing that addresses environmental concerns on or near the proposed site. The Department requires mitigation for issues addressed in the ESA. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Commenter states that the Department has released a good QAP, which Global Green USA supports. Commenter stated that point allocations and language clarity are the two areas they are looking to refine and improve. (53)

STAFF RESPONSE: Staff appreciates the assistance provided by Global Green USA. Comment is regarding changes already proposed elsewhere in the QAP. No additional change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Commenter supports the following changes in the 2009 QAP: definitions for single room occupancy and supportive housing; language in proposing at least 50% of Units in supportive housing; and developments provide 10% of the low income units at 30% AMGI as eligible for the 30% increase in eligible basis. In addition, the commenters applauded the language that encourages additional available units at or below 50% AMGI if an applicant qualifies for points under §49.9(i)(3). (32, 54) Commenter congratulated TDHCA staff for preparing a draft QAP which include "monumental improvements." Commenter also praised the high-opportunity areas that allow low-income housing in better parts of town with better access to good schools and public transportation and praised the Department for including "Green Building." Commenter also complimented the supportive housing definitions that were changed. (54)

STAFF RESPONSE: Staff appreciates support of the changes. No further change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Commenter asked for a definition of Infill Housing. (67)

STAFF RESPONSE: Staff agrees with the commenter. There needs to be a clear definition that is accepted by the general public. The reference to infill housing in §49.9(i)(16)(F) was removed from the Draft QAP at this time and will be researched more thoroughly for future inclusion.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(1). Definitions--Adaptive Reuse. (25, 66)

COMMENT: Commenter suggests that the Department clarify that a clubhouse or nonresidential building can be outside the original footprint and still be considered eligible. The commenter also requested clarification that if it were considered New Construction, then it would not be considered Adaptive Reuse. (25, 66)

STAFF RESPONSE: Staff agreed and made the following change:

(1) ...If any Units are built outside the original building footprint or foundation, the Development will be considered New Construction (and not Adaptive Reuse). A clubhouse or non-residential building may be outside the original footprint or foundation and still be considered Adaptive Reuse..."

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(2). Definitions--Administrative Deficiencies. (25)

COMMENT: Commenter suggested the following language change:

(2) Administrative Deficiencies--The absence of information or inconsistent information in the Application as is required under §§49.5, 49.6, 49.8 and 49.9 of this chapter that can be corrected by an additional submission to the Department, unless determined by the Department as unable to be corrected.

STAFF RESPONSE: Staff disagrees with the suggested language because it appears to allow any and all information to be changed. The Deficiency process is to clarify information received not to allow the Applicant to make any changes throughout the Application. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(9). Definitions--Application Acceptance Period. (25)

COMMENT: Commenter suggested the following language change:

(9) Application Acceptance Period--That period of time during which Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department, December 3, 2008 through February 27, 2009, as more fully described in §§49.8 - 49.12 of this chapter. For Tax-Exempt Bond Developments this period is the date the Volumes 1 and 2 are submitted or the date the reservation is issued by the Texas Bond Review Board, whichever is earlier, until a certain date.

STAFF RESPONSE: Staff is unclear what the commenter is suggesting. The dates for Tax-Exempt Bond Developments are different throughout the year dependent on when an Application is submitted to the Texas Bond Review Board. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(14). Definitions--At-Risk Development. (15, 68)

COMMENT: Comment made asking to remove barriers in the state that impede the coupling of funding of Sections 514 and 516 with LIHTC funding. H.R. 3221, the Housing and Economic Recovery Act, clarified that Sections 514 and 516 can be used together with tax credits. (15)

STAFF RESPONSE: No specific barriers were noted, however, the QAP already allows §514 and/or §516 to be utilized with tax credits. The QAP also currently includes reference to §514 and §516 in its definition of an At-Risk Development to help ensure that properties at risk of losing their affordability can compete in a separate set-aside. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Comment made to add a subparagraph (F) to the definition of At-Risk Development that includes properties deemed by HUD to be obsolete or economically non-viable. (68)

STAFF RESPONSE: The definition for an At-Risk Development is statutorily defined in §2306.6702 of the Texas Government Code. The Department does not have the ability to change the definition. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

49.3(15). Definitions--Bedroom. (32, 49, 52, 54)

COMMENT: Comment noted opposition to the language requiring a door on a bedroom, in the draft QAP, as it hinders loft style developments. Specific language was proposed to eliminate the requirement of a door. (32, 49, 52, 54)

STAFF RESPONSE: Staff proposed that the definition include the reference to the door unless the unit is a "loft" design with an open sleeping area of 100 square feet or more. Staff proposed no further change.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(23). Definitions--Community Revitalization Plan. (66)

Comment: Commenter noted that not all adoptions of documents are done by ordinance or resolution and suggested this definition: A published document under any name, approved and adopted by the local Governing Body by ordinance, resolution, or vote, that targets specific geographic areas for revitalization and development of residential developments. (66)

STAFF RESPONSE: Staff recommended using the proposed definition of Community Revitalization Plan noted above. Staff also suggested the following addition to the requirements of evidence submitted in requests for points under §49.9(i)(13) and (24):

(such evidence must include an ordinance, resolution, or otherwise recorded documentation of a vote taken by the local elected Governing Body specifically adopting the Community Revitalization Plan)

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(26). Definitions--Control. (52)

COMMENT: Commenter takes issue with reference in the definition of Control that indicates "managing general partners of a limited liability company." Commenter states that Limited Liability companies do not have managing General Partners, and suggests replacing with member. (52)

STAFF RESPONSE: Staff agrees with the Commenter's assertion that Limited Liability Companies do not have managing General Partners and suggested adoption of the Commenter's definition of Control as follows:

Control--(Including the terms "Controlling," "Controlled by", and/or "under common Control with") The possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership of voting securities, by contract or otherwise, including specifically ownership of more than 50% of the General Partner interest in a limited partnership, or designation as a managing member of a limited liability company."

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(27). Definitions--Controlling or Managing General Partner. (25, 52)

COMMENT: Comment made that the definition now requires ownership of 10 percent or more of the voting stock, and liability for all debts and other obligations of the venture. Commenter suggests that in order to avoid conflict with the definition of "control" in the QAP that the definition be changed as noted below. (52)

STAFF RESPONSE: Staff included this proposed definition for clarification; however, staff believes it needs additional research before it is included in the QAP. Staff recommended striking the proposed definition at this time.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(37). Definitions--Development Site. (25)

COMMENT: Commenter suggested the following clarifying language:

(37) Development Site--The area, or if scattered site areas, for which the Development is proposed to be located and which is to be under the Applicant's control pursuant to §49.9(h)(7)(A) of this chapter."

STAFF RESPONSE: Staff agreed with the clarification and recommended the requested change.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(46). Definitions--Governing Body. (19, 21, 25, 52)

COMMENT: Commenter asked the Department to consider adding this language: "An elected city, county, or tribal entity that is responsible for the creation implementation and/or enforcement of local rules and laws. As recognized by Congress, Federally Recognized Indian Tribes have the authority and are responsible for the creation, implementation and/or enforcement of rules and laws on their lands. As such, they should be recognized in TDHCA's definition of Governing Body (19, 21) Comment made that current definition suggests that the "entity" is elected. Commenter suggests modifying definition as follows; a city or county entity with elected members that is responsible..." (52) Commenter also requested the following language change: Governing Body is the body of elected public officials, responsible for the creation, implementation and/or enforcement of local rules and laws for a city or county, as applicable.

STAFF RESPONSE: Staff agreed with the Commenter's assertion and suggested changing the definition of Governing Body to include tribal entities. Staff believes that in this case, "entity" refers to the elected body, i.e. commission or council, and is appropriate language. Staff recommended the following change to include tribal entities.

Governing Body--An elected city, county, or tribal entity that is responsible for the creation implementation and/or enforcement of local rules and laws.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(47). Definitions--Governmental Entity. (19, 21)

COMMENT: Comment made that Tribal Governments could fall under 'other similar entities' and asked that the QAP provide clarification recognizing that Tribal Governments are elected entities with the power to govern all activities of the Tribe. Commenter would like the word 'tribal' to be added to definition as well. (19, 21)

STAFF RESPONSE: Staff suggested the following change: "includes federal or state agencies, departments, boards, bureaus, commissions, authorities and political subdivisions, special districts, tribal governments and other similar entities.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(48). Definitions--Governmental Instrumentality. (19, 21)

COMMENT: Commenter would like the word 'tribe' added to the definition. Commenter also states that in order for Tribes to receive funding from the Native American Housing Assistance and Self-Determination Act (NAHASDA) they must establish a Tribally Designated Housing Entity (TDHE). The TDHE is a Governmental Instrumentality of the Tribe, and is authorized to act on behalf of the tribe. Those tribes that do not have a TDHE simply let the Tribe itself take those responsibilities. (19, 21)

STAFF RESPONSE: Staff suggested the following change:

(48) Governmental Instrumentality--A legal entity such as a housing authority of a city or county, a housing finance corporation, a municipal utility, or a tribally designated housing entity, which is created by a local political subdivision under statutory authority and which instrumentality is authorized to transact business for the political subdivision.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(51). Definitions--High Opportunity Area. (40, 52)

COMMENT: The commenter suggested that the definition of High Opportunity be moved to §49.3. (40, 52)

STAFF RESPONSE: The QAP currently provides for an explanation elsewhere in the QAP. Staff concurred and recommended adding this as a definition for High Opportunity Area, as follows:

High Opportunity Area--An area that includes:

(A) existing major bus transfer centers and/or regional or local commuter rail transportation stations that are accessible to all residents including Persons with Disabilities; or

(B) a census tract which has an AMGI that is higher than the AMGI of the county or place in which the census tract is located; or

(C) a school attendance zone that has an academic rating of "Exemplary" or "Recognized" rating (as determined by the Texas Education Agency) as of the first day of the Application Submission Acceptance Period; or

(D) a census tract that has no greater than 10% poverty population according to the most recent census data (these census tracts are designated in the 2009 Housing Tax Credit Site Demographic Characteristics Report).

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(58). Definitions--Ineligible Building Types. (15, 25 46, 49, 52, 58)

COMMENT: Commenter asked the Department to boost flexibility for using tax credits for farm labor housing. Commenter suggests allowing bonus points in the 2009 QAP for farm worker housing development and preservation. (15) Commenter requested that the bedroom mix requirement not apply to Adaptive Reuse and suggests the removal of language regarding new construction of nonresidential buildings. (49) Comment made that the word "either" in the first line of subparagraph (I) should be deleted. (52) Commenter asked the Department to allow Single Room Occupancy developments to utilize otherwise ineligible building types. (58) Commenter asked the Department to waive the maximum number of efficiency units for Single Room Occupancy developments. (58)

STAFF RESPONSE: The QAP currently contains scoring items that would benefit the new development and rehabilitation of farm worker housing. The current definition included in the Draft QAP removes developments proposing Adaptive Reuse from the mentioned requirement and removes the language regarding new construction of nonresidential buildings. The definition of Ineligible Building Types allows the use of such buildings if federally permissible and the Application proposes to convert the building to a non-transient multifamily residential development. The current definition included in the Draft QAP excludes developments proposing Single Room Occupancy from the mentioned requirement. Staff recommended the following wording for subparagraph (I):

(I) Any Development that contains residential Units that violates the general public use requirement under Treasury Regulation §1.42-9."

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Commenter asked the Department to include manufactured homes installed in a single family or duplex-zoned subdivision as an Eligible Building Type. They should be manufactured in accordance with 24 CFR Chapter XX, Part 3280 *Manufactured Home Construction and Safety Standards* (MHCSS), and sited on a permanent foundation, which meets HUD standards. (46)

STAFF RESPONSE: The QAP does not have a definition for Eligible Building Types, but rather only notes those building types that are ineligible. In that section, the QAP does not list manufactured homes installed in a single family or duplex zoned subdivision as an ineligible building type. Each submitted development is determined eligible or ineligible based upon the merits of the plan for the development. No change was recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Commenter requested the following language change: (25):

(D) Any Development, other than a Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments, with building(s) with four or more stories that does not include an elevator.

(E) Any Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments proposing more than 70% of the total number of Units in the Development as two-bedroom Units.

(F) Any Development that violates the Integrated Housing Rule of the Department, §1.15 of this title.

(G) Any Development located in an Urban Area involving any New Construction of additional Units (other than a Qualified Elderly Development, a Development composed entirely of single family dwellings, and certain specific types of transitional housing for the homeless and Single Room Occupancy units, as provided in the Code, §42(i)(3)(B)(iii) and (iv)) in which any of the designs in clauses (i) - (iv) of this subparagraph are proposed. For Applications involving a combination of single family detached dwellings and multifamily dwellings, the percentages in this subparagraph do not apply to the single family detached dwellings, but they do apply to the multifamily dwellings. For Intergenerational Housing Applications, the percentages in this subparagraph do not apply to buildings that are restricted by the age requirements of a Qualified Elderly Development, but they do apply to the other multifamily buildings. An Application may reflect a total of Units for a given bedroom size greater than the percentages in clauses (i) - (iv) of this subparagraph to the extent that the increase is only to reach the next highest number divisible by four.

(i) More than 30% of the total Units are one bedroom Units; or

(ii) More than 55% of the total Units are two bedroom Units; or

(iii) More than 40% of the total Units are three bedroom Units; or

(iv) More than 5% of the total Units in the Development with four or more bedrooms.

(H) Any Development that includes age restricted units that are not consistent with the Intergenerational Housing definition and policy or the definition of a Qualified Elderly Development.

(I) Any Development that either contains residential Units designated for a single occupational group or violates the general public use requirement under Treasury Regulation §1.42-9.

STAFF RESPONSE: Staff agreed with the clarifying language and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(62). Definitions--Local Political Subdivision. (19, 21)

COMMENT: Commenter asked the Department to include 'tribal reservation' in the definition, for the same reasons as previously mentioned by this commenter. (19, 21)

STAFF RESPONSE: Staff agrees with the Commenter's assertion and recommended changing the definition of Local Political Subdivision to include tribal reservation as follows:

A county or municipality (city or tribal reservation) in Texas. For purposes of §49.9(i)(5) of this chapter, a local political subdivision may act through a Government Instrumentality such as a housing authority, housing finance corporation, or municipal utility even if the Government Instrumentality's creating statute states that the entity is not itself a "political subdivision."

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(73). Definitions--Pre-Application. (25)

COMMENT: Commenter suggested the following clarification:

(73) Pre-Application--A preliminary application, in a form prescribed by the Department, filed with the Department by an Applicant prior to submission of the Application for the State Housing Credit Ceiling, including any required exhibits or other supporting material, as more fully described in this chapter. (§2306.6704)

STAFF RESPONSE: Staff believes that this is a restriction not in statute. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(75). Definitions--Principal. (25)

COMMENT: Commenter suggests that "special limited partners" are eliminated from the definition of "Principal" as follows:

(75) Principal--The term Principal is defined as Persons that will exercise Control over a partnership, corporation, limited liability company, trust, or any other private entity. In the case of:

(A) Partnerships, Principals include all General Partners and Principals with ownership interest in the General Partner;

STAFF RESPONSE: Staff does not believe Special Limited Partners should be eliminated from the definition of Principal. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(85). Definitions--Rehabilitation. (27)

COMMENT: Comment made that the current definition of Reconstruction does not take into account the demolition and reconstruction of developments that have subsequent phasing. In order to make an impact in a neighborhood, according to the commenter, they would need to complete the full development, and the language to do so should be included in the Reconstruction definition. Comment was also made in regards to demolishing units, and how there has to be the same amount of units to replace those demolished. They acknowledged that there should not be a negative impact in a neighborhood, but suggested the ability to replace the demolished units with more total units to make such a project financially feasible. Furthermore, they would be willing to provide a market study that will determine if the number of units does not negatively impact the area or region, while still being considered for reconstruction. (27)

STAFF RESPONSE: The Draft QAP does not include a separate definition for reconstruction, as reconstruction is included in the statutory definition of Rehabilitation. Applicants currently have the ability to rehabilitate existing developments in phases. Applicants have the ability to demolish a development and replace the development with a development containing more units. In this instance, the development would be considered New Construction and not Rehabilitation. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(93). Definitions--Single Room Occupancy. (52, 58)

COMMENT: Commenter asked to replace 'need not' with 'may not.' (52)

STAFF RESPONSE: The current draft QAP includes the definition of Single Room Occupancy. Staff suggested the following change "A single efficiency unit that contains sanitary facilities but may or may not include food preparation facilities and is intended for occupancy by one person."

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Commenter asked the Department to add a clear definition of single room occupancy. (58)

STAFF RESPONSE: The current Draft QAP includes a definition of Single Room Occupancy. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(97). Definitions--Supportive Housing. (32, 54, 58)

COMMENT: Commenter suggested that the QAP use the same definition as that in the Real Estate Analysis Guidelines. (32, 54) Comment made recommending that the definition of supportive housing be clarified so that the definition, in the QAP and REA Rules, allows supportive housing to be integrated into different types of developments. (58)

STAFF RESPONSE: This request relating to integration into different types of developments warrants further research and additional public comment. Staff will consider this in the draft 2010 QAP. Staff recommended the following change to clarify the definition:

Supportive Housing--Residential Rental Developments intended for occupancy by individuals or households transitioning from homelessness, at risk of homelessness, or in need of specialized and specific social services.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(103). Definitions--Unit. (25, 49, 52)

COMMENT: Commenter asked the Department to include the definition for 'Unit' once again and that it includes the language for loft-type developments that provided square footage requirements to be considered a one, two, or three bedroom. (49) Commenter also requested that the 'Unit' definition also address the concept of a Single Room Occupancy (SRO) development. (52)

STAFF RESPONSE: The definition for Unit is statutorily defined in §2306.6702 and is already included in the QAP. Minimum square footage requirements are included in §49.9(h) of the draft QAP and the QAP now includes a definition for Single Room Occupancy. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Commenter suggested the following language change for the 'Unit' definition:

(103) Unit--Any residential rental unit consisting of an accommodation including a single room used as an accommodation on a non-transient basis, that contains complete physical facilities and fixtures for living, sleeping, eating, cooking (such as a microwave), and sanitation or (B) and SR0. (§2306.6702)

STAFF RESPONSE: Staff agreed with the clarification and recommended the change as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.3(105). Definitions--Urban Core. (23, 27, 29 40, 49, 52, 67)

COMMENT: Commenter requested a change to the proposed definition of 'Urban Core' that will allow local jurisdiction with mixed zoning classifications a new tool for redevelopment. (23) Comment was also made that as the definition is written, it appears that the final determination of whether a development is in an Urban Core will be made by the municipality in whose jurisdiction the development will be located; the current definition in the QAP is ambiguous and should be refined for clarity. (27) Comment made that the urban core should be tied to high-opportunity areas with the population of more than 100,000 people. (29) Commenter suggested that the definition of 'Urban Core' be simplified and leaves too many variables that will be difficult for developers to understand. The commenter suggested that the definition for 'Urban Core' tie back to high opportunity areas. (40, 49, 52) Another comment was made asking for a revision of the definition that was not "too narrow" and would not use "commercial zoning" as part of its definition. (67)

STAFF RESPONSE: Staff believes that the suggested definition provides objective criteria for determining whether a development is located within an Urban Core. Because Developments located in an Urban Core may receive points under the proposed scoring criteria for the 2009 QAP, staff does not agree with the "designated redevelopment..." part of this definition. This could give these areas an advantage because they would be able to receive points for both "Urban Core" and "Revitalization." Staff believes that an objective determination of whether a development is within an Urban Core will require use of locally determined zones and boundaries. The final determination, however, will be made by the Department. Staff did not agree that the description of a High Opportunity Area adequately captures the intention of the Urban Core definition and should be a separate definition. Staff suggested that the inclusion of commercial zoning is required in order to adequately capture the intention of the 'Urban Core' definition. Staff recommended the following revised definition:

Urban Core--A compact and contiguous geographic area that is composed of adjacent block groups in which at least 90% of the land not in public ownership is zoned to accommodate a mix of medium or high density residential and commercial uses within the same zoning district.

BOARD RESPONSE: Accepted staff's recommendation.

§49.5(a)(8). Ineligibility. (46)

COMMENT: Commenter asked that the one mile, three-year rule not prevent subsequent phases of a phased development from starting even when phase one is still leasing up. (46)

STAFF RESPONSE: The one mile, three-year rule is a statutory requirement. Therefore, the Department does not have the ability to eliminate this rule. The statute does provide an exception to the one mile, three-year rule if the applicant submits evidence of a vote by the local Governing Body specifically allowing the development. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Commenter requested the following language change to §49.5(a)(8)(D)(iv) and (E):

(iv) The Governing Body of the Local Political Subdivision where the Development is to be located has by vote specifically allowed the construction of a new Development located within one linear mile or less from a Development described under subparagraphs (A) - (C) of this paragraph. For purposes of this clause, evidence of the Governing Body vote or evidence required by this subparagraph must be received by the Department no later than April 1, 2009 (or for Tax-Exempt Bond Developments no later than fourteen (14) days before the Board meeting where the credits will be committed) and may not be more than one year old.

(E) In determining when an existing Development received an allocation as it relates to the application of the three-year period, the Development will be considered from the date the Board took action on approving the allocation of tax credits. In dealing with ties between two or more Developments as it relates to this rule, refer to §49.9(j) of this chapter.

STAFF RESPONSE: Staff agreed with the clarifications and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.5(b)(8) and (9). Disqualification and Debarment.

COMMENT: Commenter requested the following language change:

(8) The Applicant, Development Owner, Developer, Guarantor, or any Affiliate of such entity whose previous funding contracts or commitments have been partially or fully de-obligated during the 12 months prior to the submission of the Application due to a failure to meet contractual.

(9) The Applicant, Development Owner, Developer, Guarantor, or any Affiliate of such entity whose pre-development award of non-tax credit funds from the Department has not been repaid for the Development at the time of Carryover Allocation or Bond closing.

STAFF RESPONSE: Staff agreed with the requested clarification and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.5(f). Appeals and Administrative Deficiencies for Ineligibility, Disqualification and Debarment. (25)

COMMENT: Commenter requested the following changes:

(f) Appeals and Administrative Deficiencies for Ineligibility, Disqualification and Debarment. An Application or Person found ineligible, disqualified, debarred or otherwise terminated under subsections (a) - (e) of this section will be notified in accordance with the Administrative Deficiency process described in §49.9(d)(4) of this chapter (when applicable). They may also utilize the appeals process described in §49.17(b) of this chapter. (§2306.6721(d))

STAFF RESPONSE: Due to the limited comment received, staff believes the current language is sufficient. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.6(c). Scattered Site Limitations. (20, 30, 34, 37, 44, 45, 47, 48, 51, 55, 65)

COMMENT: Comment made that if reconstruction is a goal of the Department, which it appears to be with the additional points awarded for reconstruction, then efficient use of land should be promoted by allowing the reconstruction on land sufficient to meet local density requirements for scattered site proposals and not mandate that reconstruction has to occur on every lot.

STAFF RESPONSE: The Legislature brought the definition of reconstruction in the definition of rehabilitation and therefore the goal is to replace existing housing units. Given that the definition of reconstruction is intended to replace existing housing and not to build additional units that may cause density or zoning issues. A Development is not penalized for adding units; however, they are not able to receive points for reconstruction if they add more units than were demolished. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.6(d). Credit Amount. (20, 24, 25, 26, 28, 30, 34, 35, 37, 40, 44, 45, 47, 48, 49, 51, 52, 55, 65, 67)

COMMENT: Comment made in regards to the $2 million credit limit to any Applicant, Developer, Related Party, or Guarantor. Commenter argues that it is unfair not to prorate the credit amount allocated in all instances based on percentage of ownership or percentage of the developer fee received. This percentage option should not be limited to building capacity for inexperienced developers. Commenter also suggests that because executive directors and board members of nonprofits and housing authorities have no ownership and do not receive any of the developer fees, a credit allocation should not be assessed against these individuals. A credit allocation should not apply to a consultant unless the consultant has an ownership interest in the proposed project or will be paid an actual share of the developer fees."

STAFF RESPONSE: The Department's General Counsel has opined that the statutory $2 million limitation does apply to nonprofit entities, public housing authorities, publicly traded corporations, individual board members, and executive directors. Staff recommends no change. Regarding the comment that the limit should not apply to consultants, consultants are already excluded from the $2 million limit, provided the consultant fee does not exceed 10% of the fee paid to the Developer or $150,000. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Commenter asked the Department to raise the amount of credits per development from $1.2 to $1.8 million (35), $1.5 million (67) or $2 million; and from $2 to $4 million per developer, citing higher construction costs. (24, 26) Comment made that the $1.4 million dollar cap significantly inhibits the use of the 130% basis in High Opportunity Areas that meet the §49.6(h)(4)(D)(ii)(iv) criteria. Commenter also states that the Department's decisions to continue to impose a cap lower than statutorily required will limit the number of units that may be developed in higher opportunity areas. Commenter again cites a discrepancy in the amount of low-income minority housing in predominately white areas. (28) Another commenter suggested that due to current conditions in the tax credit investor market, the Department should impose only the statutory cap and remove the allocation cap on Developments. (40, 49, 52)

STAFF RESPONSE: The Draft QAP proposed raising the credit limit per development from $1.2 to $1.4 million. Staff believes this is an adequate increase. No additional change recommended for the credit limit per Development. The Department does not have the ability to change the $2 million credit limit per Developer because this limit is a statutory limit. No change recommended to the $2 million credit limit cap.

BOARD RESPONSE: The Board eliminated the $1.2 million credit amount per Development for 2009 and determined the statutory $2 million credit limit per Developer will be the control for the credit amount per Development.

COMMENT: Commenter stated that the $1.4 million cap does not appear to distinguish between the limited 9% credits and the 4% credits for which a competitive 9% tax credit property may qualify. Commenter suggests that in order to encourage Rehabilitations/Reconstruction projects that the QAP clearly state that the $1.4 million cap only applies to 9% credits for which an application would be eligible and not the 4% portion of the competitive tax credits. (26)

STAFF RESPONSE: Staff agrees with this clarification and proposed the following revision:

(d) Credit Amount. ... The Department will limit the allocation of tax credits to no more than 1.4 million per Development. In order to encourage Rehabilitation and reconstruction, the $1.4 million credit limitation will not apply to the 4% competitive tax credits for which such a development may qualify. The Department shall not allocate more than $2 million of tax credits in any given Application Round to any Applicant, Developer, Related Party or Guarantor; Competitive Housing Tax Credits approved by the Board during the 2009 calendar year, including commitments from the 2009 Credit Ceiling and forward commitments from the 2010 Credit Ceiling, are applied to the credit cap limitation for the 2009 Application Round."

BOARD RESPONSE: The Board eliminated the $1.2 million credit amount per Development for 2009 and determined the statutory $2 million credit limit per Developer will be the control for the credit amount per Development.

COMMENT: Commenter requested the following changes:

In order to evaluate this $2 million limitation, Nonprofit entities, public housing authorities, publicly traded corporations, individual board members, and executive directors must provide the documentation required in the Application with regard to this requirement. In order to encourage the capacity enhancement of inexperienced Developers who are ineligible to receive an experience certificate under §49.9(g) of this chapter, the Department will prorate the credit amount allocated in situations where an inexperienced Developer partners with a Developer who can re-

ceive an experience certificate under §49.9(g) of this chapter. The Department will prorate the credits based on the percentage ownership in the Developer entity, if there is an ownership interest, or the proportional percentage of the Developer fee expected to be received, when the experienced Developer does not have an ownership interest, in the Developer entity. To be considered for this provision, a copy of a Joint Venture Agreement or similar document between the experienced Developer and the inexperienced Developer must be provided, along with a narrative on how the arrangement builds the capacity of the inexperienced Developers. Tax-Exempt Bond Development Applications are not subject to these Housing Tax Credit limitations, and Tax-Exempt Bond Development Applications will not count towards the total limit on tax credits per Applicant. The limitation does not apply (§2306.6711(b))."

STAFF RESPONSE: Staff believes that this section needs additional clarification, however, it would require additional time and comment. Staff will work with the stakeholders of the program to draft language for the 2010 QAP.

BOARD RESPONSE: Accepted staff's recommendation.

§49.6(e)(2). Limitations on the Size of Developments. (25, 26)

COMMENT: Comment made requesting that Rural Bond transactions be allowed to exceed the 80 new unit construction limit, because the market demand should determine the number of units not an arbitrary number. Additionally, commenter requested that Rural Developments involving reconstruction not have a size limitation. (26)

STAFF RESPONSE: Section 2306.004 of the Texas Government Code specifically define a Rural Development and imposes a maximum limit of 80 Units for Developments proposed in Rural Areas. The Department has applied this restriction consistently to all Department programs. Staff believes that allowing no more than 80 units as part of reconstruction is an appropriate application of the statute. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Commenter requested the following clarification:

(2) Rural Developments involving any New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings) will be limited to 80 Units (this includes individual Tax-Exempt Bond Developments). Rural Developments involving only Rehabilitation (excluding reconstruction) do not have a limitation as to the number of Units.

STAFF RESPONSE: Staff agrees with the suggested language and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.6(h)(3). 30% Increase in Eligible Basis. (16, 20, 28, 30, 32, 34, 37, 41, 44, 45, 47, 48, 51, 54, 55, 58, 67)

COMMENT: Comment made supporting the 30% increase in eligible basis. Commenter requests revising the language relating to energy tax credits so that it is more objective. (16, 32, 54) Commenter also supported the boost for location near mass transit but clarifies that it should be limited to developments that are to be located near major bus transfer stations and/or regional or local rail transport stations. (16, 41) However, other comments made stating that the 30% increase for developments near a public transportation does not address the need to diversify low income minority areas and pointed out that in the Dallas area 25 of the 58 DART transit centers are already in a QCT, and therefore the Department is refusing to stray from concentrated minority low income housing. (28) Comment made asking the Department to include the following as eligible for the 30% boost: qualified elderly development, single family developments targeted for homeownership, an expanded concept of at-risk properties (20, 30, 34, 37, 44, 45, 47, 48, 51, 55) and supportive housing. (58) Commenter also requested the boost for all proposed developments located in census tracts that have not received an award of tax credits or tax-exempt bonds in the last five years, not solely rural developments. (41, 67) Commenter supports assigning an additional category for developments that are located in any of the First Tier Counties. (26, 41, 67)

STAFF RESPONSE: The QAP includes sufficient incentives for qualified elderly development, and the At-risk Set-aside addresses developments that rehabilitate or reconstruct rental housing to prevent losses of existing low-income housing. Single family developments with a focus on homeownership does not guarantee the continuation of affordability and should not in itself be eligible for the 30% increase in eligible basis. The "At-Risk" definition is statutory and thereby would require a statutory change.

Staff believes that this criterion limiting the 30% increase in eligible basis to Rural Developments provides needed incentive for rural development. No change recommended for the 30% increase for Rural Developments. The proposed Draft QAP does allow the 30% increase in eligible basis for Supportive Housing Development that propose at least 50% of the units to serve Supportive Housing tenants (§49.6(h)(4)(B)). Staff agrees that the 30% increase in eligible basis be allowed for Developments located in the Hurricane Ike eligible counties. Staff proposed the following language:

(5) The Development proposing to build in a Hurricane Ike eligible county as designated by the Emergency Economic Stabilization Act of 2008, H.R. 1424 and Presidential Declaration FEMA-1791-DR and is able to place in service by December 31, 2012 (or the date as revised by the Internal Revenue Service) as certified in the Application.

Staff agrees that a way to objectively measure this requirement is needed. Staff suggested the following revision:

(3) The Development qualifies for and receives Renewable Energy Tax Credits. For purposes of this paragraph, the Application will be required to include an architect's letter or contractor bid as evidence that the Applicant will be eligible to request Renewable Energy Tax Credits in its income tax filings. Applicant will be required to show proof of receipt of the Renewable Energy Tax Credits at the time of Cost Certification; or

Staff agrees that public transportation section needs to be clarified. Staff suggests the following revision:

(i) A Development that is proposed to be located within one-quarter mile of existing major bus transfer centers and/or regional or local rail transportation stations that are accessible to all residents including Persons with Disabilities;

BOARD RESPONSE: Accepted staff's recommendation.

§49.6(h)(4)(B) and (D)(ii). Development Proposing to Qualify for a 30% increase in Eligible Basis. (25)

COMMENT: Commenter proposed the following language:

(B) Developments proposing at least 50% of the total number of Units for Supportive Housing;

(C) Developments proposing to provide 10% of the Low-Income Units, that will serve individuals and families at or below 30% of AMGI, in excess of those that are proposed in §49.9(i)(3) of this chapter; or

(D) Developments proposed in High Opportunity Areas as provided in clauses (i) - (iv) of this subparagraph:

(i) A Development that is proposed to be located within one-quarter mile of existing public transportation or commuter rail transportation stations that are accessible to all residents including Persons with Disabilities;

(ii) A Development that is proposed to be located in a census tract which has an AMGI that is higher than the AMGI of the county or place in which the census tract is located as of the first day of the Application Submission Acceptance Period;

STAFF RESPONSE: Staff agreed with the suggested language and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.6(k). Appeals and Administrative Deficiencies for Site and Development Restrictions. (25)

COMMENTS: Commenter requested the following language change:

(k) Appeals and Administrative Deficiencies for Site and Development Restrictions. An Application or Development found to be in violation of or conflict with subsections (a) - (j) of this section will be notified in accordance with the Administrative Deficiency process described in §49.9(d)(4) of this chapter. They may also utilize the appeals process described in §49.17(b) of this chapter.

STAFF RESPONSE: Staff agreed with the suggested language and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.7(b). Set-Asides. (25)

COMMENT: Commenter suggested the following language change:

(b) Set-Asides. An Applicant may elect to compete in as many of the following Set-Asides for which the proposed Development qualifies (§2306.111(d)):

(1) At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of the Code, §42(h)(5). Qualified Nonprofit Organizations must have the Controlling interest in the Development Owner applying for this Set-Aside. If the Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the controlling managing General Partner. If the Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the controlling Managing Member. Additionally, a Qualified Nonprofit Development submitting an Application in the nonprofit Set-Aside must have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or a co-Developer as evidenced in the development agreement. (§2306.6729 and §2306.6706(b))

STAFF RESPONSE: Staff agreed with the suggested language and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.8(d)(3)(B). Pre-Application Threshold Criteria and Review. (26, 66)

COMMENT: Commenter requested that the evidence of proof of delivery expand because a recipient may refuse to sign a receipt for mail or courier delivery, in which case a returned receipt that had been properly addressed but not signed should be allowed as proof of delivery. Commenter also suggested that this requirement will be difficult to meet in order to receive confirmation from the recipients. Commenter indicated that municipalities who oppose a deal could pose a problem by simply not signing or provide evidence of proof of delivery. (26, 66)

STAFF RESPONSE: Staff believes that a return receipt, although not signed, would be acceptable evidence as long as the delivering agent (courier, postal service, etc) indicates that delivery was attempted and refused. Staff notes that the requirements of the QAP have not changed only the clarification for what satisfies "proof of delivery." The Department does not require the Applicant to submit such evidence unless the notification process is challenged. The Department must have a mechanism that shows that the notification was delivered to the intended recipient.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(c). Adherence to Obligations. (52)

COMMENT: Commenter states that these penalties are too severe and can be disproportionate in regards to the size of the infraction. Commenter recommends a system of escalating penalties; or to revise the application to have a section in which all material "Representations" concerning the project are reflected, so that the developer can refer to that section whenever plan changes are anticipated in order to determine whether an amendment is needed. (52)

STAFF RESPONSE: Staff is finalizing an Application Verification Form, which the Developer will complete at the time of Commitment or Carryover, which will be the verification for all divisions in the Department as well as a reference for the Applicant. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(d)(5)(C). Subsequent Evaluations of Applications. (60)

COMMENT: Comment made that an application that qualifies for the At-Risk Set-Aside should also be able to roll over into the Regional pool for consideration against other applicants in the region. (60)

STAFF RESPONSE: This section of the QAP currently allows that "To the extent that Applications in the At-Risk and TRDO-USDA Set-Asides are not competitive enough within their respective Set-Asides, they will also be able to compete, with no Set-Aside preference, within their appropriate sub-region." No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(h)(4)(A)(ii)(XXV). Green Building Initiative. (27, 32, 38, 43, 54, 60, 66)

COMMENT: Comment made supporting the green building initiatives. Commenter stated that NAHB has put out some guidelines and they will forward them to the Department. (27, 38) Comments were made asking to improve the point allocations for green building, to award points proportionally according to the impact of particular green practices and equipment will have on the project overall, and to clarify language to ensure more per-

formance-based and not prescriptive goals to again meet overall green building goals. (32, 54) Comment made suggesting that more points are awarded to larger photovoltaic panels, as opposed to smaller ones. Comment also suggested excluding the cost of solar insulations from the project cost so that developers are not deterred from including such systems in their projects. (43) Comment made asking the Department to consider scoring rehabilitation projects with 1.5 points per Green Building item achieved, because rehabilitation projects have less flexibility. (60) Comment made suggesting "the addition of tankless hot water heaters for 3 points" to the Green Building criteria. (66)

STAFF RESPONSE: Staff agreed with the clarifications received. These comments appear to be substantial, however, staff believes these clarifications will enable the development community to understand what is required and will enable the Department to inspect and/or monitor the amenities. Staff recommended the following revisions to §49.9(h)(4)(A)(ii)(XXV):

(-a-) evaporative coolers (for use in designated counties listed in the Application Materials, 2009 Housing Tax Credit Site Demographics Information) (1 point);

(-b-) passive solar heating/cooling (3 points maximum);

(-1-) Two points if the glazing area on the north- and south-facing walls of the building is at least 50% greater than the sum of the glazing area on the east- and west-facing walls; and the east-west axis of the building is within 15 degrees of due east-west.

(-2-) One point if in addition to the east-west axis of the building oriented within 15 degrees of due east-west, utilize a narrow floor plate (less than 40 feet), single loaded corridors and open floor plan to optimize daylight penetration and passive ventilation (note: to qualify for this particular point, application must also implement the 15 degree building orientation option in subitem (-1-) of this item); and 100% of HVAC condenser units are shaded so they are fully shaded 75% of the time during summer months (May through August); and solar screens or solar film on all East, West, and South Windows with building oriented to east-west axis within 15 degrees of due east-west, west-south axis within 15 degrees of due west-south, and south-east axis within 15 degrees of due south-east.

(-c-) water conserving features (2 points maximum, 1 point for each):

(-1-) Install low-flow toilets using less than or equal to 1.6 gallons per flush, or high efficiency toilets using less than or equal to 1.28 gallons/flush.

(-2-) Install bathroom lavatory faucets and showerheads that do not exceed 2.0 gallons/minute and kitchen faucets that do not exceed 1.5 gallons/minute. Applies to all fixtures throughout development. Rehab projects may choose to install compliant faucet aerators instead of replacing entire faucets.

(-d-) solar water heaters (Solar water heaters designed to provide at least 25% of the average energy used to heat domestic water throughout the entire development.) (2 points);

(-e-) irrigation and landscaping (must implement both of the following) (2 points);

(-1-) collected water (at least 50%) for irrigation purposes;

(-2-) selection of native trees and plants that are appropriate to the site's soils and microclimate and locate then to allow for shading in the summer and allow for heat gain in the winter;

(-f-) sub-metered utility meters (2 points maximum);

(-1-) Sub-metered utility meters on rehab project without existing sub-meters or new construction senior project (2 points); or

(-2-) Sub-metered utility meters on new construction project (excluding new construction senior project) (1 point);

(-g-) energy efficiency (4 points maximum);

(-1-) Three points if Energy Elements include Energy-Star qualified windows and glass doors; and Exterior envelope insulation, vapor barriers and air barriers greater than or equal to Energy Star air barrier and insulation criteria; and HVAC, domestic hot water heater, or insulation that exceeds Energy Star standards or exceeds the IRC 2006; or

(-2-) Four points if the project promotes energy efficiency by meeting the requirements of Energy Star for Homes by either complying with the appropriate builder option package or a HERS score of 85.

(-h-) thermally and draft efficient doors (SHGC of 0.40 or lower and U-value specified by climate zone according to the 2006 IECC) (2 points);

(-i-) photovoltaic panels for electricity and design and wiring for the use of such panels (3 points maximum);

(-1-) Photovoltaic panels that total 10 kW (1 point);

(-2-) Photovoltaic panels that total 20 kW (2 points);

(-3-) Photovoltaic panels that total 30 kW (3 points);

(-j-) construction waste management and implementation of EPA's Best Management Practices for erosion and sedimentation control during construction (1 point);

(-k-) recycling service provided throughout the compliance period (1 point);

(-l-) water permeable walkways (at least 20% of walkways and parking) (1 point);

(-m-) bamboo flooring, wool carpet, linoleum flooring, straw board, poplar OSB, or cotton batt insulation (50% of flooring on the ground floor of the development must be finished concrete and/or ceramic tile. 50% of the flooring on upper floors must be ceramic tile and/or a flooring material that is Floor Score Certified (developed by the Resilient Floor Covering Institute), applied with a Floor Score Certified adhesive and comes with a minimum 7-year wear through warranty (2 points).

Staff agreed that reconfiguration of existing Developments to include green building initiatives does require additional consideration. The Department allows this same consideration with other amenities. Staff agreed with the 1.5 point consideration. Staff proposed the following language:

(XXV) Green Building amenities (Rehabilitation Developments will receive 1.5 points for each point requested for the green building amenities):

Staff believes including tankless hot water heaters may be a reasonable request. However, it would require further research and input for staff to establish an appropriate recommendation for this year's QAP. Staff proposes this suggestion be incorporated into the 2010 QAP and commits to further research this issue. The limited amount of research that staff has conducted to date indicates many possible disadvantages to the installation of such units; including, the limited in the amount of hot water that can be produced at one time; the longer period it may take to get hot

water, since they don't start heating the water until you turn on the faucet; the possibility of an increase in water wastage since you have to let the water run longer to get your hot water; and the limited the rate of the heated water flow. Staff recommended no change.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(h)(4)(B). Threshold Criteria. (62)

COMMENT: Comment asks the Department to be more specific in its definition of "lighting fixtures." Commenter also questioned whether an option is available to either provide Energy Star light fixtures, or simply provide tenants with Energy Star bulbs. It is their contention that the energy star light fixtures will be obsolete soon. (62)

STAFF RESPONSE: Staff agreed that this requirement should be revised and recommended the following language:

(viii) Energy-Star or equivalently rated lighting in all Units, which may include compact florescent bulbs.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(h)(4)(C). Threshold Criteria. (25)

COMMENT: Commenter suggested the following clarifying language:

(C) A certification that the Development will meet the minimum threshold for size of Units as provided in clauses (i) - (v) of this subparagraph. These minimum requirements are not associated with the selection criteria points in subsection (i) of this section. Developments proposing Rehabilitation (excluding Reconstruction) or Single Room Occupancy will not be subject to the requirements of this subparagraph.

(i) 550 square feet for an efficiency Unit;

(ii) 650 square feet for a one Bedroom Unit that is not in a Qualified Elderly Development; 550 square feet for a one Bedroom Unit in the Qualified Elderly Development;

(iii) 900 square feet for a two Bedroom Unit that is not in a Qualified Elderly Development; 700 square feet for a two Bedroom Unit in a Qualified Elderly Development;

(iv) 1,000 square feet for a three Bedroom Unit; and

(v) 1,200 square feet for a four Bedroom Unit.

STAFF RESPONSE: Staff believes this change would not address the Units in an Intergenerational Development. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(h)(4). Certifications. (66)

COMMENT: Commenter requested that the Department reduce the number of signatures to one in respect to all of its certifications. (66)

STAFF RESPONSE: This is not relevant to the QAP, however staff will consider this request in the application materials.

BOARD RESPONSE: Accepted staff's recommendation. §49.9(h)(4)(E). Certification to comply with accessibility requirements. (31)

COMMENT: Comment made referring to Senate Bill 1458 passed by the 2005 Texas legislature adopting 2003 International Building Code (IBC) for all municipalities, excluding unincorporated areas, and the 2003 and 2006 IBC are enforced in Texas. Commenter went on to note that HUD also certified the 2003 and 2006 IBC in compliance with the federal Fair Housing Act. Commenter suggests that the Department include such language; "(E) A certification that the Applicant is in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301... the 2003 International Building Code, the 2006 International Building Code published by the International Code Council, the Code requirements for Housing Accessibility 200..." (31)

STAFF RESPONSE: §49.9(h)(4)(D) of the QAP already includes this requirement. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(h)(6)(E). Evidence of Development Cost. (42)

COMMENT: Comment made asking the Department to reconsider its policy on requiring a Property Condition Assessment Report for reconstruction projects. Commenter stated that when an applicant considers a reconstruction project some basic architect work must have already been done. Commenter would like to have the timeline for PCA revisited. (42)

STAFF RESPONSE: Staff believes that the Property Condition Assessment is necessary in order for the Department to be able to determine whether the demolition and reconstruction of an existing development is the most effective use of tax credits. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(h)(7)(A)(iii). Evidence of Readiness to Proceed. (25)

COMMENT: Commenter suggested the following clarification:

(iii) A contract for sale, an exclusive option to purchase or a lease which is valid for the entire period the Development is under consideration for tax credits. For Tax Exempt Bond Development Applications, site control must be valid through December 1, 2008 with option to extend through March 1, 2009 (Applications submitted for lottery) or 90 days from the date of the bond reservation with the option to extend through the scheduled TDHCA Board meeting at which the award of Housing Tax Credits will be considered (Applications not submitted for lottery). The potential expiration of site control does not warrant the Application being presented to the TDHCA Board prior to the scheduled meeting.

STAFF RESPONSE: Staff agreed with the suggested clarification and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(h)(7)(A)(iv). Identity of Interest Transaction. (20, 30, 34, 37, 44, 45, 47, 48, 51, 55, 65)

COMMENT: Comment states that the QAP unfairly limits acquisition costs to the lesser of initial acquisition costs plus costs of owning, holding, or improving the property or the as-is appraised value. Commenter suggests that the Department should allow the as-is appraised value as the acquisition costs, because some may be unable to document the costs of owning, holding or improving the land. Furthermore, the commenter suggests that limiting the acquisition cost to the lesser of the two, limits unfairly limits at-risk projects, USDA, and Housing Authorities trying to preserve low income housing. (20, 30, 34, 37, 44, 45, 47, 48, 51, 55) Commenter states that Department did not permit the applicants to take the value of the land being contributed by the LPS for points because the land contributions were characterized as identity of interest transactions which require a settle-

ment statement or other verifiable costs of owning the properties. Commenter believes that an appraisal should be sufficient to justify the value of the land contribution even in identity of interest transactions. (65)

STAFF RESPONSE: Staff believes that limiting the acquisition cost to the lesser of initial cost plus costs of owning, holding, or improving the property or the as-is appraised value ensures that the acquisition amount is not inflated. In the rare case that an issue arises regarding the Applicant's inability to document the costs of owning, holding or improving the land, the Department will resolve that issue on an individual basis. Staff does not believe that this provision in any way limits at-risk projects, USDA, and Housing Authorities trying to preserve low-income housing. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(h)(7)(B)(i) and (ii). Evidence of Readiness to Proceed. (25)

COMMENT: Commenter suggested the following clarifying language:

(i) For New Construction or reconstruction Developments, a letter from the chief executive officer of the Local Political Subdivision or another local official with appropriate jurisdiction stating that (For Tax-Exempt Bond Applications the items in subclauses (I) - (III) of this clause must be submitted no later than 14 days prior to the Board meeting when the housing tax credits will be considered):

(I) The Development is located within the boundaries of a Local Political Subdivision which does not have a zoning ordinance; and either subclause (II) or (III) of this clause;

(II) The letter must state that the Development is consistent with a local consolidated plan, comprehensive plan, or other local planning document that addresses affordable housing; or

(III) The letter must state that there is a need for affordable housing, if no such planning document exists.

(ii) For New Construction or reconstruction Developments, a letter from the chief executive officer of the Local Political Subdivision or another local official with appropriate jurisdiction stating that: ...

STAFF RESPONSE: Staff agreed with the clarification and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(h)(7)(C)(i). Evidence of Readiness to Proceed. (25)

COMMENT: Commenter requested the following change:

(i) Bona fide financing in place as evidenced by:

(I) A valid and binding loan agreement; and

(II) Deed(s) of trust in the name of the Development Owner as grantor; or

STAFF RESPONSE: Staff agreed with the suggested language and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(h)(7)(D)(ii) and (iii). County and Property Taxes. (19, 21, 25)

COMMENT: Comment made that there are places in Texas where there are not any property or county taxes. Commenter asserts that Tribal Land for Federally Recognized Indian Tribes is not assessed property taxes and the commenter would like to have a condition inserted to address this. Commenter suggests that this threshold item be deemed not applicable for tribal lands. (19, 21)

STAFF RESPONSE: Staff agreed that this item requires revision and recommended the following language:

(ii) A current valuation report from the county tax appraisal district and documentation of the current total property tax rate for the Development Site (unless the site is located on land that is not subject to federal, state or local property taxes), and..."

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(h)(7)(D)(iii)(I) - (III). Title Policy/Commitment. (19, 21, 25)

COMMENT: Comment made that Trust Lands are unable to provide a Title Policy or Title Commitment, because Title Commitments are only beneficial for fee-simple land. Commenter is asking the Department to consider accepting a Title Status Report in lieu of a Title Commitment for such lands. The Title Status Report (TSR) is issued by the Bureau of Indian Affairs (BIA). The commenter states that this would be the best, and only alternative to a Title Commitment from Tribe Lands. (19, 21)

STAFF RESPONSE: Staff concurs and suggested the following revision:

(iii) A copy of:

(I) The current title policy (or title status report if on Tribal Land) which shows that the ownership (or leasehold) of the Development Site is vested in the name of the Development Owner; or

(II) a current title commitment with the proposed insured matching the name of the Development Owner and the title of the Development Site vested in the name of the seller or lessor as indicated on the sales contract, option or lease.

(III) If the title policy, title status report, or commitment is more than six (6) months old as of the day the Application Acceptance Period closes, then a letter from the title company/Bureau of Indian Affairs indicating that nothing further has transpired on the policy, title status report or commitment.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(h)(8)(A)(ii). Certification of Notification. (25)

COMMENT: Commenter suggested the following clarifying language:

(ii) Not later than the date the Application is submitted, notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt return or similar tracking mechanism e-mail, fax or mail with registered receipt in the format required in the "Application Notification Template" provided in the Application. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are not required to notify city officials, however, are required to notify county officials...."

STAFF RESPONSE: Staff agreed with the suggested language and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(h)(8)(B). Certification of Notification for Signage. (25)

COMMENT: Commenter suggested the following clarifying language:

(B) Signage on Property or Alternative. A Public Notification Sign shall be installed on the Development Site prior to the date the Application is submitted unless prohibited by local ordinance or code or restrictive covenants. Scattered site Developments must install a sign on each "non-contiguous" Development Site. For Competitive Housing Tax Credit Applications the date, time and location of the public hearing, as published by the Department and closest to the Development Site, must be included on the sign. For Tax-Exempt Bond Developments, regardless of the Priority of the Application or the Issuer, the sign must be installed within thirty (30) days of the Department's receipt of Volumes I and II. The date, time and location of the bond Tax Exempt Fiscal Responsibility Act (TEFRA) public hearing must be included on the sign no later than thirty (30) days prior to the scheduled public hearing. Evidence submitted with the Application must include photographs of the site with the installed sign. The sign must be at least 4 feet by 8 feet in size and located within twenty feet of, and facing, the main road adjacent to the site. The sign shall be continuously maintained on the site until the day that the Board takes final action on the Application for the Development. The information and lettering on the sign must meet the minimum requirements identified in the Application. For Tax-Exempt Bond Developments, regardless of the issuer, the Applicant must certify to the fact that the sign was installed within thirty (30) days of submission and the date, time and location of the TEFRA hearing is indicated on the sign at least thirty (30) days prior to the date of the scheduled hearing. In areas where the Public Notification Sign is prohibited by local ordinance or code or restrictive covenants, an alternative to installing a Public Notification Sign and at the same required time, the Applicant shall, mail written notification to those addresses described in either clause (i) or (ii) of this subparagraph. This written notification must include the information otherwise required for the sign as provided in the Application. The final Application must include a map of the proposed Development Site and mark the distance required by clause (i) or (ii) of this subparagraph, up to 1,000 feet, showing street names and addresses; a list of all addresses the notice was mailed to; an exact copy of the notice that was mailed; and a certification that the notice was mailed through the U.S. Postal Service and stating the date of mailing. If Public Notification Sign is prohibited by local ordinance or code or restrictive covenants, evidence of the applicable ordinance or code or restrictive covenants must be submitted in the Application.

STAFF RESPONSE: Staff believes further research into restrictive covenants would be necessary to make certain that the restrictions are placed on all signage required by statute as is this signage. No change recommended at this time for the use of restrictive covenants. Staff does agree with the addition of non-contiguous language as it relates to the requirement of signage placement and recommended this change.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(h)(13). Evidence of Financial Statement. (27)

COMMENT: Comment made requesting that financial statements for individuals be good for six months or one year instead of the current ninety days. (27)

STAFF RESPONSE: Staff believes this is a reasonable request and proposed the following language:

(A) Financial statements for an individual must not be older than six (6) months from the first day of the Application Acceptance Period.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(h)(15). Self-Scoring. (25)

COMMENT: Commenter suggested the following clarifying language:

(15) Self-Scoring. Applicant's self-score must be completed on the "Application Self-Scoring Form." An Applicant may not adjust the Application Self Scoring Form, after the submission of the Application, without a request from the Department as a result of an Administrative Deficiency.

STAFF RESPONSE: Staff agreed with the suggested language and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i). Selection Criteria. (25, 33)

COMMENT: The commenter supported the changes to the QAP that promote more affordable housing in downtown areas. The commenter requested that on development location points they would like to see downtown included in any definition to be awarded four points. Commenter indicated that the city of Fort Worth is working on language that would also include other areas of the city where high-density residential and probably mixed-use development is appropriate and has been so zoned. (33)

STAFF RESPONSE: Staff appreciates the feedback provided by representatives from the city of Fort Worth and appreciates their support of affordable housing. Comment is regarding changes already proposed in the QAP. No further change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Commenter suggested the following clarifying language:

(i) Selection Criteria. All Applications will be scored and ranked using the point system identified in this subsection. Unless otherwise stated, do not round calculations. Points other than those provided in paragraphs (2) and (6) of this subsection will not be awarded unless requested in the Self Scoring Form."

STAFF RESPONSE: Staff agreed with the suggested clarification and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(2)(A). Quantifiable Community Participation. (20, 26, 27, 30, 34, 37, 44, 45, 47, 48, 51, 55)

COMMENT: Comment made that the Department continues to limit the rights of a Resident Council to rehabilitate or reconstruct a property occupied by the residents. A resident council, according to the commenter, should be allowed to comment and appropriately be scored for New Construction, if the proposed New Construction is within the boundaries of the property in which they reside or within the boundaries of their organization. Commenter gives a few examples of small public Housing developments on large tracts of land that could easily support much more low income housing and another where the small development should be demolished because it is obsolete. (20, 30, 34, 37, 44, 45, 47, 48, 51, 55)

STAFF RESPONSE: The Board has supported the requirement for "resident councils" to only comment on the rehabilitation of a Development in which they reside because a resident council is required by HUD in all public housing developments. This gives an unequal advantage to Housing Authority Applicants for the QCP scoring item. Staff does believe that a resident council

could be a member of a larger neighborhood organization that could qualify for the QCP points. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(2)(A)(vi). Quantifiable Community Participation. (26)

COMMENT: Comment made asking that the Applicant/Developer be permitted to provide production assistance, because the Neighborhood Organizations are not used to working with TDHCA rules and deadlines, and are ordinary citizens with work and busy lives of their own. The commenter suggests that due to the size of the points available it is unfair to leave it in the hands of inexperienced volunteers. Additionally, the commenter believes that it should be permissible to forward TDHCA notices of deficiency and other correspondence to Neighborhood Organizations so that deadlines are not missed. Additional comments that the time for Neighborhood Organizations should be lengthened rather than shortened, and that support from a Mayor or City Council and other than QCP points be permitted to counterbalance Neighborhood Organization opposition. (26)

STAFF RESPONSE: Staff proposed a change in the 2009 QAP to allow Applicants to interact with Neighborhood Organizations. Staff believes the Applicant may provide informational assistance to a Neighborhood Organization but may not provide production or delivery assistance. Staff suggested the following revision:

(vi) ...Any deficiency notices issued to the Neighborhood Organization will also be sent to the Applicant for information purposes only. Applicants may not provide delivery assistance of any communication between the Neighborhood Organization and the Department and Applicants may not assist the Neighborhood Organization in preparing its response to a deficiency notice. Applicants may provide information about the deficiency notice process and deadlines to a Neighborhood Organization;

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Comment made about the additional signature on neighborhood for QCP points, and that one signature from the president should be more than enough. Commenter went on to suggest that as far as time goes, it is hard to obtain these signatures because many of the organizations are volunteers, so their accountability is sometimes not as reliable as they would like. (27)

STAFF RESPONSE: Staff agreed with the accountability and reliability of these organizations. Staff believes that requiring more than one signature on the submission assures the Department that more than one person from the organization made the decision to provide a letter of support or opposition to the Department. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(2)(A)(v). Quantifiable Community Participation. (25, 52)

COMMENT: Comment was made that the third sentence in the subsection should read; "The Neighborhood Organization letter must be signed by two officials or board members of the Neighborhood Organization and must include a contact name with a mailing address and phone number of the persons signing the letter; one additional contact for the organization; a written description and map of the organization's geographical boundaries;...

STAFF RESPONSE: Staff recommended the following revision: ...The Neighborhood Organization letter must be signed by two officials or board members of the Neighborhood Organization and must include in its letter, a contact name with a mailing address and phone number of the persons signing the letter; one additional contact for the organization; a written description and map of the organization's geographical boundaries.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(2)(A)(vi). Quantifiable Community Participation. (52)

COMMENT: Comment that the next to the last sentence in the subsection should read: Applicants may not provide delivery assistance or any communication. (52)

STAFF RESPONSE: The QAP as proposed states: Applicants may not provide delivery assistance of any communication. This language is correct. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(3). Income levels of tenants in the development. (23, 35, 38)

COMMENT: Comment made commending the Department for the proposed changes in the 2009 QAP which address the inequality between mixed income and 100% low income proposals, in an effort to revitalize neighborhoods. (23)

STAFF RESPONSE: Staff appreciates the commendation regarding the encouragement of mixed income Developments. Comment is regarding changes already proposed in the QAP. No change to the QAP was applicable.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Comment made asking the Department to strike the current, low income criteria, that focuses on 50% of AMGI and replace it with 60% of AMGI. Comment suggests that changing this criterion to a maximum rent ceiling of 60% would enable a higher first mortgage to be obtained by the developer which would benefit the project sources in light of current market pricing decreases. (35) Conversely, separate comment made supporting the proposed changes to this section that encourage a greater number of Low-Income units set aside for households with incomes at 30% to 50% of area median income. (38)

STAFF RESPONSE: The Department encourages the development of Low-Income Units for households with incomes at 50% or below area median income. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(4)(A). The Size and Quality of the Units (Development Characteristics). (26, 36, 38, 54, 58)

COMMENT: Commenter suggested not increasing the minimum size of units at a time when there is a need to reduce construction costs. Comment states that increasing square footages increases both the construction costs and the utility costs once completed. Commenter stated that it is more beneficial to build bigger units because that boosts the cost for the entire unit. It was also noted that from a green building perspective, smaller, more efficient units use less building materials and are easier to heat and cool. Commenter recommended keeping unit sizes the same as 2008 or requiring 50 square feet smaller. (26, 38, 54)

STAFF RESPONSE: Staff believes it appropriate to have minimum unit sizes. The minimum threshold sizes are below the sizes as proposed by the majority of units over the past few years. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Comment made requesting that the Department allow for certain common areas to be included in the per net rentable square foot cost calculation for SRO housing and for the exemption of SRO units from minimum size thresholds and allowing for automatic award of 6 points for unit size. (36, 58)

STAFF RESPONSE: The request for common area space to be included in the net rentable area for SRO Developments is already included in the current draft of the QAP. SRO development is exempt from the size requirements and is automatically awarded the points if they are requested by the Applicant. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(5)(B). Scoring of Commitment of Development Funding by Local Political Subdivisions. (25, 26, 67)

COMMENT: Comment received applauding the Department's percentage reduction of LPS funds needed to receive maximum points. Furthermore, would like same rule applied to all Non Participating Jurisdictions. Commenter argues that small cites suffer the same lack of funding sources as well as rural. Commenter further asks that the requirement is removed completely, because according to commenter there are areas that need affordable housing, but do not have the ability to provide the support needed. Commenter argues that if a project is fiscally viable without political subdivision support then the project should be allowed to proceed. (25, 26, 67)

STAFF RESPONSE: Staff agreed that this scoring item could be revised further and agreed to work with the program stakeholders to revise this section for the 2010 QAP. Staff does recommend striking the language added in the draft.

BOARD RESPONSE: During the November 13, 2008 Board meeting, the Board amended the proposed language under §49.9(i)(5)(B), as reflected below.

(i) A total contribution equal to or greater than 1% (for Urban Developments) and 0.5% (for Rural Developments and Developments located in non-participating jurisdictions) of the Total Housing Development Cost of the Development receives 6 points; or

(ii) A total contribution equal to or greater than 2.5% (for Urban Developments) and 1.5% (for Rural and Developments located in non-participating jurisdictions) of the Total Housing Development Cost of the Development receives 12 points; or

(iii) A total contribution equal to or greater than 5% (for Urban Developments) and 3% (for Rural and Developments located in non-participating jurisdictions) of the Total Housing Development Cost of the Development receives 18 points.

§49.9(i)(6). Support from State Representative or State Senator. (20, 25, 30, 34, 37, 44, 45, 47, 48, 51, 55)

COMMENT: Comment made in regards to the timeline that a State Senator or Representative may withdraw a letter submitted by the April 1st deadline. As it stands now the Senator/Representative has until June 15, 2009, and the commenter suggests that the deadline should be May 31, 2009. Commenter states that if a letter is to be withdrawn the State Senator or Representative must inform the applicant in writing no less than two weeks before withdrawing the letter of support. (20, 25, 30, 34, 37, 44, 45, 47, 48, 51, 55). Commenter suggested the following clarifying language:

A State Representative or State Senator may withdraw (in writing) a letter that is submitted by the April 1st deadline on or before June 15, 2009 but may not submit a new letter. The previous position of support or opposition that is withdrawn will be scored as neutral (0 points).

STAFF RESPONSE: Staff believes the deadline for a State Senator or Representative to withdraw a letter submitted to the Department is in line with the close of the public comment period is reasonable. The Department will not require a senator or representative to notify an applicant of withdrawal of support. Staff does agree with the clarifying language and will include the change in the QAP.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(7). Rent Level Units. (23, 38, 58, 67)

COMMENT: Comment made commending the Department for the proposed changes in the 2009 QAP which address the inequality between mixed income and 100% low income proposals, in an effort to revitalize neighborhoods. (23)

STAFF RESPONSE: Staff appreciates the commendation regarding the encouragement of mixed income Developments. Comment was regarding changes already proposed in the QAP. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Comment made supporting the proposed changes for this item. (38). Comment also made asking that points be added to encourage the availability of units at or below 50% AMGI (58) and supporting the elimination of the percentage of Market Rate units advocating instead for new language which encourages additional units marketed to families and seniors at 50%. (67)

STAFF RESPONSE: Staff believes that including a percentage of market rate units encourages mixed-income Developments. The Draft QAP includes incentives for additional units marketed to families and seniors at or below 50% AMFI. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(8). Cost of Development by Square Foot. (25, 29, 32, 38, 40, 49, 52, 54, 65, 67)

COMMENT: Commenter submitted the following clarifying language:

(8) ...For the purposes of this paragraph only, if a building is in a Qualified Elderly Development or is an age restricted building in an Intergenerational Housing Development with an elevator or a high rise building with four or more stories serving any population, the NRA may include elevator served interior corridors....(25)

STAFF RESPONSE: Staff agreed with the clarifying language and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Comment made suggesting that the term "elevator-served" be removed because most SROs will be single story developments, and they would be better served if the language were changed as proposed. Comment made requesting that the Department allow for certain common areas to be included in the net-rentable square footage calculation for SRO housing because, in SRO housing, living-rooms, dining-room, and kitchens are congregate and thus make the net-rentable square footage

smaller. (32, 36, 54) Comment made in support of increased construction costs and the inclusion of common area in the NRA calculation for SROs (38) as well as the increase in cost per unit (67). Commenter proposed change to the third sentence in the paragraph to add, "This calculation does not include indirect construction costs or any other construction costs that are excluded by the Applicant from eligible basis." (32, 40, 49, 54) Commenter would like an allowance for developers to exclude hard costs from eligible basis and not receive tax credits for certain costs as a way for high-cost developments to earn the cost-per square foot points, and for the cost of any parking to be excluded from calculating cost per square foot. (40, 49, 29, 52, 54) Commenter states that this will prevent developments in urban areas from being penalized for building parking garages that exceed the construction cost caps established for scoring points under this section. (32, 54) Commenter asked that the Department clarify the language of this section with §49.17(d)(1) (amendments) so that applicants are not penalized for being forthright about rising construction costs. (40, 49) Commenter would like to ensure that structured parking not count against any per unit cap. (54) Commenter asked for demolition costs not be included in the cost of the development per square foot calculation. (65)

STAFF RESPONSE: Some SRO developments do contain elevators. The "elevator-served" language does not negatively effect a development but does address the NRA issues that some SRO developments may have. The Draft QAP allows up to 50 square feet of common area to be included in the net rentable area. Staff appreciates the commendation regarding the inclusion of definitions for Supportive Housing and Single Room Occupancy.

The cost of the land and the cost of the parking are costs that are necessary for the development and clearly impact the total cost of the development. Including the square footage for parking is wholly inconsistent with the purpose of comparing the cost per net rentable square foot as the parking itself does not constitute living area for the unit. Excluding the cost for any pledged amenity such as a parking facility and/or land for required parking from the total cost of the development or the eligible basis (in the case of building for tenant use) is wholly inconsistent with the ability to determine financial viability of the entire development. Making modification to the cost per square foot scoring item in this regard will also confuse the determination of total development cost and true eligible costs at underwriting and later in the development process and at the issuance of 8609. This scoring item is specifically directed toward development with a low total cost per square foot of living space and making exceptions for high cost features or amenities of a development, worthy though they might be in their own right, diminish the specific intent of this scoring item and will confuse the understanding of the product that is being pledged to be delivered. No further change recommended.

Demolition costs on the site that improve the land but are also required to construct the property are site work cost just as a detention pond or landscaping that permanently improved the value of the land would be considered a cost of construction but may not an eligible cost. Excluding ineligible but required construction costs from the cost per square foot diminish the specific intent of the cost per square foot scoring item and again could lead to confusion over what is being constructed and the reasonableness of the cost of that construction. No further change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(9)(B). Services to be Provides to Tenants. (25)

COMMENT: Commenter suggested the following clarifying language:

(B) In addition, Applications will receive 1 point for providing Notary Public Services to tenants at no cost to the tenant during regular business hours. If this point is selected, this requirement will be included in the LURA.

STAFF RESPONSE: Staff agreed with the clarifying language and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(12). Housing Needs Characteristics. (22, 25)

COMMENT: Commenter suggested that because of the devastation caused by Hurricane Ike the housing needs score should be raised to 6 in all cities affected by the Hurricane. (22)

STAFF RESPONSE: Staff believes that since the affected areas have been declared disaster areas, the 30% increase in eligible basis is a sufficient incentive for the affected areas. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Commenter suggested the following clarifying language:

(12) Housing Needs Characteristics. (§42(m)(1)(C)(ii)). Applications may qualify to receive up to 6 points (if the Development Site is located in an Area with a certain Affordable Housing Needs Score). Each Application may receive a score if correctly requested in the self score form based on objective measures of housing need in the Area where the Development is located. This Affordable Housing Need Score for each Area will be published in a Site Demographic Characteristics table in the Reference Manual. (25)

STAFF RESPONSE: Staff agreed with the clarifying language and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(13). Community Revitalization. (25)

COMMENT: Commenter suggested following change to the draft language:

(A) The Development includes the use of an Existing Residential Development and proposes any Rehabilitation or any Reconstruction that is part of a Community Revitalization Plan. Evidence of the Community Revitalization Plan and a letter from the chief executive officer or other local official with appropriate jurisdiction of the Local Political Subdivision stating that the Development Site is located within the targeted development areas outlined in the Community Revitalization Plan must be submitted; or

(B) The Development includes the use of an existing building that is designated as historic by a Governmental Entity and proposes Rehabilitation (including reconstruction) or Adaptive Reuse. The Development itself must have the designation; points in this subparagraph are not available for Developments simply located within historic districts or areas that do not have a designation on the building. The Development must include the historic building. Evidence will include proof of the historic designation from the appropriate Governmental Entity.

STAFF RESPONSE: Staff believes the current language in the Draft QAP covers most of the request. Staff recommended the following additional change:

(A) The Development includes the use of an Existing Residential Development and proposes any Rehabilitation or any Reconstruction that is part of a Community Revitalization Plan. Evidence of the Community Revitalization Plan (such evidence must include an ordinance, resolution, or otherwise recorded documentation of a vote taken by the local elected Governing Body specifically adopting the Community Revitalization Plan) and a letter from the chief executive officer or other local official with appropriate jurisdiction of local Governing Body stating that the Development Site is located within the targeted development areas outlined in the Community Revitalization Plan must be submitted; or

(B) The Development includes the use of an existing building that is designated as historic by a federal or state Entity and proposes Rehabilitation (including reconstruction) or Adaptive Reuse. The Development itself must have the designation; points in this subparagraph are not available for Developments simply located within historic districts or areas that do not have a designation on the building. The Development must include the historic building. Evidence will include proof of the historic designation from the appropriate Governmental Entity.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(14)(D). Pre-Application Participation Incentive Points. (25)

COMMENT: Commenter proposed the following clarifying language:

(D) Be applying for the same Set-Asides as indicated in the Pre-Application (Set-Asides can be dropped between Pre-Application and Application, but no Set-Asides can be added); and

STAFF RESPONSE: Staff agreed with the clarification and recommended the changes as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(15)(C). Economic Development Initiatives. (25)

COMMENT: Commenter suggested the following clarifying language:

(C) Points under subparagraphs (A) and (B) of this paragraph will not be granted if more than 3 Developments have received a Housing Tax Credit Allocation in the applicable area in the 7 years. The Applicant must provide evidence of the boundaries of the area, as required in the Application and Application Submission Procedures Manual.

STAFF RESPONSE: Staff partially agreed with the commenter and recommended the following language:

(C) Points under subparagraphs (A) and (B) of this paragraph will not be granted if more than 3 Developments received an award of Housing Tax Credits in the applicable area in the seven (7) years prior to the Application Acceptance Period. The Applicant must provide evidence of the boundaries of the area, as required in the Application and Application Submission Procedures Manual.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(16)(D), (E), (F). Development Location Points. (25, 40, 41, 50, 52)

COMMENT: Commenter requested a change in subparagraphs (D) and (E) in reference to the eligible bedroom mix and total number of units.

STAFF RESPONSE: Staff believes the subsection is clear and does not require clarification. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Comment made that the definition of types of Urban Core sites is too vague, and requested clarification that "infill" does not necessarily mean scattered sites and to clarify the zoning requirements for these points. Comments suggest that Developments proposed to be located in municipalities without zoning would not be eligible for these points. (40, 52)

STAFF RESPONSE: Staff deleted the reference to "infill housing" previously included in the Draft QAP.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Commenter asked the Department to reconsider the removal of Ex Urban language from the 2009 QAP. Commenter argued that the removal of the Ex Urban language from the QAP makes it difficult to provide affordable senior housing in the North Texas area outside of urban areas. (41, 50)

STAFF RESPONSE: Staff removed the "ex-urban" points at the suggestion of the development community during the drafting of the QAP. The points were removed because other point items had been added that all developments can receive (i.e green building, revitalization, income/rent targeting). Because input on the deletion of this item was limited, staff does not recommend reinstating it. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(17)(C). Green Building Initiatives. (16, 39, 54)

COMMENT: Global Green USA, Foundation Communities, and the Sierra Club suggested language for the green building initiative section that was developed collaboratively by members of both the environmental and developer communities including the Texas Association of Affordable Housing Providers and the Rural Rental Housing Association of Texas. (16, 39, 54)

STAFF RESPONSE: Using the collaborative language provide in the comment, staff suggested the following revision to this section:

(-a-) evaporative coolers (for use in designated counties listed in the Application Materials, 2009 Housing Tax Credit Site Demographics Information) (1 point);

(-b-) passive solar heating/cooling (3 points maximum);

(-1-) Two points if the glazing area on the north- and south-facing walls of the building is at least 50% greater than the sum of the glazing area on the east- and west-facing walls; and the east-west axis of the building is within 15 degrees of due east-west;

(-2-) One point if in addition to the east-west axis of the building oriented within 15 degrees of due east-west, utilize a narrow floor plate (less than 40 feet), single loaded corridors and open floor plan to optimize daylight penetration and passive ventilation (note: to qualify for this particular point, application must also implement the 15 degree building orientation option subitem (-1-) of this item); and 100% of HVAC condenser units are shaded so they are fully shaded 75% of the time during summer months (May through August); and solar screens or solar film on all East, West, and South Windows with building oriented to east-west axis within 15 degrees of due east-west, west-south axis within

15 degrees of due west-south, and south-east axis within 15 degrees of due south-east;

(-c-) water conserving features (2 points maximum, 1 point for each):

(-1-) Install low-flow toilets using less than or equal to 1.6 gallons per flush, or high efficiency toilets using less than or equal to 1.28 gallons/flush;

(-2-) Install bathroom lavatory faucets and showerheads that do not exceed 2.0 gallons/minute and kitchen faucets that do not exceed 1.5 gallons/minute. Applies to all fixtures throughout development. Rehab projects may choose to install compliant faucet aerators instead of replacing entire faucets;

(-d-) solar water heaters (Solar water heaters designed to provide at least 25% of the average energy used to heat domestic water throughout the entire development.) (2 points);

(-e-) irrigation and landscaping (must implement both of the following) (2 points):

(-1-) collected water (at least 50%) for irrigation purposes;

(-2-) selection of native trees and plants that are appropriate to the site's soils and microclimate and locate then to allow for shading in the summer and allow for heat gain in the winter;

(-f-) sub-metered utility meters (2 points maximum);

(-1-) Sub-metered utility meters on rehab project without existing sub-meters or new construction senior project (2 points); or

(-2-) Sub-metered utility meters on new construction project (excluding new construction senior project) (1 point);

(-g-) energy efficiency (4 points maximum);

(-1-) Three points if Energy Elements include Energy-Star qualified windows and glass doors; and Exterior envelope insulation, vapor barriers and air barriers greater than or equal to Energy Star air barrier and insulation criteria; and HVAC, domestic hot water heater, or insulation that exceeds Energy Star standards or exceeds the IRC 2006; or

(-2-) Four points if the project promotes energy efficiency by meeting the requirements of Energy Star for Homes by either complying with the appropriate builder option package or a HERS score of 85;

(-h-) thermally and draft efficient doors (SHGC of 0.40 or lower and U-value specified by climate zone according to the 2006 IECC) (2 points);

(-i-) photovoltaic panels for electricity and design and wiring for the use of such panels (3 points maximum);

(-1-) Photovoltaic panels that total 10 kW (1 point);

(-2-) Photovoltaic panels that total 20 kW (2 points);

(-3-) Photovoltaic panels that total 30 kW (3 points);

(-j-) construction waste management and implementation of EPA's Best Management Practices for erosion and sedimentation control during construction (1 point);

(-k-) recycling service provided throughout the compliance period (1 point);

(-l-) water permeable walkways (at least 20% of walkways and parking) (1 point);

(-m-) bamboo flooring, wool carpet, linoleum flooring, straw board, poplar OSB, or cotton batt insulation (50% of flooring on the ground floor of the development must be finished concrete and/or ceramic tile. 50% of the flooring on upper floors must be ceramic tile and/or a flooring material that is Floor Score Certified (developed by the Resilient Floor Covering Institute), applied with a Floor Score Certified adhesive and comes with a minimum 7-year wear through warranty (2 points);

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(18). Demonstration of Community Input other than Quantifiable Community Participation. (25, 26, 52, 64)

COMMENT: Commenter requested that these points be allowed even if a project receives 0 points under §49.9(i)(2) Quantifiable Community Participation. (26)

STAFF RESPONSE: The QAP already allows this request. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Comment suggested that the last sentence in the subsection should properly apply to the entire §49.9(i)(18), instead of just subparagraph (C). Recommends moving the last sentence to the next line, flush left so that it applies to all of the subsection. (52)

STAFF RESPONSE: Staff agreed and proposed the following revision:

...An Application may not receive points under more than one of the subparagraphs (A) - (C) of this paragraph. All letters must be received by February 27, 2009 for the Application to receive these points. At no time will the Application receive a score lower than zero for this item.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Comment made supporting the inclusion of language that provides for input from municipal management districts in the application review process. (64) Comment also received stating that Local Political Subdivision should be excluded from participation.

STAFF RESPONSE: Staff appreciates the commendation regarding the inclusion of language that provides for input from municipal management districts in the application review process. Staff believes this subsection of the QAP is clear and includes and excludes the appropriate entities. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(19). Developments in Census Tracts with no other Existing Same-type Development Supported by Tax Credits. (35, 38)

COMMENT: Comment made to eliminate any rule that penalizes HTC applications located in a qualified census tract with existing HTC developments if supported by the local community. Commenter suggests that the local community should have the right to dictate developments regardless of census tract and relative location to previous HTC developments. (35)

STAFF RESPONSE: The QAP does not prohibit a development from moving forward. However, it does restrict the availability of the 30% increase in eligible basis. Staff believes this is an appropriate restriction to control over-concentration of affordable housing.

BOARD RESPONSE: Accepted staff's recommendation.

COMMENT: Comment made asking to reduce the number of points awarded to developments in census tracts with no other existing same-type development supported by tax credits. They suggested a reduction in points for this criterion to one point so that the number of points under the criteria does not overwhelm high housing needs in community support scores. (38)

STAFF RESPONSE: The QAP does not prohibit Development in these areas. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(22). Site Characteristics. (38)

COMMENT: Comment made suggesting that an additional four points be provided to developments located within five miles of a major employment center or located within one mile from a proposed light rail line. (38)

STAFF RESPONSE: Staff believes that incentives provided under §49.6(h)(4) sufficiently addresses this comment. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(29). Bonus Points. (26, 27, 32, 41, 52, 54, 60, 66, 67)

COMMENT: Comment made that the addition of Bonus Points will create more issues than it solves and that it is unfair to developers who are new to the program or who did not have a project in 2008 (26)(60) and works against the goal of the Department to diversify the pool of tax credit recipients. (32, 41, 54) Other comments emphasized that more clarification would be needed if these points remain. (27) Different commenters noted various concerns with this section. (52, 66, 67)

STAFF RESPONSE: Staff believes that including criteria where bonus points may be awarded to an Application is a reasonable goal. However, it requires further research and input for staff to establish an appropriate recommendation for this years QAP and would warrant additional public comment. Staff proposed this suggestion be incorporated into the 2010 QAP and commits to further research this issue. Staff recommended removing the new §49.9(i)(29) Bonus Points that was added in the draft 2009 QAP.

BOARD RESPONSE: Accepted staff's recommendation.

§49.9(i)(30). Scoring Criteria Penalties. (25)

COMMENT: Commenter suggested the language of "penalties will be imposed" to "penalties may be imposed".

STAFF RESPONSE: Staff believes the language is correct in directing staff on how penalties are to be imposed. It is the Board's discretion to consider other alternatives to penalties. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.12(a)(1). Tax-Exempt Bond Applications. (27)

COMMENT: Comment received requesting that the requirement that the Application be submitted within three days of receipt of the bond reservation be extended. (27)

STAFF RESPONSE: This timeline is required by the Bond Review Board Rules, 10 TAC §190.3(13), and cannot be adjusted by the Department. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.13(c)(1). Documentation Submission Requirements. (25, 52)

COMMENT: Comment received detailing multiple changes as to the evidence of organizational documents that would meet the requirements for this subsection. (25) Commenter noted that it is unclear what the Department expects to receive in order to provide evidence that an entity has the authority to do business in Texas. (52)

STAFF RESPONSE: Staff believes the changes requested by commenter (25) need further research. Staff commits to work with the stakeholders of the programs to recommend changes to the 2010 QAP. Staff recommended one change to be applied to §49.9(h)(9)(B)(ii) and §49.13(c)(1) as follows:

Evidence that the entity has the authority to do business in Texas in the form of a Certificate of Filing from the Texas Secretary of State;

BOARD RESPONSE: Accepted staff's recommendation.

§49.14(a)(5). Carryover; 10% Test; Commencement of Substantial Construction. (25)

COMMENT: Commenter requested the following change:

(5) The Department will not execute a Carryover Allocation Agreement with any Development Owner in Material Noncompliance on October 1, 2009, and the Commitment Notice for such Development shall be rescinded.

STAFF RESPONSE: Although staff agreed that the requested language change should be the correct language and process, staff believes this is a change that warrants additional comment. Staff will consider this language change for the 2010 QAP. No change recommended at this time.

BOARD RESPONSE: Accepted staff's recommendation.

§49.14(b)(1). Carryover; 10% Test; Commencement of Substantial Construction. (25) COMMENT: Commenter suggested the following clarifying language:

(1) Evidence that the Development Owner has purchased, transferred, leased or otherwise has ownership of, the Development Site."

STAFF RESPONSE: Staff agreed with the clarifying language and recommended the change as requested.

BOARD RESPONSE: Accepted staff's recommendation.

§49.14(b)(4). Carryover; 10% Test; Commencement of Substantial Construction. (52, 57)

COMMENT: Comment made that in order to meet the 10% test the developer must provide evidence of having commenced and continued substantial construction. Commenter goes on to say that a developer has been able to obtain an extension of the Commencement of Substantial Construction Deadline if needed. Although under the proposed QAP the 10% test is due 11 months after the Carryover Agreement, and if meeting the commencement of substantial construction deadline is part and parcel of the 10% test then the commencement of substantial construction deadline can only be extended until December 31 at the very most. This is because the 10% test must be met within 12 months after the carryover allocation agreement under the Internal Revenue Code. Commenter suggests deleting §49.14(b)(4) and reference to the §49.14(b)(5). (52)

STAFF RESPONSE: The Department has the ability to have requirements that are more restrictive than the federal requirements. Staff believes the deadlines stated in the 2008 QAP are more realistic and safer for developments as a whole and keep the focus on producing affordable units as quickly as possible. In an effort to implement the changes allowed in H.R 3221, staff proposed that the 10% Test be met in accordance with the legislation. Staff believes it is prudent for the Department to require the commencement of substantial construction be met at the time of 10% Test to help ensure the Development can be completed by the placed in service deadline.

BOARD RESPONSE: Accepted staff's recommendation.

§49.14(b)(5). Carryover; 10% Test; Commencement of Substantial Construction.

STAFF RECOMMENDATION: Staff recommended deleting paragraph (5) of subsection (b) because a previous recommendation deleted the bonus points in the selection that are referenced in the paragraph.

COMMENT: Comment made regarding the definition of commencement of substantial construction, which is described in Chapter 60, the Compliance Rules. (57)

STAFF RESPONSE: This comment will be included with the comments for the Compliance Rules, Chapter 60, which are scheduled to go before the Board in final form at the January 2009 Board meeting.

BOARD RESPONSE: Accepted staff's recommendation.

§49.17. Appeals Process and Amendment of Application Subsequent to Allocation by Board. (49)

COMMENT: Comment received suggesting that there should be more flexibility from the Department in regards to amendments. Commenter goes on to suggest that due to current financial circumstances if the Department is not more flexible in the amendment process many 9% tax credit allocations will fail to be syndicated by investors. Suggestion made to alter the definition as follows; "The board's policy is that an amendment should be generally viewed favorably unless the amendment proposes removing a significant threshold criteria item or proposes altering a selection criteria item that would have decreased the number of points to a level that would have resulted in the application not receiving an allocation." (49)

STAFF RESPONSE: Staff believes that the Board has and uses the discretion to be flexible in regards to amendments. Staff commits to revisit the amendment policy previously approved by the Board and work with the development community to amend the policy if necessary. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.17(d). Appeals Process and Amendment of Application Subsequent to Allocation by Board. (25)

COMMENT: Comment received requesting the Department add language to the QAP as follows:

(9) The Department may promulgate policies or procedures for the administration of amendment requests hereunder.

STAFF RESPONSE: The Department currently has an amendment policy that is in accordance with the Department's governing statute and the QAP. Staff does not believe this additional language is necessary at this time. No change recommended.

BOARD RESPONSE: Accepted staff's recommendation.

§49.17(e). Housing Tax Credit and Ownership Transfers. (49)

COMMENT: Commenter asked for clarification for the transfer of ownership. Commenter states that the rule implies that transfers to an affiliated entity do not require agency approval, and furthermore asks that the Department allow transfers prior to issuance of 8609s due to changes made at time of partnership closing. The commenter suggests that "other than an Affiliate of the Development Owner..." be deleted in subsection (e). Also that in §49.17(e)(1) add the language as follows; Transfers (other than to an Affiliate) be added.

STAFF RESPONSE: Staff recommended the following change:

(e) ...A Development Owner may not transfer an allocation of Housing Tax Credits or ownership of a Development supported with an allocation of Housing Tax Credits to any Person including an Affiliate of the Development Owner unless the Development Owner obtains the Executive Director's prior, written approval of the transfer.

(1) Transfers (other than an Affiliate included in the ownership structure) will not be approved prior to the issuance of IRS Forms 8609 unless the Development Owner can provide evidence that a hardship is creating the need for the transfer (potential bankruptcy, removal by a partner, etc.)...

BOARD RESPONSE: Accepted staff's recommendation.

ADMINISTRATIVE CHANGES: Staff made administrative revisions throughout the QAP to correct spelling, punctuation, numbering and spacing errors; consistently capitalize defined terms; minor clarification; and, consistently utilize defined terms.

BOARD RESPONSE: Accepted staff's recommendations.

Figure: 10 TAC Chapter 49--Preamble

The new sections are adopted pursuant to authority granted in Chapter 2306, Texas Government Code, Subchapter DD ("Low Income Housing Tax Credit Program"), which requires the Department to administer the low income housing tax credit program; and specifically §2306.67022, which requires the Department to adopt annually a qualified allocation plan.

§49.1. Purpose and Authority; Program Statement; Allocation Goals.

(a) Purpose and Authority. The rules in this chapter apply to the allocation by the Texas Department of Housing and Community Affairs (the Department) of Housing Tax Credits authorized by applicable federal income tax laws. The Internal Revenue Code of 1986, §42, (the "Code") as amended, provides for credits against federal income taxes for owners of qualified low-income rental housing Developments. That section provides for the allocation of the available tax credit amount by state housing credit agencies. Pursuant to Chapter 2306, Subchapter DD, of the Texas Government Code, the Department is authorized to make Housing Credit Allocations for the State of Texas. As required by the Internal Revenue Code, §42(m)(1), the Department developed this Qualified Allocation Plan (QAP) which is set forth in §§49.1 - 49.23 of this chapter. Sections in this chapter establish procedures for applying for and obtaining an allocation of Housing Tax Credits, along with ensuring that the proper Threshold Criteria, Selection Criteria, priorities and preferences are followed in making such allocations.

(b) Program Statement. The Department shall administer the program to encourage the development and preservation of appropriate types of rental housing for households that have difficulty finding suitable, accessible, affordable rental housing in the private marketplace; maximize the number of suitable, accessible, affordable residential rental units added to the state's housing supply; prevent losses

for any reason to the state's supply of suitable, accessible, affordable residential rental units by enabling the Rehabilitation of rental housing or by providing other preventive financial support; and provide for the participation of for-profit organizations and provide for and encourage the participation of nonprofit organizations in the acquisition, development and operation of accessible affordable housing developments in rural and urban communities. (§2306.6701)

(c) Allocation Goals. It shall be the goal of this Department and the Board, through these provisions, to encourage diversity through broad geographic allocation of tax credits within the state, and in accordance with the regional allocation formula; to promote maximum utilization of the available tax credit amount; and to allocate credits among as many different entities as practicable without diminishing the quality of the housing that is being built. The processes and criteria utilized to realize this goal are described in §§49.7, 49.8 and 49.9 of this chapter, without in any way limiting the effect or applicability of all other provisions of this title. (General Appropriation Act, Article VII, Rider 8(e))

§49.3. Definitions.

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

(1) Adaptive Reuse--The renovation or rehabilitation of an existing non-residential building or structure (e.g., school, warehouse, office, hospital, etc.), including physical alterations that modify the building's previous or original intended use. If any Units are built outside the original building footprint or foundation, the Development will be considered New Construction and not Adaptive Reuse. A clubhouse or non-residential building may be outside the original footprint or foundation and still be considered Adaptive Reuse. The number of floors or stories may be increased in a building as long as the total number of Units for the Development does not exceed 80 Units in a Rural Area or 252 Units in an Urban Area.

(2) Administrative Deficiencies--The absence of information or inconsistent information in the Application as is required under §§49.5, 49.6, 49.8 and 49.9 of this chapter that can be corrected by an additional submission to the Department, unless determined by the Department as unable to be corrected.

(3) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with any other Person, and specifically shall include parents or subsidiaries. Affiliates also include all General Partners, Special Limited Partners and Principals with an ownership interest unless the entity is an experienced Developer as described in §49.9(h)(9)(D) of this chapter.

(4) Agreement and Election Statement--A document in which the Development Owner elects, irrevocably, to fix the Applicable Percentage with respect to a building or buildings, as that in effect for the month in which the Department and the Development Owner enter into a binding agreement as to the housing credit dollar amount to be allocated to such building or buildings.

(5) Applicable Fraction--The fraction used to determine the Qualified Basis of the qualified low-income building, which is the smaller of the Unit fraction or the floor space fraction, all determined as provided in the Code, §42(c)(1).

(6) Applicable Percentage--The percentage used to determine the amount of the Housing Tax Credit for any Development (New Construction, Reconstruction, and/or Rehabilitation), as defined more fully in the Code, §42(b).

(A) For purposes of the Application, the Applicable Percentage will be projected at:

(i) the greater of 9% or the current applicable percentage for 70% present value credits for new buildings, pursuant to §42(b) of the Code for the month in which the Application is submitted to the Department; or

(ii) 15 basis points over the current applicable percentage for 30% present value credits associated with acquisition and with qualified Tax-Exempt Bond Developments, pursuant to §42(b) of the Code for the month in which the Application is submitted to the Department.

(B) For purposes of making a credit recommendation at any other time, the Applicable Percentage will be based in order of priority on:

(i) The percentage indicated in the Agreement and Election Statement, if executed; or

(ii) The actual applicable percentage as determined by the Code, §42(b), if all or part of the Development has been placed in service and for any buildings not placed in service the percentage will be the actual percentage as determined by the Code, §42(b) for the most current month; or

(iii) The percentage as calculated in subparagraph (A) of this paragraph if the Agreement and Election Statement has not been executed and no buildings have been placed in service.

(7) Applicant--Any Person or Affiliate of a Person who files a Pre-Application or an Application with the Department requesting a Housing Credit Allocation. (§2306.6702)

(8) Application--An application, in the form prescribed by the Department, filed with the Department by an Applicant, including any exhibits or other supporting material. (§2306.6702)

(9) Application Acceptance Period--That period of time during which Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department, December 8, 2008 through February 27, 2009, as more fully described in §§49.8 - 49.12 of this chapter. For Tax-Exempt Bond Developments this period is the date the Volumes 1 and 2 are submitted or the date the reservation is issued by the Texas Bond Review Board, whichever is earlier.

(10) Application Round--The period beginning on the date the Department begins accepting Applications and continuing until all available Housing Tax Credits are allocated, but not extending past the last day of the calendar year. (§2306.6702). For purposes of this section, this definition applies to Housing Tax Credits allocated with the State Housing Credit Ceiling.

(11) Application Submission Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for the filing of Pre-Applications and Applications for Housing Tax Credits.

(12) Area--

(A) The geographic area contained within the boundaries of:

(i) An incorporated place; or

(ii) Census Designated Place (CDP) as established by the U.S. Census Bureau for the most recent Decennial Census.

(B) For Developments located outside the boundaries of an incorporated place or CDP, the Development shall take up the

Area characteristics of the incorporated place or CDP whose boundary is nearest to the Development site.

(13) Area Median Gross Income (AMGI)--Area median gross household income, as determined for all purposes under and in accordance with the requirements of the Code, §42.

(14) At-Risk Development--A Development that: (§2306.6702)

(A) has received the benefit of a subsidy in the form of a below-market interest rate loan, interest rate reduction, rental subsidy, Section 8 housing assistance payment, rental supplement payment, rental assistance payment, or equity incentive under at least one of the following federal laws, as applicable:

(i) Sections 221(d)(3) and (5), National Housing Act (12 U.S.C. §17151);

(ii) Section 236, National Housing Act (12 U.S.C. §1715z-1);

(iii) Section 202, Housing Act of 1959 (12 U.S.C. §1701q);

(iv) Section 101, Housing and Urban Development Act of 1965 (12 U.S.C. §1701s);

(v) The Section 8 Additional Assistance Program for housing Developments with HUD-Insured and HUD-Held Mortgages administered by the United States Department of Housing and Urban Development;

(vi) The Section 8 Housing Assistance Program for the Disposition of HUD-Owned Projects administered by the United States Department of Housing and Urban Development;

(vii) Sections 514, 515, and 516, Housing Act of 1949 (42 U.S.C. §§1484, 1485, and 1486); or

(viii) Section 42, of the Internal Revenue Code of 1986 (26 U.S.C. §42); and

(B) Is subject to the following conditions:

(i) The stipulation to maintain affordability in the contract granting the subsidy is nearing expiration (expiration will occur within two calendar years of July 31 of the year the Application is submitted); or

(ii) The federally insured mortgage on the Development is eligible for prepayment or is nearing the end of its mortgage term (the term will end within two calendar years of July 31 of the year the Application is submitted).

(C) An Application for a Development that includes the demolition of the existing Units which have received the financial benefit described in subparagraph (A) of this paragraph will not qualify as an At-Risk Development unless the redevelopment will include the same site.

(D) Developments must be at risk of losing all affordability from all of the financial benefits available on the Development, provided such benefit constitutes a subsidy, described in subparagraph (A) of this paragraph on the site. However, Developments that have an opportunity to retain or renew any of the financial benefit described in subparagraph (A) of this paragraph must retain or renew all possible financial benefit to qualify as an At-Risk Development.

(E) Nearing expiration on a requirement to maintain affordability includes Developments eligible to request a qualified contract under §42 of the Code. Evidence must be provided in the form of a copy of the recorded LURA, the first years' IRS Forms 8609 for all buildings showing Part II completed and, if applicable, documentation from the original application regarding the right of first refusal.

(15) Bedroom--A portion of a Unit which is no less than 100 square feet; has no width or length less than 8 feet; is self contained with a door (or the unit is a "loft" design with an open sleeping area of 100 square feet or more); has at least one window that provides exterior access; and has at least one closet that is not less than 2 feet deep and 3 feet wide and high enough to accommodate 5 feet of hanging space. A den, study or other similar space that could reasonably function as a bedroom and meets this definition is considered a bedroom.

(16) Board--The governing Board of the Department. (§2306.004)

(17) Carryover Allocation--An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(C) and Treasury Regulations, §1.42-6.

(18) Carryover Allocation Document--A document issued by the Department, and executed by the Development Owner, pursuant to §49.14(a) of this chapter.

(19) Carryover Allocation Procedures Manual--The manual produced and amended from time to time by the Department which sets forth procedures, forms, and guidelines for filing Carryover Allocation requests.

(20) Code--The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued thereunder by the United States Department of the Treasury or the Internal Revenue Service.

(21) Colonia--A geographic Area that is located in a county some part of which is within 150 miles of the international border of this state, that consists of 11 or more dwellings that are located in close proximity to each other in an area that may be described as a community or neighborhood, and that (§2306.581):

(A) Has a majority population composed of individuals and families of low-income and very low-income, based on the federal Office of Management and Budget poverty index, and meets the qualifications of an economically distressed Area under §17.921, Water Code; or

(B) Has the physical and economic characteristics of a colonia, as determined by the Department.

(22) Commitment Notice--A notice issued by the Department to a Development Owner pursuant to §49.13 of this chapter and also referred to as the "commitment."

(23) Community Revitalization Plan--A published document under any name, approved and adopted by the local Governing Body by ordinance, resolution, or vote that targets specific geographic areas for revitalization and development of residential developments.

(24) Competitive Housing Tax Credits--Tax credits available from the State Housing Credit Ceiling.

(25) Compliance Period--With respect to a building, the period of fifteen (15) taxable years, beginning with the first taxable year of the Credit Period pursuant to the Code, §42(i)(1).

(26) Control (including the terms "Controlling," "Controlled by," and/or "under common Control with")--The possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership of voting securities, by contract or otherwise, including specifically ownership of more than 50% of the General Partner

interest in a limited partnership, or designation as a managing member of a limited liability company.

(27) Cost Certification Procedures Manual--The manual produced, and amended from time to time, by the Department which sets forth procedures, forms, and guidelines for filing requests for IRS Form(s) 8609 for Developments placed in service under the Housing Tax Credit Program.

(28) Credit Period--With respect to a building within a Development, the period of ten (10) taxable years beginning with the taxable year the building is placed in service or, at the election of the Development Owner, the succeeding taxable year, as more fully defined in the Code, §42(f)(1).

(29) Department--The Texas Department of Housing and Community Affairs, an agency of the State of Texas, established by Chapter 2306, Texas Government Code, including Department employees and/or the Board. (§2306.004)

(30) Determination Notice--A notice issued by the Department to the Development Owner of a Tax-Exempt Bond Development which states that the Development may be eligible to claim Housing Tax Credits without receiving an allocation of Housing Tax Credits from the State Housing Credit Ceiling because it satisfies the requirements of this QAP; sets forth conditions which must be met by the Development before the Department will issue the IRS Form(s) 8609 to the Development Owner; and specifies the Department's determination as to the amount of tax credits necessary for the financial feasibility of the Development and its viability as a rent restricted Development throughout the extended use period. (§42(m)(1)(D))

(31) Developer--Any Person entering into a contract with the Development Owner to provide development services with respect to the Development and receiving a fee for such services (which fee cannot exceed the limits identified in §49.9(d)(6)(B) of this chapter) and any other Person receiving any portion of such fee, whether by subcontract or otherwise.

(32) Development--A proposed qualified and/or approved low-income housing project, as defined by the Code, §42(g), for Adaptive Reuse, New Construction, reconstruction, or Rehabilitation, that consists of one or more buildings containing multiple Units, and that, if the Development shall consist of multiple buildings, is financed under a common plan and is owned by the same Person for federal tax purposes, and the buildings of which are either:

(A) Located on a single site or contiguous site; or

(B) Located on scattered sites and contain only rent-restricted units. (§2306.6702)

(33) Development Consultant--Any Person (with or without ownership interest in the Development) who provides professional services relating to the filing of an Application, Carryover Allocation Document, and/or cost certification documents.

(34) Development Funding--

(A) a loan or grant; or

(B) an in-kind contribution, including a donation of real property, a fee waiver for a building permit or for water or sewer service, or a similar contribution that:

(i) provides an economic benefit; and

(ii) results in a quantifiable cost reduction for the applicable Development. (§2306.004(4-a))

(35) Development Owner--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract or ground lease approved by the Department. (§2306.6702)

(36) Development Site--The area, or if scattered site areas, for which the Development is proposed to be located and which is to be under the Applicant's control pursuant to §49.9(h)(7)(A) of this chapter.

(37) Development Team--All Persons or Affiliates thereof that play a role in the Development, construction, Rehabilitation, management and/or continuing operation of the subject Property, which will include any Development Consultant and Guarantor.

(38) Disaster Area--An area that has been declared as a disaster pursuant to §418.014 of the Texas Government Code.

(39) Economically Distressed Area--Consistent with §17.921 of the Texas Water Code, an Area in which:

(A) Water supply or sewer services are inadequate to meet minimal needs of residential users as defined by Texas Water Development Board rules;

(B) Financial resources are inadequate to provide water supply or sewer services that will satisfy those needs; and

(C) An established residential subdivision was located on June 1, 1989, as determined by the Texas Water Development Board.

(40) Eligible Basis--With respect to a building within a Development, the building's Eligible Basis as defined in the Code, §42.

(41) Executive Award and Review Advisory Committee ("The Committee")--A Departmental committee as set forth in Chapter 2306 of the Texas Government Code. (§2306.1112)

(42) Existing Residential Development--Any Development Site which contains four (4) or more existing residential Units at the time the Volume I is submitted to the Department.

(43) Extended Housing Commitment--An agreement between the Department, the Development Owner and all successors in interest to the Development Owner concerning the extended housing use of buildings within the Development throughout the extended use period as provided in the Code, §42(h)(6). The Extended Housing Commitment with respect to a Development is expressed in the LURA applicable to the Development.

(44) General Contractor--One who contracts for the construction or Rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors. This party may also be referred to as the "contractor."

(45) General Partner--That partner, or collective of partners, identified as the general partner of the partnership that is the Development Owner and that has general liability for the partnership. In addition, unless the context shall clearly indicate the contrary, if the Development Owner in question is a limited liability company, the term "General Partner" shall also mean the managing member or other party with management responsibility for the limited liability company.

(46) Governing Body--An elected city, county or tribal entity that is responsible for the creation, implementation and/or enforcement of local rules and laws.

(47) Governmental Entity--Includes federal or state agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts, tribal governments and other similar entities.

(48) Governmental Instrumentality--A legal entity such as a housing authority of a city or county, a housing finance corporation, or a municipal utility, or a tribal designated housing entity, which is created by a local political subdivision under statutory authority and which instrumentality is authorized to transact business for the political subdivision.

(49) Grant--Financial assistance that is awarded in the form of money to a housing sponsor or Development for a specific purpose and that is not required to be repaid. A Grant includes a forgivable loan. (§2306.004)

(50) Guarantor--Any Person that provides, or is anticipated to provide, a guaranty for the equity or debt financing for the Development.

(51) High Opportunity Area--an area that includes:

(A) existing major bus transfer centers and/or regional or local commuter rail transportation stations that are accessible to all residents including Persons with Disabilities; or

(B) a census tract which has an AMGI that is higher than the AMGI of the county or place in which the census tract is located; or

(C) a school attendance zone that has an academic rating of "Exemplary" or "Recognized" rating (as determined by the Texas Education Agency) as of the first day of the Application Submission Acceptance Period; or

(D) a census tract that has no greater than 10% poverty population according to the most recent census data (these census tracts are designated in the 2009 Housing Tax Credit Site Demographic Characteristics Report).

(52) Historically Underutilized Businesses (HUB)--Any entity defined as a historically underutilized business with its principal place of business in the State of Texas in accordance with Chapter 2161, Texas Government Code.

(53) Housing Credit Agency--A Governmental Entity charged with the responsibility of allocating Housing Tax Credits pursuant to the Code, §42. For the purposes of this chapter, the Department is the sole "Housing Credit Agency" of the State of Texas.

(54) Housing Credit Allocation--An allocation by the Department to a Development Owner for a specific Application of Housing Tax Credits in accordance with the provisions of this chapter.

(55) Housing Credit Allocation Amount--With respect to a Development or a building within a Development, that amount the Department determines to be necessary for the financial feasibility of the Development and its viability as a Development throughout the affordability period and which it allocates to the Development.

(56) Housing Tax Credit ("tax credits")--A tax credit allocated, or for which a Development may qualify, under the Housing Tax Credit Program, pursuant to the Code, §42. (§2306.6702)

(57) HUD--The United States Department of Housing and Urban Development, or its successor.

(58) Ineligible Building Types--Those Developments which are ineligible, pursuant to this QAP, for funding under the Housing Tax Credit Program, as follows:

(A) Hospitals, nursing homes, trailer parks, dormitories (or other buildings that will be predominantly occupied by students) or other facilities which are usually classified as transient housing (other than certain specific types of transitional housing for the homeless and Single Room Occupancy units, as provided in the Code, §42(i)(3)(B)(iii) and (iv)) are not eligible. However, structures formerly used as hospitals, nursing homes or dormitories are eligible for Housing Tax Credits if the Development involves the conversion of the building to a non-transient multifamily residential Development. Refer to IRS Revenue Ruling 98-47 for clarification of assisted living.

(B) Any Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments of two stories or more that does not include elevator service for any Units or living space above the first floor.

(C) Any Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments with any Units having more than two bedrooms with the exception of up to three employee Units reserved for the use of the manager, maintenance, and/or security officer. These employee Units must be specifically designated as such.

(D) Any Development with building(s) with four or more stories that does not include an elevator.

(E) Any Qualified Elderly Development or age restricted buildings in Intergenerational Housing Developments proposing more than 70% two-bedroom Units.

(F) Any Development that violates the Integrated Housing Rule of the Department, §1.15 of this title.

(G) Any Development located in an Urban Area involving any New Construction of additional Units (other than a Qualified Elderly Development, a Development composed entirely of single family dwellings, and certain specific types of transitional housing for the homeless and Single Room Occupancy units, as provided in the Code, §42(i)(3)(B)(iii) and (iv)) in which any of the designs in clauses (i) - (iv) of this subparagraph are proposed. For Applications involving a combination of single family detached dwellings and multifamily dwellings, the percentages in this subparagraph do not apply to the single family detached dwellings. For Intergenerational Housing Applications, the percentages in this subparagraph do not apply to buildings that are restricted by the age requirements of a Qualified Elderly Development. An Application may reflect a total of Units for a given bedroom size greater than the percentages in clauses (i) - (iv) of this subparagraph to the extent that the increase is only to reach the next highest number divisible by four.

(i) More than 30% of the total Units are one bedroom Units; or

(ii) More than 55% of the total Units are two bedroom Units; or

(iii) More than 40% of the total Units are three bedroom Units; or

(iv) More than 5% of the total Units in the Development with four or more bedrooms.

(H) Any Development that includes age restricted units that are not consistent with the Intergenerational Housing definition and policy or the definition of a Qualified Elderly Development.

(I) Any Development that contains residential Units that violates the general public use requirement under Treasury Regulation §1.42-9.

(59) Intergenerational Housing--Housing that includes specific Units that are restricted to the age requirements of a Qualified Elderly Development and specific Units that are not age restricted in the same Development that:

(A) Have separate and specific buildings exclusively for the age restricted Units;

(B) Have specific leasing offices and leasing personnel for the age restricted Units;

(C) Have separate and specific entrances, and other appropriate security measures for the age restricted Units;

(D) Provide shared social service programs that encourage intergenerational activities but also provide separate amenities for each age group;

(E) Share the same Development Site;

(F) Are developed and financed under a common plan and owned by the same Person for federal tax purposes; and

(G) Meet the requirements of the federal Fair Housing Act.

(60) IRS--The Internal Revenue Service, or its successor.

(61) Land Use Restriction Agreement (LURA)--An agreement between the Department and the Development Owner which is binding upon the Development Owner's successors in interest, that encumbers the Development with respect to the requirements of this chapter, Chapter 2306, Texas Government Code, and the requirements of the Code, §42. (§2306.6702)

(62) Local Political Subdivision--A county or municipality (city or tribal reservation) in Texas. For purposes of §49.9(i)(5) of this chapter, a local political subdivision may act through a Government Instrumentality such as a housing authority, housing finance corporation, or municipal utility even if the Government Instrumentality's creating statute states that the entity is not itself a "political subdivision."

(63) Low-Income Unit--sometimes referred to as a tax credit Unit, that is a Unit that is income and rent restricted at no greater than 60% of AMGI and is included in the Applicable Fraction for the Housing Tax Credit program.

(64) Material Noncompliance--As defined in Chapter 60, Subchapter A of this title.

(65) Minority Owned Business--A business entity at least 51% of which is owned by members of a minority group or, in the case of a corporation, at least 51% of the shares of which are owned by members of a minority group, and that is managed and Controlled by members of a minority group in its daily operations. Minority group includes women, African Americans, American Indians, Asian Americans, and Mexican Americans and other Americans of Hispanic origin. (§2306.6734)

(66) Neighborhood Organization--An organization that is composed of persons living near one another within the organization's defined boundaries for the neighborhood and that has a primary purpose of working to maintain or improve the general welfare of the neighborhood. A neighborhood organization includes a homeowners' association or a property owners' association. (§2306.001(23-a))

(67) Net Rentable Area (NRA)--The unit space that is available exclusively to the tenant and is typically heated and cooled by a mechanical HVAC system. NRA is measured to the outside of the studs of a unit or to the middle of walls in common with other units. NRA does not include common hallways, stairwells, elevator shafts, janitor closets, electrical closets, balconies, porches, patios, or other areas not actually available to the tenants for their furnishings, nor does NRA include the enclosing walls of such areas.

(68) New Construction--Any construction of a Development or a portion of a Development that does not meet the definition of Rehabilitation (which includes Reconstruction).

(69) ORCA--Office of Rural Community Affairs, as established by Chapter 487 of the Texas Government Code.

(70) Person--Without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization or entity of any nature whatsoever and shall include any group of Persons acting in concert toward a common goal, including the individual members of the group.

(71) Persons with Disabilities--A person who:

(A) Has a physical, mental or emotional impairment that:

(i) Is expected to be of a long, continued and indefinite duration;

(ii) Substantially impedes his or her ability to live independently; and

(iii) Is of such a nature that the disability could be improved by more suitable housing conditions;

(B) Has a developmental disability, as defined in the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. §15002); or

(C) Has a disability, as defined in 24 CFR §5.403.

(72) Persons with Special Needs--Persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, victims of domestic violence, persons with HIV/AIDS, homeless populations and migrant farm workers.

(73) Pre-Application--A preliminary application, in a form prescribed by the Department, filed with the Department by an Applicant prior to submission of the Application, including any required exhibits or other supporting material, as more fully described in this chapter. (§2306.6704)

(74) Pre-Application Acceptance Period--That period of time during which Competitive Housing Tax Credit Pre-Applications for a Housing Credit Allocation from the State Housing Credit Ceiling may be submitted to the Department.

(75) Principal--The term Principal is defined as Persons that will exercise Control over a partnership, corporation, limited liability company, trust, or any other private entity. In the case of:

(A) Partnerships, Principals include all General Partners, Special Limited Partners and Principals with ownership interest;

(B) Corporations, Principals include any officer authorized by the board of directors to act on behalf of the corporation, including the president, vice president, secretary, treasurer and all other executive officers, and each stock holder having a 10% or more interest in the corporation; and

(C) Limited liability companies, Principals include all managing members, members having a 10% or more interest in the limited liability company or any officer authorized to act on behalf of the limited liability company.

(76) Property--The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built thereon in connection with the Application.

(77) Qualified Allocation Plan (QAP)--This Plan as adopted.

(78) Qualified Basis--With respect to a building within a Development, the building's Eligible Basis multiplied by the Applicable Fraction, within the meaning of the Code, §42(c)(1).

(79) Qualified Census Tract--Any census tract which is so designated by the Secretary of HUD in accordance with the Code, §42(d)(5)(C)(ii).

(80) Qualified Elderly Development--A Development which meets the requirements of the federal Fair Housing Act and:

(A) Is intended for, and solely occupied by, individuals sixty-two (62) years of age or older; or

(B) Is intended and operated for occupancy by at least one individual fifty-five (55) years of age or older per Unit, where at least 80% of the total housing Units are occupied by at least one individual who is fifty-five (55) years of age or older; and where the Development Owner publishes and adheres to policies and procedures which demonstrate an intent by the owner and manager to provide housing for individuals fifty-five (55) years of age or older. (See 42 U.S.C. §3607(b))

(81) Qualified Market Analyst--A real estate appraiser certified or licensed by the Texas Appraiser Licensing and Certification Board, a real estate consultant, or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's performance, experience, and educational background will provide the general basis for determining competency as a Market Analyst. Competency will be determined by the Department, in its sole discretion. The Qualified Market Analyst must be a Third Party.

(82) Qualified Nonprofit Organization--An organization that is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, that is exempt from federal income taxation under the Code, §501(a), that is not affiliated with or Controlled by a for profit organization, and includes as one of its exempt purposes the fostering of low-income housing within the meaning of the Code, §42(h)(5)(C). A Qualified Nonprofit Organization may select to compete in one or more of the Set-Asides, including, but not limited to, the nonprofit Set-Aside, the At-Risk Development Set-Aside and the TRDO-USDA Allocation. (§2306.6729)

(83) Qualified Nonprofit Development--A Development in which a Qualified Nonprofit Organization (directly or through a partnership or wholly-owned subsidiary):

(A) Holds a controlling interest in the Development proposed to be financed from the nonprofit allocation pool (§2306.6729); and

(B) Owns an interest in the Development and materially participates (within the meaning of the Code, §469(h), as it may be amended from time to time) in its development and operation throughout the Compliance Period, and otherwise meets the requirements of the Code, §42(h)(5). (§2306.6729)

(84) Reference Manual--That certain manual, and any amendments thereto, produced by the Department which sets forth reference material pertaining to the Housing Tax Credit Program.

(85) Rehabilitation--The improvement or modification of an Existing Residential Development through alteration, incidental addition or enhancement. The term includes the demolition of an Existing Residential Development and the reconstruction of a Development on the Development Site, but does not include Adaptive Reuse. Rehabilitation includes repairs necessary to correct the results of deferred maintenance, the replacement of principal fixtures and components, improvements to increase the efficient use of energy, and installation of security devices. Reconstruction, for these purposes, includes the demolition of one or more residential buildings in an Existing Residential Development and the re-construction of the Units on the Development Site. Developments proposing Adaptive Reuse or proposing to increase the total number of Units in the Existing Residential Development are not considered Rehabilitation or reconstruction.

(86) Related Party--As defined, (§2306.6702)

(A) The following individuals or entities:

(i) The brothers, sisters, spouse, ancestors, and descendants of a person within the third degree of consanguinity, as determined by Chapter 573 of the Texas Government Code;

(ii) A person and a corporation, if the person owns more than 50% of the outstanding stock of the corporation;

(iii) Two or more corporations that are connected through stock ownership with a common parent possessing more than 50% of:

(I) The total combined voting power of all classes of stock of each of the corporations that can vote;

(II) The total value of shares of all classes of stock of each of the corporations; or

(III) The total value of shares of all classes of stock of at least one of the corporations, excluding, in computing that voting power or value, stock owned directly by the other corporation;

(iv) A grantor and fiduciary of any trust;

(v) A fiduciary of one trust and a fiduciary of another trust, if the same person is a grantor of both trusts;

(vi) A fiduciary of a trust and a beneficiary of the trust;

(vii) A fiduciary of a trust and a corporation if more than 50% of the outstanding stock of the corporation is owned by or for:

(I) The trust; or

(II) A person who is a grantor of the trust;

(viii) A person or organization and an organization that is tax-exempt under the Code, §501(a), and that is controlled by that person or the person's family members or by that organization;

(ix) A corporation and a partnership or joint venture if the same persons own more than:

(I) 50% of the outstanding stock of the corporation; and

(II) 50% of the capital interest or the profits' interest in the partnership or joint venture;

(x) An S corporation and another S corporation if the same persons own more than 50% of the outstanding stock of each corporation;

(xi) An S corporation and a C corporation if the same persons own more than 50% of the outstanding stock of each corporation;

(xii) A partnership and a person or organization owning more than 50% of the capital interest or the profits' interest in that partnership; or

(xiii) Two partnerships, if the same person or organization owns more than 50% of the capital interests or profits' interests.

(B) Nothing in this definition is intended to constitute the Department's determination as to what relationship might cause entities to be considered "related" for various purposes under the Code.

(87) Residential Rental Development--For purposes of this definition, Residential Rental Development does not include: hotels, motels dormitories, fraternity or sorority houses, rooming houses, hospitals, nursing homes, sanitariums, rest homes, trailer parks and courts for use on a transient basis. Residential Rental Development means:

(A) A property that meets specific requirements including occupancy of Low-Income Tenants during the affordability period when Units must be continually rented or available for rent;

(B) A building or structure, together with functionally related and subordinate facilities, containing one or more Units that are available to members of the general public; and

(C) A property that does not provide continual or frequent nursing, medical or psychiatric services.

(88) Rules--The Department's Housing Tax Credit Program Qualified Allocation Plan and Rules as presented in this chapter.

(89) Rural Area--An Area that is located (this definition is not the same as Rural Projects as defined in §520 of the Housing Act of 1949 for purposes of determining rural income as described in H.R 3221):

(A) Outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) Within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an Urban Area; or

(C) In an Area that is eligible for funding by Texas Rural Development Office or the United States Department of Agriculture (TRDO-USDA), other than an Area that is located in a municipality with a population of more than 50,000. (§2306.004)

(90) Rural Development--A Development or proposed Development that is located in a Rural Area, other than rural New Construction Developments with more than 80 Units.

(91) Selection Criteria--Criteria used to determine housing priorities of the State under the Housing Tax Credit Program as specifically defined in §49.9(i) of this chapter.

(92) Set-Aside--A reservation of a portion of the available Housing Tax Credits under the State Housing Credit Ceiling to provide financial support for specific types of housing or geographic locations or serve specific types of Applications or Applicants as permitted by the Qualified Allocation Plan on a priority basis. (§2306.6702)

(93) Single Room Occupancy (SRO)--A single efficiency unit that contains sanitary facilities but may or may not include food preparation facilities and is intended for occupancy by one person.

(94) Special Management Districts--Those districts named under Chapters 3801 to 3853, Texas Special District Local Laws Code, Subtitle C.

(95) State Housing Credit Ceiling--The limitation on the aggregate amount of Housing Credit Allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with the Code, §42(h)(3)(C) and/or additional ceiling provided by The Housing and Economic Recovery Act of 2008, H.R 3221.

(96) Student Eligibility--Per the Code, §42(i)(3)(D), A Unit shall not fail to be treated as a low-income Unit merely because it is occupied:

(A) By an individual who is:

(i) A student and receiving assistance under Title IV of the Social Security Act (42 U.S.C. §§601 et seq.); or

(ii) Enrolled in a job training program receiving assistance under the Job Training Partnership Act (29 U.S.C.S. §§1501 et seq., generally; for full classification, consult U.S.C.S. Tables volumes) or under other similar federal, state, or local laws; or

(B) Entirely by full-time students if such students are:

(i) Single parents and their children and such parents and children are not dependents (as defined by the Code §152) of another individual; or

(ii) Married and file a joint return.

(97) Supportive Housing--Residential Rental Developments intended for occupancy by individuals or households transitioning from homelessness, at risk of homelessness, or in need of specialized and specific social services.

(98) Tax-Exempt Bond Development--A Development requesting or having been awarded Housing Tax Credits and which receives a portion of its financing from the proceeds of tax-exempt bonds which are subject to the state volume cap as described in the Code, §42(h)(4), such that the Development does not receive an allocation of tax credit authority from the State Housing Credit Ceiling.

(99) Third Party--A Third Party is a Person who is not:

(A) An Applicant, General Partner, Developer, or General Contractor; or

(B) An Affiliate or a Related Party to the Applicant, General Partner, Developer or General Contractor; or

(C) Receiving any portion of the fees from the Development.

(100) Threshold Criteria--Criteria used to determine whether the Development satisfies the minimum level of acceptability for consideration as specifically defined in §49.9(h) of this chapter. (§2306.6702)

(101) Total Housing Development Cost--The total of all costs incurred or to be incurred by the Development Owner in acquiring, constructing, rehabilitating and financing a Development, as determined by the Department based on the information contained in the Application. Such costs include reserves and any expenses attributable to commercial areas. Costs associated with the sale or use of Housing Tax Credits to raise equity capital shall also be included in the Total Housing Development Cost. Such costs include but are not limited to syndication and partnership organization costs and fees, filing fees, broker commissions, related attorney and accounting fees, appraisal, engineering, and the environmental site assessment.

(102) TRDO-USDA--Texas Rural Development Office (TRDO) of the United States Department of Agriculture (USDA) serving the State of Texas (also known as USDA Rural Development and formerly known as TxFmHA) or its successor.

(103) Unit--Any residential rental unit consisting of an accommodation including a single room used as an accommodation on a non-transient basis, that contains complete physical facilities and fix-

tures for living, sleeping, eating, cooking (such as a microwave), and sanitation. (§2306.6702)

(104) Urban Area--The Area that is located within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area other than an Area described in paragraph (89)(B) of this section or eligible for funding as described in paragraph (89)(C) of this section.

(105) Urban Core--A compact and contiguous geographical area that is composed of adjacent block groups in which at least 90% of the land not in public ownership is zoned to accommodate a mix of medium or high density residential and commercial uses within the same zoning district.

§49.4. State Housing Credit Ceiling.

The Department shall determine the State Housing Credit Ceiling for each calendar year as provided in the Code, §42(h)(3)(C), using such information and guidance as may be made available by the Internal Revenue Service and/or The Housing and Economic Recovery Act of 2008, H.R. 3221 and H.R. 1424. The Department shall publish each such determination in the *Texas Register* within thirty (30) days after the receipt of such information as is required for that purpose by the Internal Revenue Service. The aggregate amount of commitments of Housing Credit Allocations made by the Department during any calendar year shall not exceed the State Housing Credit Ceiling for such year as provided in the Code, §42. As permitted by the Code, §42(h)(4), Housing Credit Allocations made to Tax-Exempt Bond Developments are not included in the State Housing Credit Ceiling.

§49.5. Ineligibility; Disqualification and Debarment; Certain Applicant and Development Standards; Representation by Former Board Member or Other Person; Due Diligence, Sworn Affidavit; Appeals and Administrative Deficiencies for Ineligibility, Disqualification and Debarment.

(a) Ineligibility. An Application is ineligible if:

(1) The Applicant, Development Owner, Developer or Guarantor has been or is barred, suspended, or terminated from procurement in a state or federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs; or (§2306.6721(c)(2))

(2) The Applicant, Development Owner, Developer or Guarantor has been convicted of a state or federal felony crime involving fraud, bribery, theft, misrepresentation of material fact, misappropriation of funds, or other similar criminal offenses within fifteen (15) years preceding the Application deadline; or

(3) The Applicant, Development Owner, Developer or Guarantor at the time of Application is: subject to an enforcement or disciplinary action under state or federal securities law or by the NASD; is subject to a federal tax lien; or is the subject of an enforcement proceeding with any Governmental Entity; or

(4) The Applicant, Development Owner, Developer or Guarantor with any past due audits has not submitted those past due audits to the Department in a satisfactory format. A Person is not eligible to receive a commitment of Housing Tax Credits from the Department if any audit finding or questioned or disallowed cost is unresolved as of June 1 of each year, or for Tax-Exempt Bond Developments or other Applications not applying for Housing Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) no later than thirty (30) days after Volume III of the Application is submitted; or (§2306.6703(a)(1))

(5) At the time of Application or at any time during the two-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments any time during the two-year period preceding the date the Application is submitted to the Department), the Applicant or a Related Party is or has been:

(A) A member of the Board; or

(B) The Executive Director, a Deputy Executive Director, the Director of Multifamily Finance Production, the Director of Portfolio Management and Compliance, the Director of Real Estate Analysis, or a manager over Housing Tax Credits employed by the Department; (§2306.6703(a)(2))

(6) The Applicant proposes to replace in less than fifteen (15) years any private activity bond financing of the Development described by the Application, unless:

(A) The Applicant proposes to maintain for a period of thirty (30) years or more 100% of the Development Units supported by Housing Tax Credits as rent-restricted and exclusively for occupancy by individuals and families earning not more than 50% of the Area Median Gross Income, adjusted for family size; and

(B) At least one-third of all the units in the Development are public housing units or Section 8 Development-based units; or

(7) The Development is located in a municipality or in a valid Extra Territorial Jurisdiction (ETJ) of a municipality, or if located completely outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Round begins (or for Tax-Exempt Bond Developments at the time the reservation is made by the Texas Bond Review Board) unless the Applicant: (§2306.6703(a)(4))

(A) Has obtained prior approval of the Development from the Governing Body of the appropriate municipality or county containing the Development; and

(B) Has included in the Application a written statement of support from that Governing Body. This statement must reference this rule and authorize an allocation of Housing Tax Credits for the Development;

(C) For purposes of this paragraph, evidence under subparagraphs (A) and (B) of this paragraph must be received by the Department no later than April 1, 2009 (or for Tax-Exempt Bond Developments no later than fourteen (14) days before the Board meeting where the credits will be considered) and may not be more than one year old from the date the Volume 1 is submitted to the Department; or

(8) The Applicant proposes to construct a new Development proposing New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings) that is located one linear mile (measured by a straight line on a map) or less from a Development that: (§2306.6703(a)(3))

(A) Serves the same type of household as the new Development, regardless of whether the Development serves families, elderly individuals, or another type of household (Intergenerational Housing is not a type of household as it relates to this restriction); and

(B) Has received an allocation of Housing Tax Credits (including Tax-Exempt Bond Developments) for any New Construction at any time during the three-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments the three-year period preceding the date the Volume I is submitted); and

(C) Has not been withdrawn or terminated from the Housing Tax Credit Program;

(D) An Application is not ineligible under this paragraph if:

(i) The Development is using federal HOPE VI funds received through the United States Department of Housing and Urban Development; locally approved funds received from a public improvement district or a tax increment financing district; funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. §§12701 et seq.); or funds provided to the state and participating jurisdictions under the Housing and Community Development Act of 1974 (42 U.S.C. §§5301 et seq.); or

(ii) The Development is located in a county with a population of less than one million; or

(iii) The Development is located outside of a metropolitan statistical area; or

(iv) The Governing Body, of the Local Political Subdivision where the Development is to be located has by vote specifically allowed the construction of a new Development located within one linear mile or less from a Development described under subparagraphs (A) - (C) of this paragraph. For purposes of this clause, evidence of the Governing Body vote or evidence required by this subparagraph must be received by the Department no later than April 1, 2009 (or for Tax-Exempt Bond Developments no later than fourteen (14) days before the Board meeting where the credits will be committed) and may not be more than one year old.

(E) In determining when an existing Development received an allocation as it relates to the application of the three-year period, the Development will be considered from the date the Board took action on approving the allocation of tax credits. In dealing with ties between two or more Developments as it relates to this rule, refer to §49.9(j) of this chapter.

(9) A Development is proposed to be located adjacent to or within 300 feet of a sexually-oriented business. For purposes of this paragraph, a sexually-oriented business shall be defined as stated in §243.002 of the Texas Government Code.

(10) A submitted Application has an entire Volume of the Application missing; has excessive omissions of documentation from the Threshold Criteria or Uniform Application documentation; or is so unclear, disjointed or incomplete that a thorough review cannot reasonably be performed by the Department, as determined by the Department. If an Application is determined ineligible pursuant to this subsection, the Application will be terminated without being processed as an Administrative Deficiency. To the extent that a review was able to be performed, specific reasons for the Department's determination of ineligibly will be included in the termination letter to the Applicant.

(b) Disqualification and Debarment. The Department will disqualify an Application, and/or debar a Person, if it is determined by the Department that any issues identified in the paragraphs of this subsection exist. The Department may debar a Person for one year from the date of debarment, or until the violation causing the debarment has been remedied, whichever term is longer, if the Department determines the facts warrant it. Causes for disqualification and debarment include: (§2306.6721)

(1) The provision of fraudulent information, knowingly falsified documentation, or other intentional or negligent material misrepresentation in the Application or other information submitted to the Department at any stage of the evaluation or approval process; or

(2) The Applicant, Development Owner, Developer or Guarantor or anyone that has Controlling ownership interest in the Development Owner, Developer or Guarantor, or any Affiliate of such entities that is active in the ownership or Control of one or more other rent restricted rental housing properties in the state of Texas administered by the Department is in Material Noncompliance with the LURA (or any other document containing an Extended Housing Commitment) or the program rules in effect for such property as further described in Chapter 60 of this title on May 1, 2009 for Competitive Housing Tax Credit Applications or for Tax-Exempt Bond Development Applications or other Applications not applying for Housing Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) no later than thirty (30) days after Volume III of the Application is submitted (§2306.6721(c)(3)); or

(3) The Applicant, Development Owner, Developer, or any Guarantor, anyone that has Controlling ownership interest in the Development Owner, Developer or Guarantor, or any Affiliate of such entity that is active in the ownership or Control has been a Principal of any entity that failed to make all loan payments to the Department in accordance with the terms of the loan, as amended, or was otherwise in default with any provisions of any loans from the Department; or

(4) The Applicant or the Development Owner that is active in the ownership or Control of one or more tax credit properties in the state of Texas has failed to pay in full any fees or penalties within thirty (30) days of when they were billed by the Department, as further described in §49.20 of this chapter; or

(5) An Applicant or a Related Party and any Person who is active in the construction, Rehabilitation, ownership, or Control of the proposed Development, including a General Partner or contractor, and a Principal or Affiliate of a General Partner or contractor, or an individual employed as a consultant, lobbyist or attorney by an Applicant or a Related Party, communicates with any Board member during the period of time beginning on the date Applications are filed in an Application Round and ending on the date the Board makes a final decision with respect to the approval of any Application in that Application Round, unless the communication takes place at any board meeting or public hearing held with respect to that Application but not during a recess or other non-record portion of the meeting or hearing. Communication with Department staff must be in accordance with §49.9(b) of this chapter; violation of the communication restrictions of §49.9(b) of this chapter is also a basis for disqualification and/or debarment; (§2306.1113)

(6) It is determined by the Department's General Counsel that there is evidence that establishes probable cause to believe that an Applicant, Development Owner, Developer, or any of their employees or agents has violated a state revolving door or other standard of conduct or conflict of interest statute, including §2306.6733, Texas Government Code, or a section of Chapter 572, Texas Government Code, in making, advancing, or supporting the Application;

(7) Applicants may be ineligible as further described in §49.5 of this chapter;

(8) The Applicant, Development Owner, Developer, Guarantor, or any Affiliate of such entity whose previous funding contracts or commitments have been partially or fully deobligated due to a failure to meet contractual obligations during the twelve (12) months prior to the submission of the applications;

(9) The Applicant, Development Owner, Developer, Guarantor, or any Affiliate of such entity whose pre-development award of non-tax credit funds from the Department has not been repaid for the Development at the time of Carryover Allocation or Bond closing.

(c) Certain Applicant and Development Standards. Notwithstanding any other provision of this chapter, the Department may not

allocate tax credits to a Development proposed by an Applicant if the Department determines that: (§2306.223)

(1) The Development is not necessary to provide needed decent, safe, and sanitary housing at rental prices that individuals or families of low and very low-income or families of moderate income can afford;

(2) The Development Owner undertaking the proposed Development will not supply well-planned and well-designed housing for individuals or families of low and very low-income or families of moderate income;

(3) The Development Owner is not financially responsible;

(4) The Development Owner has contracted, or will contract for the proposed Development with, a Developer that:

(A) Is on the Department's debarred list, including any parts of that list that are derived from the debarred list of the United States Department of Housing and Urban Development;

(B) Has breached a contract with a public agency and failed to cure that breach; or

(C) Misrepresented to a subcontractor the extent to which the Developer has benefited from contracts or financial assistance that has been awarded by a public agency, including the scope of the Developer's participation in contracts with the agency and the amount of financial assistance awarded to the Developer by the agency;

(5) The financing of the housing Development is not a public purpose and will not provide a public benefit; and/or

(6) The Development will be undertaken outside the authority granted by this chapter to the Department and the Development Owner.

(d) Representation by Former Board Member or Other Person. (§2306.6733)

(1) A former Board member or a former executive director, deputy executive director, director of multifamily finance production, director of portfolio management and compliance, director of real estate analysis or manager over Housing Tax Credits previously employed by the Department may not:

(A) For compensation, represent an Applicant or one of its Related Parties for an allocation of tax credits before the second anniversary of the date that the Board member's, director's, or manager's service in office or employment with the Department ceased; or

(B) Represent any Applicant or a Related Party of an Applicant or receive compensation for services rendered on behalf of any Applicant or Related Party regarding the consideration of an Application in which the former board member, director, or manager participated during the period of service in office or employment with the Department, either through personal involvement or because the matter was within the scope of the board member's, director's, or manager's official responsibility; or for compensation, communicate directly with a member of the legislative branch to influence legislation on behalf of an Applicant or Related Party before the second anniversary of the date that the board member's, director's, or manager's service in office or employment with the Department ceased.

(2) A Person commits a criminal offense if the Person violates §2306.6733. An offense under this section is a Class A misdemeanor.

(e) Due Diligence, Sworn Affidavit. In exercising due diligence in considering information of possible ineligibility, possible grounds for disqualification and debarment, Applicant and Development standards, possible improper representation or compensation, or similar matters, the Department may request a sworn affidavit or affidavits from the Applicant, Development Owner, Developer, Guarantor, or other Persons addressing the matter. If an affidavit determined to be sufficient by the Department is not received by the Department within seven (7) business days of the date of the request by the Department, the Department may terminate the Application.

(f) Appeals and Administrative Deficiencies for Ineligibility, Disqualification and Debarment. An Applicant or Person found ineligible, disqualified, debarred or otherwise terminated under subsections (a) - (e) of this section will be notified in accordance with the Administrative Deficiency process described in §49.9(d)(4) of this chapter. They may also utilize the appeals process described in §49.17(b) of this chapter. (§2306.6721(d))

§49.6. Site and Development Restrictions: Floodplain; Ineligible Building Types; Scattered Site Limitations; Credit Amount; Limitations on the Size of Developments; Limitations on Rehabilitation Costs; Unacceptable Sites; Appeals and Administrative Deficiencies for Site and Development Restrictions.

(a) Floodplain. Any Development proposing New Construction or Reconstruction and located within the one-hundred (100) year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps must develop the site so that all finished ground floor elevations are at least one foot above the flood plain and parking and drive areas are no lower than six inches below the floodplain, subject to more stringent local requirements. If no FEMA Flood Insurance Rate Maps are available for the proposed Development, flood zone documentation must be provided from the local government with jurisdiction identifying the one-hundred (100) year floodplain. No buildings or roads that are part of a Development proposing Rehabilitation or Adaptive Reuse, with the exception of Developments with federal funding assistance from HUD or TX USDA-RHS, will be permitted in the one-hundred (100) year floodplain unless they already meet the requirements established in this subsection for New Construction.

(b) Ineligible Building Types. Applications involving Ineligible Building Types as defined in §49.3(56) of this chapter will not be considered for allocation of tax credits.

(c) Scattered Site Limitations. Consistent with §49.3(32) of this chapter, a Development must be financed under a common plan, be owned by the same Person for federal tax purposes, and the buildings may be either located on a single site or contiguous site, or be located on scattered sites and contain only rent-restricted units. Tax-Exempt Bond Developments are permitted to be located on multiple sites consistent with Chapter 1372 of the Texas Government Code and as further clarified by the Texas Bond Review Board.

(d) Credit Amount. The Department shall issue tax credits only in the amount needed for the financial feasibility and viability of a Development throughout the affordability period. The issuance of tax credits or the determination of any allocation amount in no way represents or purports to warrant the feasibility or viability of the Development by the Department, or that the Development will qualify for and be able to claim Housing Tax Credits. The Department shall not allocate more than $2 million of tax credits in any given Application Round to any Applicant, Developer, Related Party or Guarantor; Competitive Housing Tax Credits approved by the Board during the 2009 calendar year, including commitments from the 2009 Credit Ceiling and forward commitments from the 2010 Credit Ceiling, are applied to the credit cap limitation for the 2009 Application Round. In order to evaluate this $2 million limitation, Nonprofit entities, public housing authorities, publicly traded corporations, individual board members,

and executive directors must provide the documentation required in the Application with regard to this requirement. In order to encourage the capacity enhancement of inexperienced Developers, the Department will prorate the credit amount allocated in situations where an Application is submitted in the either the Rural Regional Allocation or the Urban Regional Allocation. The Department will prorate the credits based on the percentage ownership, if there is an ownership interest, or the proportional percentage of the Developer fee received, if this applies to a Developer without an ownership interest. To be considered for this provision, a copy of a Joint Venture Agreement and narrative on how this builds the capacity of the inexperienced Developers is required. Tax-Exempt Bond Development Applications are not subject to these Housing Tax Credit limitations, and Tax-Exempt Bond Development Applications will not count towards the total limit on tax credits per Applicant. The limitation does not apply (§2306.6711(b)):

(1) To an entity which raises or provides equity for one or more Developments, solely with respect to its actions in raising or providing equity for such Developments (including syndication related activities as agent on behalf of investors);

(2) To the provision by an entity of "qualified commercial financing" within the meaning of the Code (without regard to the 80% limitation thereof);

(3) To a Qualified Nonprofit Organization or other not-for-profit entity, to the extent that the participation in a Development by such organization consists only of the provision of loan funds, grants or social services; and

(4) To a Development Consultant with respect to the provision of consulting services, provided the Development Consultant fee received for such services does not exceed 10% of the fee to be paid to the Developer (or 20% for Qualified Nonprofit Developments), or $150,000, whichever is greater.

(e) Limitations on the Size of Developments.

(1) The minimum Development size will be 16 Units if the Development involves Housing Tax Credits. The minimum Development size will be 4 Units if the funding source only involves the Housing Trust Fund or HOME Program.

(2) Rural Developments involving any New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings) will be limited to 80 Units (this includes individual Tax-Exempt Bond Developments). Rural Developments involving only Rehabilitation (excluding reconstruction) do not have a limitation as to the number of Units.

(3) Urban Developments involving any New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings), in the Competitive Housing Tax Credit Application Round will be limited to 252 total Units, wherein the maximum Department administered Units will be limited to 200 Units. Tax-Exempt Bond Developments will be limited to 252 restricted and total Units. These maximum Unit limitations also apply to those Developments which involve a combination of Rehabilitation, Reconstruction, and New Construction. Only Developments that consist solely of acquisition/Rehabilitation or Rehabilitation may exceed the maximum Unit restrictions.

(4) For Applications that are proposing an additional phase to an existing tax credit Development; that are otherwise adjacent to an existing tax credit Development; or that are proposing a Development on a contiguous site to another Application awarded in the same program year, the combined Unit total for the existing and proposed Developments may not exceed the maximum allowable Development size set forth in this subsection unless:

(A) the first phase of the Development has been completed and has attained Sustaining Occupancy (as defined in §1.31 of this title) for at least six (6) months; or

(B) a resolution from the Governing Body of the city or county, in which the proposed Development is located, dated on or before the date the Application is submitted, is submitted with the Application. Such resolution must state that there is a need for additional Units and that the Governing Body has reviewed a market study, the conclusion of which supports the need for additional Units; or

(C) the proposed Development is intended to provide replacement of previously existing affordable Units on the Development Site or that were originally located within a one mile radius from the Development Site; provided, however, the combined number of Units in the proposed Development may not exceed the number of Units being replaced. Documentation of such replacement units must be provided.

(f) Limitations on the Location of Developments. Staff will only recommend, and the Board may only allocate, Housing Tax Credits from the State Housing Credit Ceiling to more than one Development from the State Housing Credit Ceiling in the same calendar year if the Developments are, or will be, located more than one linear mile apart as determined by the Department. If the Board forward commits credits from the following year's State Housing Credit Ceiling, the Development is considered to be in the calendar year in which the Board votes, not in the year of the State Housing Credit Ceiling. This limitation applies only to communities contained within counties with populations exceeding one million (which for calendar year 2009 are Harris, Dallas, Tarrant and Bexar Counties). For purposes of this chapter, any two sites not more than one linear mile apart are deemed to be "in a single community." (§2306.6711(f)). This restriction does not apply to the allocation of Housing Tax Credits to Developments financed through the Tax-Exempt Bond program, including the Tax-Exempt Bond Development Applications under review and existing Tax-Exempt Bond Developments in the Department's portfolio. (§2306.67021)

(g) Limitations of Development in Certain Census Tracts. Staff will not recommend and the Board will not allocate Housing Tax Credits for a Competitive Housing Tax Credit or Tax-Exempt Bond Development located in a census tract that has more than 30% Housing Tax Credit Units per total households in the census tract as established by the U.S. Census Bureau for the most recent Decennial Census unless the Applicant:

(1) In an Area whose population is less than 100,000;

(2) Proposes only reconstruction or Rehabilitation (excluding New Construction of non-residential buildings); or

(3) Submits to the Department an approval of the Development referencing this rule in the form of a resolution from the Governing Body of the appropriate municipality or county containing the Development. For purposes of this paragraph, evidence of the local government approval must be received by the Department no later than April 1, 2009 for Competitive Housing Tax Credit Applications (or for Tax-Exempt Bond Development Applications no later than fourteen (14) days before the Board meeting where the credits will be committed). These ineligible census tracts are outlined in the 2009 Housing Tax Credit Site Demographic Characteristics Report.

(h) Developments Proposing to Qualify for a 30% increase in Eligible Basis. Staff will only recommend a 30% increase in Eligible Basis (paragraphs (3) and (4) of this subsection only apply to Competitive Housing Tax Credits allocated from the State Credit Ceiling) if:

(1) The Development proposing to build in a Hurricane Rita Gulf Opportunity Zone (Rita GO Zone), which was designated

as a Difficult to Develop Area as determined by H.B. 4440, is able to be placed in service by December 31, 2010 (or date as revised by the Internal Revenue Service) as certified in the Application;

(2) The Development is located in a Qualified Census Tract that has less than 40% Housing Tax Credit Units per households in the tract as established by the U.S. Census Bureau for the most recent Decennial Census. Developments located in a Qualified Census Tract that has in excess of 40% Housing Tax Credit Units per households in the tract are not eligible to qualify for a 30% increase in Eligible Basis, which would otherwise be available for the Development Site pursuant to the Code, §42(d)(5)(C), unless the Development is proposing only Reconstruction or Rehabilitation (excluding New Construction of non-residential buildings). These ineligible Qualified Census Tracts are outlined in the 2009 Housing Tax Credit Site Demographic Characteristics Report;

(3) The Development qualifies for and receives Renewable Energy Tax Credits. For purposes of this paragraph, the Application will be required to include an architect's letter or contractor bid as evidence that the Applicant will be eligible to request Renewable Energy Tax Credits in its income tax filings. Applicant will be required to show proof of receipt of the Renewable Energy Tax Credits at the time of Cost Certification; or

(4) Pursuant to the authority granted by H.R. 3221, the Development meets one of the criteria described in subparagraphs (A) - (D) of this paragraph:

(A) Rural Developments located in a census tract that has not received an award of Housing Tax Credits or Tax-Exempt Bonds (serving the same population type as proposed) in the last five (5) years from the date of the Application Acceptance Period;

(B) Developments proposing at least 50% of the total number of Units for Supportive Housing;

(C) Developments proposing to provide 10% of the Low-Income Units, that will serve individuals and families at or below 30% of AMGI, in excess of those that are proposed in §49.9(i)(3) of this chapter; or

(D) Developments proposed in High Opportunity Areas as provided in clauses (i) - (iv) of this subparagraph:

(i) A Development that is proposed to be located within one-quarter mile of existing major bus transfer centers and/or regional or local commuter rail transportation stations that are accessible to all residents including Persons with Disabilities;

(ii) A Development that is proposed to be located in a census tract which has an AMGI that is higher than the AMGI of the county or place in which the census tract is located as of the first day of the Application Acceptance Period;

(iii) A Development (serving families with children) that is proposed to be located in a school attendance zone that has an academic rating of "Exemplary" or "Recognized" rating (as determined by the Texas Education Agency) as of the first day of the Application Submission Acceptance Period; or

(iv) A Development that is proposed in a census tract that has no greater than 10% poverty population according to the most recent census data (these census tracts are designated in the 2009 Housing Tax Credit Site Demographic Characteristics Report).

(5) The Development proposing to build in a Hurricane Ike eligible county as designated by the Emergency Economic Stabilization Act of 2008, H.R. 1424 and Presidential Declaration FEMA-1791-DR and is able to place in service by December 31, 2012 (or the date as revised by the Internal Revenue Service) as certified in the Application.

(i) Rehabilitation Costs. Developments involving Rehabilitation must establish that the Rehabilitation will substantially improve the condition of the housing and will involve at least $15,000 per Unit in direct hard costs (including site work, contingency, contractor profit, overhead and general requirements) unless financed with TRDO-USDA in which case the minimum is $9,000.

(j) Unacceptable Sites. Developments will be ineligible if the Development is located on a site that is determined to be unacceptable by the Department.

(k) Appeals and Administrative Deficiencies for Site and Development Restrictions. An Application or Development found to be in violation under subsections (a) - (j) of this section will be notified in accordance with the Administrative Deficiency process described in §49.9(d)(4) of this chapter. They may also utilize the appeals process described in §49.17(b) of this chapter.

§49.7. Regional Allocation Formula; Set-Asides; Redistribution of Credits.

(a) Regional Allocation Formula. (§2306.1115 as required by §2306.111(d) of the Texas Government Code) The Department uses a regional distribution formula developed by the Department and commented on by the public to distribute credits from the State Housing Credit Ceiling to all Urban Areas and Rural Areas. This formula establishes separate targeted tax credit amounts for Rural Areas and Urban Areas within each of the Uniform State Service Regions. Each Uniform State Service Region's targeted tax credit amount will be published on the Department's website. The regional allocation for Rural Areas is referred to as the Rural Regional Allocation and the regional allocation for Urban Areas is referred to as the Urban Regional Allocation. Developments qualifying for the Rural Regional Allocation must meet the Rural Development definition. The Regional Allocation target will reflect that at least 20% of the State Housing Credit Ceiling for each calendar year shall be allocated to Developments in Rural Areas with a minimum of $500,000 for each Uniform State Service Region. (§2306.111(d)(3))

(b) Set-Asides. An Applicant may elect to compete in as many of the following Set-Asides for which the proposed Development qualifies (§2306.111(d)):

(1) At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of the Code, §42(h)(5). Qualified Nonprofit Organizations must have the Controlling interest in the Development Owner applying for this Set-Aside. If the Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the controlling managing General Partner. If the Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the controlling Managing Member. Additionally, a Qualified Nonprofit Development submitting an Application in the nonprofit Set-Aside must have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or a co-Developer as evidenced in the development agreement; (§2306.6729 and §2306.6706(b))

(2) At least 5% of the State Housing Credit Ceiling for each calendar year shall be allocated to Developments which are financed through TRDO-USDA, that meet the definition of a Rural Development, do not exceed 80 Units if proposing any New Construction (excluding New Construction of non-residential buildings), and have filed an "Intent to Request 2009 Housing Tax Credits" form by the Pre-Application submission deadline. (§2306.111(d)(2)). If an Application in this Set-Aside involves Rehabilitation it will be attributed

to, and come from the, At-Risk Development Set-Aside; if an Application in this Set-Aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region. Developments financed through TRDO-USDA's §538 Guaranteed Rural Rental Housing Program, in whole or in part, will not be considered under this Set-Aside. Any Rehabilitation or Reconstruction of an existing §515 Development that retains the §515 loan and restrictions will be considered under the At-Risk Development and TRDO-USDA Set-Asides, unless such Development is also financed through TRDO-USDA's §538 Guaranteed Rural Rental Housing Program. Commitments of 2009 Competitive Housing Tax Credits issued by the Board in 2009 will be applied to each Set-Aside, Rural Regional Allocation, Urban Regional Allocation and/or TRDO-USDA Set-Aside for the 2009 Application Round as appropriate;

(3) At least 15% of the State Housing Credit Ceiling for each calendar year will be allocated under the At-Risk Development Set-Aside and will be deducted from the State Housing Credit Ceiling prior to the application of the regional formula required under subsection (a) of this section. Through this Set-Aside, the Department, to the extent possible, shall allocate credits to Applications involving the preservation of Developments designated as At-Risk Developments as defined in §49.3(14) of this chapter. (§2306.6714). To qualify as an At-Risk Development, the Applicant must provide evidence that it either is not eligible to renew, retain or preserve any portion of the financial benefit described in §49.3(14)(A) of this chapter, or provide evidence that it will renew, retain or preserve the financial benefit described in §49.3(14)(A) of this chapter; and must have filed an "Intent to Request 2009 Housing Tax Credits" form by the Pre-Application submission deadline. Up to 5% of the State Credit Ceiling associated with this Set-Aside may be given priority to Rehabilitation Developments funded with TRDO.

(c) Redistribution of Credits. (§2306.111(d)). If any amount of Housing Tax Credits remain after the initial commitment of Housing Tax Credits among the Set-Asides, Rural Regional Allocation and Urban Regional Allocation, the Department may redistribute the credits amongst the different regions and Set-Asides depending on the quality of Applications submitted as evaluated under the factors described in §49.9(d) of this chapter, the need to most closely achieve regional allocation goals and then the level of demand exhibited in the Uniform State Service Regions during the Application Round, except that, if there are any tax credits set aside for Developments in a Rural Area in a specific Uniform State Service Region that remain after the allocation under §49.9(d)(5)(C) of this chapter, those tax credits shall be made available in any other Rural Area in the state, first, and then to Developments in Urban areas of any uniform state service region. (§2306.111(d)(3)). As described in subsection (b)(1) and (2) of this section, no more than 90% of the State's Housing Credit Ceiling for the calendar year may go to Developments which are not Qualified Nonprofit Developments. If credits will be transferred from a Uniform State Service Region which does not have enough qualified Applications to meet its regional credit distribution amount, then those credits will be apportioned to the other Uniform State Service Regions.

§49.8. Pre-Applications for Competitive Housing Tax Credits: Submission; Communication with Departments Staff; Evaluation Process; Threshold Criteria and Review; Results (§2306.6704).

(a) Pre-Application Submission. Any Applicant requesting a Housing Credit Allocation may submit a Pre-Application to the Department during the Pre-Application Acceptance Period along with the required Pre-Application Fee as described in §49.20 of this chapter. Only one Pre-Application may be submitted by an Applicant for each site under the State Housing Credit Ceiling. The Pre-Application submission is a voluntary process. While the Pre-Application Acceptance Period is open, Applicants may withdraw their Pre-Application and subsequently file a new Pre-Application utilizing the original Pre-Application Fee that was paid as long as no evaluation was performed by the Department. The Department is authorized though not required to request the Applicant to provide additional information it deems relevant to clarify information contained in the Pre-Application or to submit documentation for items it considers to be Administrative Deficiencies. The rejection of a Pre-Application shall not preclude an Applicant from submitting an Application with respect to a particular Development or site at the appropriate time.

(b) Communication with the Department. Applicants that submit a Pre-Application are restricted from communication with Department staff as provided in §49.9(b) of this chapter. (§2306.1113)

(c) Pre-Application Evaluation Process. Eligible Pre-Applications will be evaluated for Pre-Application Threshold Criteria. Applications that are associated with a TRDO-USDA Development are not exempt from Pre-Application and are eligible to compete for the Pre-Application points further outlined in §49.9(i)(14) of this chapter. Pre-Applications that are found to have Administrative Deficiencies will be handled in accordance with §49.9(d)(4) of this chapter. Department review at this stage is limited and not all issues of eligibility and threshold are reviewed at Pre-Application. Acceptance by staff of a Pre-Application does not ensure that an Applicant satisfies all Application eligibility, Threshold or documentation requirements. The Department is not responsible for notifying an Applicant of potential areas of ineligibility or threshold deficiencies at the time of Pre-Application.

(d) Pre-Application Threshold Criteria and Review. Applicants submitting a Pre-Application will be required to submit information demonstrating their satisfaction of the Pre-Application Threshold Criteria. The Pre-Applications not meeting the Pre-Application Threshold Criteria will be terminated and the Applicant will receive a written notice to the effect that the Pre-Application Threshold Criteria have not been met. The Department shall not be responsible for the Applicant's failure to meet the Pre-Application Threshold Criteria and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Pre-Application Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. The Pre-Application Threshold Criteria include:

(1) Submission of a "Pre-Application Submission Form" and "Certification of Pre-Application Itemized Self-Score." The Applicant may not change the Self-Score unless requested by the Department in a Deficiency Notice;

(2) Evidence of property control through February 27, 2009 as evidenced by the documentation required under §49.9(h)(7)(A) of this chapter; and

(3) Evidence in the form of a certification that all of the notifications required under this paragraph have been made. Requests for Neighborhood Organizations under subparagraph (A) of this paragraph must be made by the deadlines described in subparagraph (A)(i) of this paragraph; notifications under subparagraph (C) of this paragraph must be made prior to the close of the Pre-Application Acceptance Period. (§2306.6704). Evidence of notification must meet the requirements identified in subparagraph (B) of this paragraph to all of the individuals and entities identified in subparagraph (B) of this paragraph. (§2306.6704)

(A) The Applicant must request a list of Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site as follows:

(i) No later than December 8, 2008, the Applicant must e-mail, fax or mail with registered receipt a completed "Neighborhood Organization Request" letter as provided in the Pre-Applica-

tion to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an Area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located an Area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the Extra Territorial Jurisdiction (ETJ) of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request Neighborhood Organizations from that source in the same format;

(ii) If no reply letter is received from the local elected officials by January 1, 2009, then the Applicant must certify to that fact in the "Pre-Application Notification Certification Form" provided in the Pre-Application;

(iii) The Applicant must list all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as provided by the local elected officials, or that the Applicant has knowledge of as of Pre-Application Submission in the "Pre-Application Notification Certification Form" provided in the Pre-Application.

(B) Not later than the date the Pre-Application is submitted, notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt return or similar tracking mechanism in the format required in the "Pre-Application Notification Template" provided in the Pre-Application. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are not required to notify city officials, however, are required to notify county officials. Evidence of Notification is required in the form of a certification in the "Pre-Application Notification Certification Form" provided in the Pre-Application, although it is encouraged that Applicants retain proof of delivery of the notifications, to the persons or entities prescribed in clauses (i) - (ix) of this subparagraph, in the event that the Department requires proof of Notification. Evidence of proof of delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of receipt by the recipient for facsimile and electronic mail. Officials to be notified are those officials in office at the time the Pre-Application is submitted.

(i) Neighborhood Organizations on record with the state or county whose boundaries include the proposed Development Site as identified in subparagraph (A)(iii) of this paragraph;

(ii) Superintendent of the school district containing the Development;

(iii) Presiding officer of the board of trustees of the school district containing the Development;

(iv) Mayor of any municipality containing the Development;

(v) All elected members of the Governing Body of any municipality containing the Development;

(vi) Presiding officer of the Governing Body of the county containing the Development;

(vii) All elected members of the Governing Body of the county containing the Development;

(viii) State senator of the district containing the Development; and

(ix) State representative of the district containing the Development.

(C) Each such notice must include, at a minimum, all of the following:

(i) The Applicant's name, address, individual contact name and phone number;

(ii) The Development name, address, city and county;

(iii) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(iv) Statement of whether the Development proposes New Construction, reconstruction, Adaptive Reuse or Rehabilitation;

(v) The type of Development being proposed (single family homes, duplex, apartments, townhomes, high-rise etc.) and population being served (family, Intergenerational Housing, or elderly);

(vi) The approximate total number of Units and approximate total number of low-income Units;

(vii) The approximate percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the approximate percentage of Units that are market rate;

(viii) The number of Units and proposed rents (less utility allowances) for the low-income Units and the number of Units and the proposed rents for any market rate Units. Rents to be provided are those that are effective at the time of the Pre-Application, which are subject to change as annual changes in the area median income occur; and

(ix) The expected completion date if credits are awarded.

(e) Pre-Application Results. Only Pre-Applications which have satisfied all of the Pre-Application Threshold Criteria requirements set forth in subsection (d) of this section and §49.9(i)(14) of this chapter, will be eligible for Pre-Application points. The order and scores of those Developments released on the Pre-Application Submission Log do not represent a commitment on the part of the Department or the Board to allocate tax credits to any Development and the Department bears no liability for decisions made by Applicants based on the results of the Pre-Application Submission Log. Inclusion of a Development on the Pre-Application Submission Log does not ensure that an Applicant will receive points for a Pre-Application.

§49.9. Application: Submission; Ex Parte Communications; Adherence to Obligations; Evaluation Process for Competitive Applications Under the State Housing Credit Ceiling; Evaluation Process for Tax-Exempt Bond Development Applications; Evaluation Process for Rural Rescue Applications Under the 2010 Credit Ceiling; Experience Pre-Certification Procedures; Threshold Criteria; Selection Criteria; Tiebreaker Factors; Staff Recommendations.

(a) Application Submission. Any Applicant requesting a Housing Credit Allocation or a Determination Notice must submit an Application, and the required Application fee as described in §49.20 of this chapter, to the Department during the Application Acceptance Period. Only complete Applications will be accepted. All required volumes must be submitted as required by the Application Submission Procedures Manual and fully complete for submission with all required copies and received by the Department not later

than 5:00 p.m. on the date the Application is due. A bookmarked electronic copy of all required volumes and exhibits, unless otherwise indicated in the Application Submission Procedures Manual, must be submitted in the format of a single file presented in the order as required by the Application Submission Procedures Manual on a CD-R (non-rewritable) clearly labeled with the report type, Development name, and Development location is required for submission and must be received by the Department not later than 5:00 p.m. on the date the Application is due. Only one Application may be submitted for a site in an Application Round. While the Application Acceptance Period is open, an Applicant may withdraw an Application and subsequently file a new Application utilizing the original Pre-Application Fee that was paid as long as no evaluation was performed by the Department. The Department is authorized, but not required, to request the Applicant to provide additional information it deems relevant to clarify information contained in the Application or to submit documentation for items it considers to be an Administrative Deficiency, including ineligibility criteria, site and development restrictions, and threshold and selection criteria documentation. (§2306.6708). An Applicant may not change or supplement any part of an Application in any manner after the filing deadline, and may not add any Set-Asides, increase the requested credit amount, or revise the Unit mix (both income levels and bedroom mixes), except in response to a direct request from the Department to remedy an Administrative Deficiency as further described in §49.3(2) of this chapter or by amendment of an Application after a commitment or allocation of tax credits as further described in §49.17(d) of this chapter.

(b) Ex Parte Communications.

(1) During the period beginning on the first date of the Application Acceptance Period and ending on the date the Board makes a final decision with respect to the approval of any Application in that Application Round, a member of the Board may not communicate with the following Persons:

(A) an Applicant or Related Party; and

(B) any Person who is:

(i) active in the construction, rehabilitation, ownership, or Control of the proposed Development, including:

(I) a General Contractor; and

(II) a Developer; and

(III) a General Partner, Principal or Affiliate of a General Partner or General Contractor; or

(ii) employed as a consultant, lobbyist, or attorney by an Applicant or a Related Party.

(2) During the period beginning on the first date of the Application Acceptance Period and ending on the date the Board makes a final decision with respect to the approval of any Application in that Application Round, an employee of the Department may communicate about any Application with the following Persons:

(A) the Applicant or a Related Party; and

(B) any Person who is:

(i) active in the construction, rehabilitation, ownership, or Control of the proposed Development, including:

(I) a General Partner or General Contractor; and

(II) a Developer; and

(III) a Principal or Affiliate of a General Partner or General Contractor; or

(ii) employed as a consultant, lobbyist or attorney by the Applicant or a Related Party.

(3) A communication under paragraph (2) of this subsection may be oral or in any written form, including electronic communication through the Internet, and must satisfy the following conditions:

(A) the communication must be restricted to technical or administrative matters directly affecting the Application;

(B) the communication must occur or be received on the premises of the Department during established business hours; and

(C) a record of the communication must be maintained and included with the Application for purposes of Board review and must contain the following information:

(i) the date, time, and means of communication;

(ii) the names and position titles of the Persons involved in the communication and, if applicable, the Person's relationship to the Applicant;

(iii) the subject matter of the communication; and

(iv) a summary of any action taken as a result of the communication.

(4) Notwithstanding paragraph (1) or (2) of this subsection, a Board member or Department employee may communicate without restriction with a Person listed in paragraph (1) or (2) of this subsection during any Board meeting or public hearing held with respect to the Application, but not during a recess or other non-record portion of the meeting or hearing.

(5) Paragraph (1) of this subsection does not prohibit the Board from participating in social events at which a Person with whom communications are prohibited may or will be present, provided that all matters related to Applications to be considered by the Board will not be discussed.

(c) Adherence to Obligations. (§2306.6720, General Appropriation Act, Article VII, Rider 8(a)). All representations, undertakings and commitments made by an Applicant in the Application process for a Development, whether with respect to Threshold Criteria, Selection Criteria or otherwise, shall be deemed to be a condition to any Commitment Notice, Determination Notice, or Carryover Allocation for such Development, the violation of which shall be cause for cancellation of such Commitment Notice, Determination Notice, or Carryover Allocation by the Department, and if concerning the ongoing features or operation of the Development, shall be enforceable even if not reflected in the LURA. All such representations are enforceable by the Department and the tenants of the Development, including enforcement by administrative penalties for failure to perform, as stated in the representations and in accordance with the LURA. If a Development Owner does not produce the Development as represented in the Application; does not receive approval for an amendment to the Application by the Department prior to implementation of such amendment; or does not provide the necessary evidence for any points received by the required deadline:

(1) The Development Owner must provide a plan to the Department, for approval and subsequent implementation, that incorporates additional amenities to compensate for the non-conforming components; and

(2) The Board will opt either to terminate the Application and rescind the Commitment Notice, Determination Notice or Carryover Allocation Agreement as applicable or the Department must:

(A) Reduce the score for Applications for Competitive Housing Tax Credits that are submitted by an Applicant or Affiliate related to the Development Owner of the non-conforming Development by up to ten points for the two Application Rounds concurrent to, or following, the date that the non-conforming aspect, or lack of financing, was recognized by the Department of the need for the amendment; the placed in service date; or the date the amendment is accepted by the Board;

(B) Prohibit eligibility to apply for Housing Tax Credits for a Tax-Exempt Bond Development that are submitted by an Applicant or Affiliate related to the Development Owner of the non-conforming Development for up to twenty-four (24) months from the date that the non-conforming aspect, or lack of financing, was recognized by the Department of the need for the amendment; the placed in service date; or the date the amendment is accepted by the Board, less any time delay caused by the Department;

(C) In addition to, or in lieu of, the penalty in subparagraph (A) or (B) of this paragraph, the Board may assess a penalty fee of up to $1,000 per day for each violation.

(3) For amendments approved administratively by the Executive Director, the penalties in paragraph (2) of this subsection will not be imposed.

(d) Evaluation Process for Competitive Applications Under the State Housing Credit Ceiling. Applications submitted for competitive consideration under the State Housing Credit Ceiling will be reviewed according to the process outlined in this subsection. An Application, during any of these stages of review, may be determined to be ineligible as further described in §49.5 of this chapter; Applicants will be promptly notified in these instances.

(1) Set-Aside and Selection Criteria Review. All Applications will first be reviewed as described in this paragraph. Applications will be confirmed for eligibility for Set-Asides. Then, each Application will be preliminarily scored according to the Selection Criteria listed in subsection (i) of this section. When a particular scoring criterion involves multiple points, the Department will award points to the proportionate degree, in its determination, to which a proposed Development complied with that criterion. As necessary to complete this process only, Administrative Deficiencies may be issued to the Applicant. This process will generate a preliminary Department score for every Application.

(2) Application Review Assessment. Each Application will be assessed based on either the Applicant's self-score or the Department's preliminary score, region, and any Set-Asides that the Application indicates it is eligible for, consistent with paragraph (5) of this subsection. Those Applications that appear to be most competitive will be reviewed in detail for Eligibility and Threshold Criteria during the Application Round.

(3) Eligibility and Threshold Criteria Review. Applications that appear to be most competitive will be evaluated for eligibility under §49.5(a)(7) - (9), (b) - (f) and §49.6 of this chapter. The remaining portions of the Eligibility Review under §49.5 of this chapter will be performed in the Compliance Evaluation and Eligibility Review as described under paragraph (7) of this subsection. The most competitive Applications will also be evaluated against the Threshold Criteria under subsection (h) of this section. The same portions of the Threshold Criteria review may be performed in the Underwriting Evaluation and Criteria review for financial feasibility by the Department's Real Estate Analysis Division as described under paragraph (6) of this subsection. Applications not meeting Threshold Criteria will be notified of any Administrative Deficiencies, in each event the Applicant will be given an opportunity to correct such deficiencies. Applications not meeting Threshold Criteria after receipt and review of the Administrative Deficiency response will be terminated and the Applicant will be provided a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. Not all Applications will be reviewed in detail for Threshold Criteria. To the extent that the review of Threshold Criteria documentation, or submission of Administrative Deficiency documentation, alters the score assigned to the Application, an Applicant will be notified of its final score.

(4) Administrative Deficiencies. If an Application contains Administrative Deficiencies pursuant to §49.3(2) of this chapter which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies. Because the review for Eligibility, Selection, Threshold Criteria, and review for financial feasibility by the Department's Real Estate Analysis Division may occur separately, Administrative Deficiency requests may be made several times. The Department staff will request clarification or correction in a deficiency notice in the form of an e-mail, or if an e-mail address is not provided in the Application, by facsimile, and a telephone call (only if there has not been confirmation of the receipt of the e-mail within twenty-four (24) hours) to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. If Administrative Deficiencies are not clarified or corrected to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice, then for competitive Applications under the State Housing Credit Ceiling, five points shall be deducted from the Selection Criteria score for each additional day the deficiency remains unresolved. If Administrative Deficiencies are not clarified or corrected by 5:00 p.m. on the seventh business day following the date of the deficiency notice, then the Application shall be terminated. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. This Administrative Deficiency process applies to requests for information made by the Real Estate Analysis Division review.

(5) Subsequent Evaluation of Applications and Methodology for Award Recommendations to the Board. The Department will assign, as herein described, Developments for review for financial feasibility by the Department's Real Estate Analysis Division--in general these will be those Applications identified as most competitive and that meet the requirements of Eligibility and Threshold. This procedure will also be used in making recommendations to the Board as follows:

(A) Assignments will be determined by separately selecting the Applications with the highest scores in the At-Risk Set-Aside Statewide until the minimum requirements stated in §49.7(b) of this chapter are attained;

(B) Assignments will then be determined by selecting the Applications with the highest scores in the TRDO-USDA Allocation until the minimum requirements stated in §49.7(b) of this chapter are attained. If an Application in this Set-Aside involves Rehabilitation it will be attributed to, and come from the, At-Risk Set-Aside; if an Application in this Set-Aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region;

(C) Remaining funds within each Uniform State Service Region will then be selected based on the highest scoring Devel-

opments in each of the 26 sub-regions, regardless of Set-Aside, in accordance with the requirements under §49.7(a) of this chapter, without exceeding the credit amounts available for a Rural Regional Allocation and Urban Regional Allocation in each region. To the extent that Applications in the At-Risk and TRDO-USDA Set-Asides are not competitive enough within their respective Set-Asides, they will also be able to compete, with no Set-Aside preference, within their appropriate sub-region;

(D) If there are any tax credits set-aside for Developments in a Rural Area in a specific Uniform State Service Region that remain after allocation under subparagraph (C) of this paragraph those tax credits shall then be made available in any other Rural Area in the state to the Application in the most underserved Rural sub-region as compared to the Region's Rural Allocation. (§2306.111(d)(3)). This will be referred to as the Rural collapse;

(E) If there are any tax credits remaining in any sub-region after the Rural collapse, in the Rural Regional Allocation or Urban Regional Allocation, they then will be combined and made available to the Application in the most underserved sub-region as compared to the sub-region's allocation. This will be referred to as the statewide collapse;

(F) Staff will ensure that at least 10% of the State Housing Credit Ceiling is allocated to Qualified Nonprofit Organizations to satisfy the Nonprofit Set-Aside. If 10% is not met, then the Department will add the highest scoring Application by a Qualified Nonprofit Organization statewide until the 10% Nonprofit Set-Aside is met. Staff will ensure that at least 20% of the State Housing Credit Ceiling is allocated to Rural Developments. If this 20% minimum is not met, then the Department will add the highest scoring Rural Development Application statewide until the 20% Rural Development Set-Aside is met. Selection for each of the Set-Asides will take precedence over selection for the Rural Regional Allocation and Urban Regional Allocation. Funds for the Rural Regional Allocation or Urban Regional Allocation within a region, for which there are no eligible feasible Applications, will be redistributed as provided in §49.7(c) of this chapter, Redistribution of Credits. If the Department determines that an allocation recommendation would cause a violation of the $2 million limit described in §49.6(d) of this chapter, the Department will make its recommendation by selecting the Development(s) that most effectively satisfies(y) the Department's goals in meeting Set-Aside and regional allocation goals. Based on Application rankings, the Department shall continue to underwrite Applications until the Department has processed enough Applications satisfying the Department's underwriting criteria to enable the allocation of all available Housing Tax Credits according to regional allocation goals and Set-Aside categories. To enable the Board to establish a Waiting List, the Department shall underwrite as many additional Applications as necessary to ensure that all available Competitive Housing Tax Credits are allocated within the period required by law. (§2306.6710(a) - (f); §2306.111)

(6) Underwriting Evaluation and Criteria. The Department shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of Housing Tax Credits. In determining an appropriate level of Housing Tax Credits, the Department shall, at a minimum, evaluate the cost of the Development based on acceptable cost parameters as adjusted for inflation and as established by historical final cost certifications of all previous Housing Tax Credit allocations for the county in which the Development is to be located; if certifications are unavailable for the county, then the metropolitan statistical area in which the Development is to be located; or if certifications are unavailable under the county or the metropolitan statistical area, then the Uniform State Service Region in which the Development is to be located. Underwriting of a Development will include a determination by the Department, pursuant to the Code §42, that the amount of Housing Tax Credits recommended for commitment to a Development is necessary for the financial feasibility of the Development and its long-term viability as a qualified rent restricted housing property. In making this determination, the Department will use the Underwriting Rules and Guidelines, §1.32 of this title. An Applicant may not change or supplement any part of an Application in any manner after the filing deadline, and may not add any set-asides, increase their credit amount, or revise their unit mix (both income levels and bedroom mixes), except in response to a direct request from the Real Estate Analysis Division to remedy an Administrative Deficiency as further described in §49.3(2) of this chapter or by amendment of an Application after a commitment or allocation of tax credits as further described in §49.17(d) of this chapter. To the extent that the review of Administrative Deficiency documentation during this review alters the score assigned to the Application, Applicants will be re-notified of their final score. Receipt of feasibility points under subsection (i)(1) of this section does not ensure that an Application will be considered feasible during the feasibility evaluation by the Real Estate Analysis Division and conversely, a Development may be found feasible during the feasibility evaluation by the Real Estate Analysis Division even if it did not receive points under subsection (i)(1) of this section. (§2306.6710 and §2306.11)

(A) The Department may have an external party perform the underwriting evaluation to the extent it determines appropriate. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation.

(B) The Department will reduce the Applicant's estimate of Developer's and/or General Contractor fees in instances where these exceed the fee limits determined by the Department. In the instance where the General Contractor is an Affiliate of the Development Owner and both parties are claiming fees, General Contractor's overhead, profit, and general requirements, the Department shall be authorized to reduce the total fees estimated to a level that it determines to be reasonable under the circumstances. Further, the Department shall deny or reduce the amount of Housing Tax Credits allocated with respect to any portion of costs which it deems excessive or unreasonable. Excessive or unreasonable costs may include Developer fee attributable to Related Party acquisition costs. The Department also may require bids or Third Party estimates in support of the costs proposed by any Applicant. The Developer's fee limits will be calculated as follows:

(i) New construction pursuant to §42(b)(1)(A) U.S.C., the Developer fee cannot exceed 15% of the project's Total Eligible Basis, less Developer fees, or 20% of the project's Total Eligible Basis, less Developer fees if the Development proposes 49 total Units or less; and

(ii) Acquisition/rehabilitation Developments that are eligible for acquisition credits pursuant to §42(b)(1)(B) U.S.C., the acquisition portion of the Developer fee cannot exceed 15% of the existing structures acquisition basis, less Developer fee if the Development proposes 50 total Units or more, or 20% of the project's Total Eligible Basis, less Developer fees if the Development proposes 49 total Units or less, and will be limited to 4% credits. The rehabilitation portion of the Developer fee cannot exceed 15% of the total rehabilitation basis, less Developer fee if the Development proposes 50 total Units or more, or 20% of the project's Total Eligible Basis, less Developer fees if the Development proposes 49 total Units or less.

(7) Compliance Evaluation and Eligibility Review. After the Department has determined which Developments will be reviewed for financial feasibility, those same Developments will be reviewed for

evaluation of the compliance status by the Department's Portfolio Management and Compliance Division, in accordance with Chapter 60 of this title, and will be evaluated in detail for eligibility under §49.5(a) - (f) of this chapter.

(8) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns. Such inspection will evaluate the Development Site based upon the criteria set forth in the Site Evaluation form provided in the Application and the inspector shall provide a written report of such site evaluation. The evaluations shall be based on the condition of the surrounding neighborhood, including appropriate environmental and aesthetic conditions and proximity to retail, medical, recreational, and educational facilities, and employment centers. The site's appearance to prospective tenants and its accessibility via the existing transportation infrastructure and public transportation systems shall be considered. "Unacceptable" sites include, without limitation, those containing a non-mitigable environmental factor that may adversely affect the health and safety of the residents. For Developments applying under the TRDO-USDA Set-Aside, the Department may rely on the physical site inspection performed by TRDO-USDA.

(e) Evaluation Process for Tax-Exempt Bond Development Applications. Applications submitted for consideration as Tax-Exempt Bond Developments will be reviewed according to the process outlined in this subsection. An Application, during any of these stages of review, may be determined to be ineligible as further described in §49.5 of this chapter; Applicants will be promptly notified in these instances.

(1) Eligibility and Threshold Criteria Review. All Tax-Exempt Bond Development Applications will first be reviewed as described in this paragraph. Tax-Exempt Bond Development Applications will be confirmed for eligibility under §49.5 and §49.6 of this chapter and Applications will be evaluated in detail against the Threshold Criteria. Tax-Exempt Bond Development Applications found to be ineligible and/or not meeting Threshold Criteria will be notified of any Administrative Deficiencies, in each event the Applicant will be given an opportunity to correct such deficiencies. Applications not meeting the Threshold Criteria after receipt and review of the Administrative Deficiency response will be terminated and the Applicant will be provided a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled.

(2) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies. Because the review for Eligibility, Threshold Criteria, and review for financial feasibility by the Department's Real Estate Analysis Division may occur separately, Administrative Deficiency requests may be made several times. The Department staff will request clarification or correction in a deficiency notice in the form of an e-mail, or if an e-mail address is not provided in the Application, by facsimile, and a telephone call (only if there has not been confirmation of the receipt of the e-mail within twenty-four (24) hours) to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. All Administrative Deficiencies shall be clarified or corrected to the satisfaction of the Department within five (5) business days. Failure to resolve all outstanding deficiencies by 5:00 p.m. on the fifth business day following the date of the deficiency notice will result in a penalty fee of $500 for each business day the deficiency remains unresolved. Applications with unresolved deficiencies after 5:00 p.m. on the tenth day following the date of the deficiency notice will be terminated. The Applicant will be responsible for the payment of fees accrued pursuant to this paragraph regardless of any termination pursuant to §49.5(b)(4) of this chapter. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period. The Application will not be presented to the Board for consideration until all outstanding fees have been paid. This Administrative Deficiency process applies equally to the Real Estate Analysis Division review and feasibility evaluation and the same penalty and termination will be assessed.

(3) Underwriting and Compliance Evaluation and Criteria. The Department will assign all eligible Tax-Exempt Bond Development Applications meeting the eligibility and threshold requirements for review for financial feasibility by the Department's Real Estate Analysis Division, or the Department may have an external party perform the underwriting evaluation to the extent it determines appropriate. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation. The Department or external party shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of Housing Tax Credits as further described in subsection (d)(6) of this section. Tax-Exempt Bond Development Applications will also be reviewed for evaluation of the compliance status by the Department's Portfolio Management and Compliance Division in accordance with Chapter 60, Subchapter A of this title.

(4) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns as further described in subsection (d)(8) of this section.

(f) Evaluation Process for Rural Rescue Applications Under the 2010 Credit Ceiling. Applications submitted for consideration as Rural Rescue Applications pursuant to §49.10(c) of this chapter under the 2010 Credit Ceiling will be reviewed according to the process outlined in this subsection. A Rural Rescue Application, during any of these stages of review, may be determined to be ineligible as further described in §49.5 of this chapter; Applicants will be promptly notified in these instances.

(1) Procedures for Intake and Review.

(A) Applications for Rural Rescue deals may be submitted between March 2, 2009 and November 15, 2009 and must be submitted in accordance with §49.21 of this chapter. A complete Application must be submitted at least forty (40) days prior to the date of the Board meeting at which the Applicant would like the Board to act on the proposed Development. Applications must include the full Application Fee as further described in §49.20(c) of this chapter. Applicants must submit documents in accordance with the procedures set out in the 2009 Application Submission Procedures Manual for Volumes I, II, III and IV. Volume IV, evidencing Selection Criteria, MUST be submitted.

(B) Applicants do not need to participate in the Pre-Application process outlined in §49.8 of this chapter, nor will they need to submit pre-certification documents identified in subsection (g) of this section.

(C) Applications will be processed on a first-come, first-served basis. Applications unable to meet all deficiency and underwriting requirements within thirty (30) days of the request by the Department, will remain under consideration, but will lose their submission status and the next Application in line will be moved ahead in order to expedite those Applications most able to proceed. Applications for Rural Rescue will be processed and evaluated as

described in this paragraph. Applications will be reviewed to ensure that the Application is eligible as a rural "rescue" Development as described in paragraph (2) of this subsection.

(D) Prior to the Development being recommended to the Board, TRDO-USDA must provide the Department with a copy of the physical site inspection report performed by TRDO-USDA, as provided in subsection (d)(8) of this section.

(2) Eligibility Review. All Rural Rescue Applications will first be reviewed as described in this paragraph and eligibility will be confirmed pursuant to §49.5 and §49.6 of this chapter and the criteria listed in subparagraphs (A) - (C) of this paragraph. Applications found to be ineligible will be notified.

(A) Applications must be funded through TRDO-USDA;

(B) Applications must able to provide evidence that the loan:

(i) has been foreclosed and is in the TRDO-USDA inventory; or

(ii) is being foreclosed; or

(iii) is being accelerated; or

(iv) is in imminent danger of foreclosure or acceleration; or

(v) is for an Application in which two adjacent parcels are involved, of which at least one parcel qualifies under clauses (i) - (iv) of this subparagraph and for which the Application is submitted under one ownership structure, one financing plan and for which there are no market rate units; and

(C) Applicants must be identified as in compliance with TRDO-USDA regulations.

(3) Threshold Review. Applications will be evaluated in detail against the Threshold Criteria. Applications found to be ineligible and/or not meeting Threshold Criteria will be notified of any Administrative Deficiencies, in which event the Applicant is given an opportunity to correct such deficiencies. Applications not meeting Threshold Criteria after receipt and review of the Administrative Deficiency response will be terminated and the Applicant will be provided a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. Not all Applications will be reviewed in detail for Threshold Criteria.

(4) Selection Criteria Review. All Rural Rescue Applications will be evaluated against the Selection Criteria and a score will be assigned to the Application. The minimum score for Selection Criteria is not required to be achieved to be eligible.

(5) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification or correction of information submitted at the time of the Application, the Department staff may request clarification or correction of such Administrative Deficiencies as further described in subsection (d)(4) of this section.

(6) Underwriting and Compliance Evaluation and Criteria. The Department will assign all eligible Rural Rescue Applications meeting the eligibility and threshold requirements for review for financial feasibility by the Department's Real Estate Analysis Division, or the Department may have an external party perform the underwriting evaluation to the extent it determines appropriate. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation. The Department or external party shall underwrite an Application to determine the financial feasibility of the Development and an appropriate level of Housing Tax Credits as further described in subsection (d)(6) of this section. Rural Rescue Development Applications will also be reviewed for evaluation of the previous participation by the Department's Portfolio Management and Compliance Division in accordance with Chapter 60 of this title.

(7) Site Evaluation. Site conditions shall be evaluated through a physical site inspection by the Department or its assigns as further described in subsection (d)(8) of this section.

(8) Credit Ceiling and Applicability of this chapter. All Rural Rescue Applicants will receive their credit allocation out of the 2010 Credit Ceiling and therefore, will be required to follow the rules and guidelines identified in the 2010 Qualified Allocation Plan and Rules (QAP). However, because the 2010 QAP will not be in effect during the time period that the Rural Rescue Applications can be submitted, Applications submitted and eligible under the Rural Rescue Set-Aside will be considered by the Board to have satisfied the requirements of the 2010 QAP and are waived from 2010 QAP requirements that are changes from the 2009 QAP, to the extent permitted by statute.

(9) Procedures for Recommendation to the Board. Consistent with subsection (k) of this section, staff will make its recommendation to the Committee. The Committee will make commitment recommendations to the Board. Staff will provide the Board with a written, documented recommendation which will address at a minimum the financial and programmatic viability of each Application and a breakdown of which Selection Criteria were met by the Applicant. The Board will make its decision based on §49.10(a) of this chapter. Any award made to a Rural Rescue Development will be credited against the TRDO-USDA Set-Aside for the 2010 Application Round, as required under subsection (d)(5) of this section.

(10) Limitation on Allocation. No more than $350,000 in credits will be forward committed from the 2010 State Housing Credit Ceiling. To the extent Applications are received that exceed the maximum limitation; staff will prepare the award for Board consideration noting for the Board that the award would require a waiver of this limitation.

(g) Experience Pre-Certification Procedures. No later than fourteen (14) days prior to the close of the Application Acceptance Period for Competitive Housing Tax Credit Applications, an Applicant must submit the documents required in this subsection to obtain the required pre-certification. For Applications submitted for Tax-Exempt Bond Applications or Applications not applying for Competitive Housing Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) all of the documents in this section must be submitted with the Application. Upon receipt of the evidence required under this section, a certification from the Department will be provided to the Applicant for inclusion in its Application(s). Evidence must show that one of the Development Owner's General Partners, the Developer or their Principals have a record of successfully constructing or developing residential units (single family or multifamily) in the capacity of owner, General Partner or Developer. If a Public Housing Authority organized an entity for the purpose of developing residential units the Public Housing Authority shall be considered a Principal for the purpose of this requirement. If the individual requesting the certification was not the Development Owner, General Partner or Developer, but was the individual within one of those entities doing the work associated with the development of the Units (responsibility for work associated with

the development of Units includes, but is not limited to, application submission, third-party engagement, post award activities, construction, cost certification, etc.), the individual must show that the units were successfully developed as required in paragraphs (1) and (2) of this subsection, and also provide written confirmation from the entity involved stating that the individual was the person responsible for the development. If rehabilitation experience is being claimed to qualify for an Application involving New Construction, then the rehabilitation must have been substantial and involved at least $12,000 of direct hard cost per unit.

(1) The term "successfully" is defined as acting in a capacity as the owner, General Partner, or Developer of:

(A) At least 100 residential units or, if less than 100 residential units, 80% of the total number of Units the Applicant is applying to build (e.g. you must have 40 units successfully built to apply for 50 Units); or

(B) At least 36 residential units if the Development is a Rural Development; or

(C) At least 25 residential units if the Development has 36 or fewer total Units.

(2) One or more of the following documents must be submitted: American Institute of Architects (AIA) Document A111 - Standard Form of Agreement Between Owner & Contractor, AIA Document G704 - Certificate of Substantial Completion, IRS Form 8609, HUD Form 9822, development agreements, partnership agreements, or other documentation satisfactory to the Department verifying that the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals have the required experience. If submitting the IRS Form 8609, only one form per Development is required. The evidence must clearly indicate:

(A) That the Development has been completed (i.e. Development Agreements, Partnership Agreements, etc. must be accompanied by certificates of completion);

(B) That the names on the forms and agreements tie back to the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals as listed in the Application; and

(C) The number of units completed or substantially completed.

(h) Threshold Criteria. The following Threshold Criteria listed in this subsection are mandatory requirements that must be submitted at the time of Application submission unless specifically indicated otherwise:

(1) Completion and submission of the Application, which includes the entire Uniform Application and any other supplemental forms which may be required by the Department. (§2306.1111)

(2) Completion and submission of the Site Packet as provided in the Application.

(3) Set-Aside Eligibility. Documentation must be provided that confirms eligibility for all Set-Asides under which the Application is seeking funding as required in the Application.

(4) Certifications. The "Certification Form" provided in the Application confirming the following items:

(A) A certification of the basic amenities selected for the Development. All Developments must meet at least the minimum threshold of points. These points are not associated with the selection criteria points in subsection (i) of this section. The amenities selected must be made available for the benefit of all tenants. If fees in addition to rent are charged for amenities reserved for an individual tenant's use, then the amenity may not be included among those provided to satisfy this requirement. Developments must provide a minimum number of common amenities in relation to the Development size being proposed. The amenities selected must be selected from clause (ii) of this subparagraph and made available for the benefit of all tenants. Developments proposing Rehabilitation (excluding Reconstruction) or proposing Single Room Occupancy will receive 1.5 points for each point item (do not round). Applications for non-contiguous scattered site housing, including New Construction, reconstruction, Adaptive Reuse, Rehabilitation, and single-family design, will have the threshold test applied based on the number of Units per individual site, and must submit a separate certification for each individual site under control by the Applicant. Any future changes in these amenities, or substitution of these amenities, must be approved by the Department in accordance with §49.17(d) of this chapter and may result in a decrease in awarded credits if the substitution or change includes a decrease in cost, or in the cancellation of a Commitment Notice or Carryover Allocation if all of the Common Amenities claimed are no longer met.

(i) Applications must meet a minimum threshold of points (based on the total number of Units in the Development) as follows:

(I) Total Units are less than 16, 0 points are required to meet Threshold for Single Room Occupancy and 1 point is required to meet threshold for all other Developments;

(II) Total Units are 16 to 24, 2 points are required to meet Threshold;

(III) Total Units are 25 to 40, 3 points are required to meet Threshold;

(IV) Total Units are 41 to 76, 6 points are required to meet Threshold;

(V) Total Units are 77 to 99, 9 points are required to meet Threshold;

(VI) Total Units are 100 to 149, 12 points are required to meet Threshold;

(VII) Total Units are 150 to 199, 15 points are required to meet Threshold; or

(VIII) Total Units are 200 or more, 18 points are required to meet Threshold.

(ii) Amenities for selection include those items listed in subclauses (I) - (XXV) of this clause. Both Developments designed for families and Qualified Elderly Developments can earn points for providing each identified amenity unless the item is specifically restricted to one type of Development. All amenities must meet accessibility standards as further described in subparagraphs (D) and (F) of this paragraph. An Application can only count an amenity once, therefore combined functions (a library which is part of a community room) only count under one category. Spaces for activities must be sized appropriately to serve the anticipated population.

(I) Full perimeter fencing (2 points);

(II) Controlled gate access (1 point);

(III) Gazebo w/sitting area (1 point);

(IV) Accessible walking/jogging path separate from a sidewalk (1 point);

(V) Community laundry room with at least one front loading washer (1 point);

(VI) Barbecue grill and picnic table-at least one of each for every 50 Units (1 point);

(VII) Covered pavilion that includes barbecue grills and tables (2 points);

(VIII) Swimming pool (3 points);

(IX) Furnished fitness center equipped with a minimum of two of the following fitness equipment options with at least one option per every 40 Units or partial increment of 40 Units: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, sauna, stair climber, etc. The maximum number of equipment options required for any Development, regardless of number of Units, shall be five (2 points);

(X) Equipped and functioning business center or equipped computer learning center with 1 computer for every 30 Units proposed in the Application, 1 printer for every 3 computers (with minimum of one printer), and 1 fax machine (2 points);

(XI) Furnished Community room (1 point);

(XII) Library with an accessible sitting area (separate from the community room) (1 point);

(XIII) Enclosed sun porch or covered community porch/patio (2 points);

(XIV) Service coordinator office in addition to leasing offices (1 point);

(XV) Senior Activity Room (Arts and Crafts, etc.) (2 points);

(XVI) Health Screening Room (1 point);

(XVII) Secured Entry (elevator buildings only) (1 point);

(XVIII) Horseshoe pit, putting green or shuffleboard court (1 point);

(XIX) Community Dining Room w/full or warming kitchen (3 points);

(XX) One Children's Playscape Equipped for 5 to 12 year olds, or one Tot Lot (1 point);

(XXI) Two Children's Playscapes Equipped for 5 to 12 year olds, two Tot Lots, or one of each (2 points);

(XXII) Sport Court (Tennis, Basketball or Volleyball) (2 points);

(XXIII) Furnished and staffed Children's Activity Center (3 points);

(XXIV) Community Theater Room equipped with a 52 inch or larger screen with surround sound equipment; DVD player; and theater seating (3 points); or

(XXV) Green Building amenities (Rehabilitation Developments will receive 1.5 points for each point requested for the green building amenities):

(-a-) evaporative coolers (for use in designated counties listed in the Application Materials, 2009 Housing Tax Credit Site Demographics Information) (1 point);

(-b-) passive solar heating/cooling (3 points maximum);

(-1-) Two points if the glazing area on the north- and south-facing walls of the building is at least 50% greater than the sum of the glazing area on the east- and west-facing walls; and the east-west axis of the building is within 15 degrees of due east-west;

(-2-) One point if in addition to the east-west axis of the building oriented within 15 degrees of due east-west, utilize a narrow floor plate (less than 40 feet), single loaded corridors and open floor plan to optimize daylight penetration and passive ventilation (note: to qualify for this particular point, application must also implement the 15 degree building orientation option in subitem (-1-) of this item); and 100% of HVAC condenser units are shaded so they are fully shaded 75% of the time during summer months (May through August); and solar screens or solar film on all East, West, and South Windows with building oriented to east-west axis within 15 degrees of due east-west, west-south axis within 15 degrees of due west-south, and south-east axis within 15 degrees of due south-east;

(-c-) water conserving features (2 points maximum, 1 point for each):

(-1-) Install low-flow toilets using less than or equal to 1.6 gallons per flush, or high efficiency toilets using less than or equal to 1.28 gallons/flush;

(-2-) Install bathroom lavatory faucets and showerheads that do not exceed 2.0 gallons/minute and kitchen faucets that do not exceed 1.5 gallons/minute. Applies to all fixtures throughout the development. Rehab projects may choose to install compliant faucet aerators instead of replacing entire faucets;

(-d-) solar water heaters (Solar water heaters designed to provide at least 25% of the average energy used to heat domestic water throughout the entire development.) (2 points);

(-e-) irrigation and landscaping (must implement both of the following) (2 points):

(-1-) collected water (at least 50%) for irrigation purposes;

(-2-) selection of native trees and plants that are appropriate to the site's soils and microclimate and locate then to allow for shading in the summer and allow for heat gain in the winter;

(-f-) sub-metered utility meters (2 points maximum);

(-1-) Sub-metered utility meters on rehab project without existing sub-meters or new construction senior project (2 points); or

(-2-) Sub-metered utility meters on new construction project (excluding new construction senior project) (1 point);

(-g-) energy efficiency (4 points maximum);

(-1-) Three points if Energy Elements include Energy-Star qualified windows and glass doors; and Exterior envelope insulation, vapor barriers and air barriers greater than or equal to Energy Star air barrier and insulation criteria; and HVAC, domestic hot water heater, or insulation that exceeds Energy Star standards or exceeds the IRC 2006; or

(-2-) Four points if the project promotes energy efficiency by meeting the requirements of Energy Star for Homes by either complying with the appropriate builder option package or a HERS score of 85;

(-h-) thermally and draft efficient doors (SHGC of 0.40 or lower and U-value specified by climate zone according to the 2006 IECC) (2 points);

(-i-) photovoltaic panels for electricity and design and wiring for the use of such panels (3 points maximum);

(-1-) Photovoltaic panels that total 10 kW (1 point);

(-2-) Photovoltaic panels that total 20 kW (2 points);

(-3-) Photovoltaic panels that total 30 kW (3 points);

(-j-) construction waste management and implementation of EPA's Best Management Practices for erosion and sedimentation control during construction (1 point);

(-k-) recycling service provided throughout the compliance period (1 point);

(-l-) water permeable walkways (at least 20% of walkways and parking) (1 point);

(-m-) bamboo flooring, wool carpet, linoleum flooring, straw board, poplar OSB, or cotton batt insulation (50% of flooring on the ground floor of the development must be finished concrete and/or ceramic tile. 50% of the flooring on upper floors must be ceramic tile and/or a flooring material that is Floor Score Certified (developed by the Resilient Floor Covering Institute), applied with a Floor Score Certified adhesive and comes with a minimum 7-year wear through warranty (2 points).

(B) A certification that the Development will have all of the following Amenities at no charge to the tenants. All New Construction or Reconstruction Units must provide the amenities in clauses (i) - (viii) of this subparagraph. Rehabilitation (excluding Reconstruction) and Adaptive Reuse must provide the amenities in clauses (ii) - (viii) of this subparagraph unless expressly identified as not required. (§2306.187)

(i) All New Construction Units must be wired with RG-6 COAX or better and CAT3 phone cable or better, wired to each bedroom, dining room and living room;

(ii) Blinds or window coverings for all windows;

(iii) Disposal and Energy-Star or equivalently rated dishwasher (not required for TRDO-USDA or SRO Developments);

(iv) Energy-Star or equivalently rated Refrigerator (not required for SRO Developments);

(v) Oven/Range (not required for SRO Developments);

(vi) Exhaust/vent fans (vented to the outside) in bathrooms;

(vii) Energy-Star or equivalently rated ceiling fans in living areas and bedrooms; and

(viii) Energy-Star or equivalently rated lighting in all Units, which may include compact florescent bulbs.

(C) A certification that the Development will meet the minimum threshold for size of Units as provided in clauses (i) - (v) of this subparagraph. These minimum requirements are not associated with the Selection Criteria points in subsection (i) of this section. Developments proposing Rehabilitation (excluding Reconstruction) or Single Room Occupancy will not be subject to the requirements of this subparagraph.

(i) 550 square feet for an efficiency Unit;

(ii) 650 square feet for a non-elderly one Bedroom Unit; 550 square feet for an elderly one Bedroom Unit;

(iii) 900 square feet for a non-elderly two Bedroom Unit; 700 square feet for an elderly two Bedroom Unit;

(iv) 1,000 square feet for a three Bedroom Unit; and

(v) 1,200 square feet for a four Bedroom Unit.

(D) A certification that the Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere to local building codes or if no local building codes are in place then to the most recent version of the International Building Code.

(E) A certification that the Applicant is in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), and the Fair Housing Amendments Act of 1988 (42 U.S.C. §§3601 et seq.); the Civil Rights Act of 1964 (42 U.S.C. §§2000a et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. §§12101 et seq.); the Rehabilitation Act of 1973 (29 U.S.C. §§701 et seq.); Fair Housing Accessibility; the Texas Fair Housing Act; and that the Development is designed consistent with the Fair Housing Act Design Manual produced by HUD, the Code Requirements for Housing Accessibility 2000 (or as amended from time to time) produced by the International Code Council and the Texas Accessibility Standards. (§2306.257; §2306.6705(7))

(F) A certification that the Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses, and that the Applicant will submit a report at least once in each 90-day period following the date of the Commitment Notice until the Cost Certification is submitted, in a format prescribed by the Department and provided at the time a Commitment Notice is received, on the percentage of businesses with which the Applicant has contracted that qualify as Minority Owned Businesses. (§2306.6734)

(G) Pursuant to §2306.6722, any Development supported with a Housing Tax Credit allocation shall comply with the accessibility standards that are required under §504, Rehabilitation Act of 1973 (29 U.S.C. §794), and specified under 24 C.F.R. Part 8, Subpart C. The Applicant must provide a certification from the Development engineer, an accredited architect or Department-approved third party accessibility specialist, that the Development will comply with the accessibility standards that are required under §504, Rehabilitation Act of 1973 (29 U.S.C. §794), and specified under 24 C.F.R. Part 8, Subpart C and this subparagraph. (§2306.6722 and §2306.6730)

(H) For Developments involving New Construction (excluding New Construction of non-residential buildings) where some Units are two-stories or single family design and are normally exempt from Fair Housing accessibility requirements, a minimum of 20% of each Unit type (i.e. one bedroom, two bedroom, three bedroom) must provide an accessible entry level and all common-use facilities in compliance with the Fair Housing Guidelines, and include a minimum of one bedroom and one bathroom or powder room at the entry level. A similar certification will also be required after the Development is completed from an inspector, architect, or accessibility specialist.

(I) A certification that the Development will be equipped with energy saving devices that meet the standard statewide energy code adopted by the state energy conservation office, unless historic preservation codes permit otherwise for a Development involving historic preservation. All Units must be air-conditioned. The measures must be certified by the Development architect as being included in the design of each tax credit Unit at the time the 10%

Test Documentation is submitted and in actual construction upon Cost Certification. (§2306.6725(b)(1))

(J) A certification that the Development will be built by a General Contractor that satisfies the requirements of the General Appropriation Act, Article VII, Rider 8(c) applicable to the Department which requires that the General Contractor hired by the Development Owner or the Applicant, if the Applicant serves as General Contractor, must demonstrate a history of constructing similar types of housing without the use of federal tax credits.

(K) A certification that the Development Owner agrees to establish a reserve account consistent with §2306.186, Texas Government Code and as further described in §1.37 of this title.

(L) A certification that the Applicant, Developer, or any employee or agent of the Applicant has not formed a Neighborhood Organization for purposes of subsection (i)(2) of this section, has not given money or a gift to cause the Neighborhood Organization to take its position of support or opposition, nor has provided any assistance to a Neighborhood Organization to meet the requirements under subsection (i)(2) of this section which are not allowed under that subsection, as it relates to the Applicant's Application or any other Application under consideration in 2009.

(M) Operate in accordance with the requirements pertaining to rental assistance in Chapter 60 of this title.

(N) A certification that the Development Owner will contract with a Management Company throughout the Compliance Period that will perform criminal background checks on all adult tenants, head and co-head of households.

(5) Design Items. This exhibit will provide:

(A) All of the architectural drawings identified in clauses (i) - (iii) of this subparagraph. While full size design or construction documents are not required, the drawings must have an accurate and legible scale and show the dimensions. All Developments involving New Construction, or conversion of existing buildings not configured in the Unit pattern proposed in the Application, must provide all of the items identified in clauses (i) - (iii) of this subparagraph. For Developments involving Rehabilitation for which the Unit configurations are not being altered, only the items identified in clauses (i) and (iii) of this subparagraph are required:

(i) A site plan which:

(I) Is consistent with the number of Units and Unit mix specified in the "Rent Schedule" provided in the Application;

(II) Is consistent with the number of buildings and building type/unit mix specified in the "Building/Unit Configuration" provided in the Application; and

(III) Identifies all residential and common buildings;

(ii) Floor plans and elevations for each type of residential building and each common area building clearly depicting the height of each floor and a percentage estimate of the exterior composition. Adaptive Reuse Developments, are only required to provide building plans delineating each unit by number, type and area consistent with those in the "Rent Schedule" and pictures of each elevation of the existing building depicting the height of each floor and percentage estimate of the exterior composition; and

(iii) Unit floor plans for each type of Unit. The net rentable areas these Unit floor plans represent should be consistent with those shown in the "Rent Schedule" and "Building/Unit Configuration" provided in the Application. Adaptive Reuse Developments, are only required to provide Unit floor plans for each distinct typical Unit type (i.e. one-bedroom, two-bedroom) and for all Units types that vary in area by 10% from the typical Unit; and

(B) A boundary survey of the proposed Development Site and of the property to be purchased. In cases where more property is purchased than the proposed Development Site, the survey or plat must show the survey calls for both the larger site and the Development Site. The survey must clearly delineate the flood plain boundary lines and show all easements. The survey does not have to be recent; but it must show the property purchased and the property proposed for the Development Site. In cases where the Development Site is only a part of the site being purchased, the depiction or drawing of the Development Site may be professionally compiled and drawn by an architect, engineer or surveyor.

(6) Evidence of the Development's development costs and corresponding credit request and syndication information as described in subparagraphs (A) - (G) of this paragraph.

(A) A written narrative describing the financing plan for the Development, including any non-traditional financing arrangements; the use of funds with respect to the Development; the funding sources for the Development including construction, permanent and bridge loans, rents, operating subsidies, and replacement reserves; and the commitment status of the funding sources for the Development. This information must be consistent with the information provided throughout the Application. (§2306.6705(1))

(B) All Developments must submit the "Development Cost Schedule" provided in the Application. This exhibit must have been prepared and executed not more than six (6) months prior to the close of the Application Acceptance Period.

(C) Provide a letter of commitment from a syndicator that, at a minimum, provides an estimate of the amount of equity dollars expected to be raised for the Development in conjunction with the amount of Housing Tax Credits requested for allocation to the Development Owner, including pay-in schedules, syndicator consulting fees and other syndication costs. No syndication costs should be included in the Eligible Basis. (§2306.6705(2) and (3))

(D) For Developments located in a Qualified Census Tract (QCT) as determined by the Secretary of HUD or otherwise qualifying for a 30% increase in Eligible Basis, pursuant to the Code, §42(d)(5)(C) or §49.6(h)(3) and (4) of this chapter, if permitted under §49.6(h) of this chapter, Applicants must submit a copy of the census map clearly showing that the proposed Development is located within a QCT. Census tract numbers must be clearly marked on the map, and must be identical to the QCT number stated in the Department's Reference Manual.

(E) Rehabilitation Developments (including reconstruction) and Adaptive Reuse must submit a Property Condition Assessment meeting the requirements of paragraph (14)(C) of this subsection.

(F) If offsite costs are included in the budget as a line item, or embedded in the site acquisition contract, or referenced in the utility provider letters, then the supplemental form "Off Site Cost Breakdown" must be provided.

(G) If projected site work costs include unusual or extraordinary items or exceed $9,000 per Unit, then the Applicant must provide a detailed cost breakdown prepared by a Third Party engineer or architect, and a letter from a certified public accountant allocating which portions of those site costs should be included in Eligible Basis and which ones may be ineligible.

(7) Evidence of readiness to proceed as evidenced by at least one of the items under each of subparagraphs (A) - (D) of this paragraph:

(A) Evidence of Property control in the name of the Development Owner. If the evidence is not in the name of the Development Owner, then the documentation should reflect an expressed ability to transfer the rights to the Development Owner. All of the sellers of the proposed Property for the thirty-six (36) months prior to the first day of the Application Acceptance Period and their relationship, if any, to members of the Development team must be identified at the time of Application (not required at Pre-Application). One of the following items described in clauses (i) - (iii) of this subparagraph must be provided, and if the acquisition can be characterized as an identity of interest transaction as described in §1.32 of this title, items described in clause (iv) of this subparagraph must also be provided:

(i) A recorded warranty deed with corresponding executed settlement statement, unless required to submit items under clause (iv) of this subparagraph; or

(ii) A contract for lease (the minimum term of the lease must be at least forty-five (45) years) which is valid for the entire period the Development is under consideration for tax credits; or

(iii) A contract for sale, an exclusive option to purchase or a lease which is valid for the entire period the Development is under consideration for tax credits. For Tax Exempt Bond Development Applications, site control must be valid through December 1, 2008 with option to extend through March 1, 2009 (Applications submitted for lottery) or ninety (90) days from the date of the bond reservation with the option to extend through the scheduled TDHCA Board meeting at which the award of Housing Tax Credits will be considered (Applications not submitted for lottery). The potential expiration of site control does not warrant the Application being presented to the TDHCA Board prior to the scheduled meeting.

(iv) If the acquisition can be characterized as an identity of interest transaction, as described in §1.32 of this title, subclauses (I) - (III) of this clause, the Applicant must provide (not required at Pre-Application):

(I) Documentation of the original acquisition cost in the form of a settlement statement or, if a settlement statement is not available, the seller's most recent audited financial statement specifically indicating the asset value for the Development Site; and

(II) If the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost claimed in the Application;

(-a-) An appraisal meeting the requirements of paragraph (14)(D) of this subsection; and

(-b-) Any other verifiable costs of owning, holding, or improving the Property that, when added to the value from subclause (I) of this clause, justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include property taxes, interest expense, a calculated return on equity at a rate consistent with the historical returns of similar risks, the cost of any physical improvements made to the property, the cost of rezoning, replatting or developing the property, or any costs to provide or improve access to the property.

(-2-) For transactions which include existing buildings that will be rehabilitated or otherwise maintained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the property, a calculated return on equity at a rate consistent with the historical returns of similar risks, and allow the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the property and avoid foreclosure.

(III) In no instance will the acquisition cost utilized by the underwriter exceed the lesser of the original acquisition cost evidenced by subclause (I) of this clause plus costs identified in subclause (II)(-b-) of this clause, or the "as-is" value conclusion evidenced by subclause (II)(-a-) of this clause.

(v) As described in clauses (ii) and (iii) of this subparagraph, property control must be continuous. Closing on the property is acceptable, as long as evidence is provided that there was no period in which control was not retained.

(B) Evidence from the appropriate local municipal authority that satisfies one of clauses (i) - (iii) of this subparagraph. Documentation may be from more than one department of the municipal authority and must have been prepared and executed not more than six (6) months prior to the close of the Application Acceptance Period. (§2306.6705(5))

(i) For New Construction, Adaptive Reuse or reconstruction Developments, a letter from the chief executive officer of the Local Political Subdivision or another local official with appropriate jurisdiction stating that (For Tax-Exempt Bond Applications the items in subclauses (I) - (III) of this clause must be submitted no later than fourteen (14) days prior to the Board meeting when the housing tax credits will be considered):

(I) The Development is located within the boundaries of a Local Political Subdivision which does not have a zoning ordinance; and either subclause (II) or (III) of this clause;

(II) The letter must state that the Development is consistent with a local consolidated plan, comprehensive plan, or other local planning document that addresses affordable housing; or

(III) The letter must state that there is a need for affordable housing, if no such planning document exists.

(ii) For New Construction or reconstruction Developments, a letter from the chief executive officer of the Local Political Subdivision or another local official with appropriate jurisdiction stating that:

(I) The Development is permitted under the provisions of the zoning ordinance that applies to the location of the Development; or

(II) The Applicant is in the process of seeking the appropriate zoning and has signed and provided to the political subdivision a release agreeing to hold the political subdivision and all other parties harmless in the event that the appropriate zoning is denied (§2306.6705(1)(B)). The Applicant must also provide at the time of Application a copy of the application for appropriate zoning filed with the local entity responsible for zoning approval and proof of delivery of that application in the form of a signed certified mail receipt, signed overnight mail receipt, or confirmation letter from said official. Final approval of appropriate zoning must be achieved and documentation of acceptable zoning for the Development, as proposed in the Application, must be provided to the Department at the time the Commitment Fee, or Determination Notice Fee, is paid. If this evidence is not provided with the Commitment Fee, any commitment of credits will be rescinded. No extensions may be requested for the deadline for submitting evidence of final approval of appropriate zoning.

(iii) For Rehabilitation Developments, if the property is currently a non-conforming use as presently zoned, a letter from the chief executive officer of the political subdivision or another local official with appropriate jurisdiction which addresses the items in subclauses (I) - (IV) of this clause:

(I) A detailed narrative of the nature of non-conformance;

(II) The applicable destruction threshold;

(III) Owner's rights to reconstruct in the event of damage; and

(IV) Penalties for noncompliance.

(C) Evidence of interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department and any other sources documented in the Application. Any local, state or federal financing identified in this section which restricts household incomes at any AMGI lower than restrictions required pursuant to the Rules must be identified in the Rent Schedule and the local, state or federal income restrictions must include corresponding rent levels that do not exceed 30% of the income limitation in accordance with §42(g) of the Code. The income and corresponding rent restrictions will be imposed by the Housing Tax Credit LURA and monitored throughout the extended use period. Such evidence must be consistent with the sources and uses of funds represented in the Application and shall be provided in one or more of the following forms described in clauses (i) - (iv) of this subparagraph:

(i) Bona fide financing in place as evidenced by:

(I) A valid and binding loan agreement; and

(II) Deed(s) of trust in the name of the Development Owner as grantor; or

(III) For TRDO-USDA §515 Developments involving, an executed TRDO-USDA letter indicating TRDO-USDA has received a Consent Request, also referred to as a Preliminary Submittal, as described in 7 CFR §3560.406 and a copy of the original loan documents; or

(ii) Bona fide commitment or term sheet for the interim and permanent loans issued by a lending institution or mortgage company that is actively and regularly engaged in the business of lending money which is addressed to the Development Owner and which has been executed by the lender (the term of the loan must be for a minimum of fifteen (15) years with at least a thirty (30) year amortization). The commitment must state an expiration date and all the terms and conditions applicable to the financing including the mechanism for determining the interest rate, if applicable, and the anticipated interest rate and any required Guarantors. Such a commitment may be conditional upon the completion of specified due diligence by the lender and upon the award of tax credits; or

(iii) Any Federal, State or local gap financing, whether of soft or hard debt, must be identified at the time of Application as evidenced by:

(I) Evidence from the lending agency that an application for funding has been made or from the Applicant indicating an intent to apply for funding; and

(II) A term sheet which clearly describes the amount and terms of the funding, and the date by which the funding determination will be made and any commitment issued, must be submitted; and

(III) Evidence of application for funding from another Department program is not required except as indicated on the Uniform Application, as long as the Department funding is on a concurrent funding period with the Application submitted and the Applicant clearly indicates that such an Application has been filed as required by the Application Submission Procedures Manual; and

(IV) If the commitment from any funding source identified in this subparagraph has not been received by the date the Department's Commitment Notice is to be submitted, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the funding source, the Commitment Notice may be rescinded; or

(iv) If the Development will be financed through more than 5% of Development Owner contributions, provide a letter from an Third Party CPA verifying the capacity of the Development Owner to provide the proposed financing with funds that are not otherwise committed together with a letter from the Development Owner's bank or banks confirming that sufficient funds are available to the Development Owner. Documentation must have been prepared and executed not more than six (6) months prior to the close of the Application Acceptance Period.

(D) Provide the documents in clauses (i) - (iii) of this subparagraph:

(i) A copy of the full legal description for the Development Site; and

(ii) A current valuation report from the county tax appraisal district and documentation of the current total property tax rate for the Development Site (unless the site is located on land that is not subject to federal, state or local property taxes); and

(iii) A copy of:

(I) The current title policy (or title status report if on Tribal Land) which shows that the ownership (or leasehold) of the Development Site is vested in the name of the Development Owner; or

(II) a current title commitment with the proposed insured matching the name of the Development Owner and the title of the Development Site vested in the name of the seller or lessor as indicated on the sales contract, option or lease;

(III) If the title policy, title status report, or commitment is more than six (6) months old as of the day the Application Acceptance Period closes, then a letter from the title company/Bureau of Indian Affairs indicating that nothing further has transpired on the policy, title status report or commitment.

(8) Evidence in the form of a certification of all of the notifications described in the subparagraphs of this paragraph. Such notices must be prepared in accordance with the "Public Notifications" certification provided in the Application.

(A) Evidence in the form of a certification that the Applicant met the requirements and deadlines identified in clauses (i) - (iii) of this subparagraph. Notification must not be older than three (3) months from the first day of the Application Acceptance Period. (§2306.6705(9)). If evidence of these notifications was submitted with the Pre-Application Threshold for the same Application and satisfied the Department's review of Pre-Application Threshold, then no additional notification is required at Application, except that re-notification is required by tax credit Applicants who have submitted a change in the Application, whether from Pre-Application to Application or as a result of an Administrative Deficiency that reflects a total Unit increase of greater than 10%, a total increase of greater than 10% for any given level of AMGI, or a change to the population being served (elderly,

Intergenerational Housing or family). For Applications submitted for Tax-Exempt Bond Developments or Applications not applying for Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.), notifications and proof thereof must not be older than three (3) months prior to the date the Volume III of the Application is submitted.

(i) The Applicant must request a list of Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site from local elected officials as follows:

(I) No later than January 20, 2009 for Competitive Housing Tax Credit Applications (or for Tax-Exempt Bond Applications, Rural Rescue, or Applications not applying for Tax Credits, but applying only for other Multifamily Programs such as HOME, Housing Trust Fund, etc., not later than fourteen (14) days prior to submission of the Threshold documentation), the Applicant must e-mail, fax or mail with registered receipt a completed "Neighborhood Organization Request" letter as provided in the Application to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an Area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located an Area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the Extra Territorial Jurisdiction (ETJ) of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request Neighborhood Organizations from that source in the same format;

(II) If no reply letter is received from the local elected officials by February 20, 2009 (or For Tax-Exempt Bond Developments or Applications not applying for Tax Credits, but applying only for other Multifamily Programs such as HOME, Housing Trust Fund, etc., by seven (7) days prior to the submission of the Application), then the Applicant must certify to that fact in the "Application Notification Certification Form" provided in the Application;

(III) The Applicant must list all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as outlined by the local elected officials, or that the Applicant has knowledge of as of the submission of the Application, in the "Application Notification Certification Form" provided in the Application.

(ii) Not later than the date the Application is submitted, notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt return or similar tracking mechanism e-mail, fax or mail with registered receipt in the format required in the "Application Notification Template" provided in the Application. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are not required to notify city officials, however, are required to notify county officials. Evidence of Notification is required in the form of a certification in the "Application Notification Certification Form" provided in the Application, although it is encouraged that Applicants retain proof of delivery of the notifications, to the persons or entities prescribed in subclauses (I) - (IX) of this clause, in the event that the Department requires proof of Notification. Evidence of proof of delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of receipt by recipient for facsimile and electronic mail. Officials to be notified are those officials in office at the time the Application is submitted.

(I) Neighborhood Organizations on record with the state or county whose boundaries include the proposed Development Site as identified in clause (i)(III) of this subparagraph.

(II) Superintendent of the school district containing the Development;

(III) Presiding officer of the board of trustees of the school district containing the Development;

(IV) Mayor of the Governing Body of any municipality containing the Development;

(V) All elected members of the Governing Body of any municipality containing the Development;

(VI) Presiding officer of the Governing Body of the county containing the Development;

(VII) All elected members of the Governing Body of the county containing the Development;

(VIII) State senator of the district containing the Development; and

(IX) State representative of the district containing the Development.

(iii) Each such notice must include, at a minimum, all of the following:

(I) The Applicant's name, address, individual contact name and phone number;

(II) The Development name, address, city and county;

(III) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(IV) Statement of whether the Development proposes New Construction, reconstruction, Adaptive Reuse or Rehabilitation;

(V) The type of Development being proposed (single family homes, duplex, apartments, townhomes, high-rise etc.) and population being served (family, Intergenerational Housing or elderly);

(VI) The approximate total number of Units and approximate total number of low-income Units;

(VII) The approximate percentage of Units serving each level of AMGI (e.g. 20% at 50% of AMGI, etc.) and the approximate percentage of Units that are market rate;

(VIII) The number of Units and proposed rents (less utility allowances) for the low-income Units and the number of Units and the proposed rents for any market rate Units. Rents to be provided are those that are effective at the time of the Application, which are subject to change as annual changes in the area median income occur; and

(IX) The expected completion date if credits are awarded.

(B) Signage on Property or Alternative. A Public Notification Sign shall be installed on the Development Site prior to the date the Application is submitted unless prohibited by local ordinance or code. Scattered site Developments must install a sign on each non-contiguous Development Site. For Competitive Housing Tax Credit Applications the date, time and location of the public hearing, as published

by the Department and closest to the Development Site, must be included on the sign. For Tax-Exempt Bond Developments, regardless of the Priority of the Application or the Issuer, the sign must be installed within thirty (30) days of the Department's receipt of Volumes I and II. The date, time and location of the bond Tax Exempt Fiscal Responsibility Act (TEFRA) public hearing must be included on the sign no later than thirty (30) days prior to the scheduled public hearing. Evidence submitted with the Application must include photographs of the site with the installed sign. The sign must be at least 4 feet by 8 feet in size and located within twenty feet of, and facing, the main road adjacent to the site. The sign shall be continuously maintained on the site until the day that the Board takes final action on the Application for the Development. The information and lettering on the sign must meet the minimum requirements identified in the Application. For Tax-Exempt Bond Developments, regardless of the issuer, the Applicant must certify to the fact that the sign was installed within thirty (30) days of submission and the date, time and location of the TEFRA hearing is indicated on the sign at least thirty (30) days prior to the date of the scheduled hearing. In areas where the Public Notification Sign is prohibited by local ordinance or code, an alternative to installing a Public Notification Sign and at the same required time, the Applicant shall, mail written notification to those addresses described in either clause (i) or (ii) of this subparagraph. This written notification must include the information otherwise required for the sign as provided in the Application. The final Application must include a map of the proposed Development Site and mark the distance required by clause (i) or (ii) of this subparagraph, up to 1,000 feet, showing street names and addresses; a list of all addresses the notice was mailed to; an exact copy of the notice that was mailed; and a certification that the notice was mailed through the U.S. Postal Service and stating the date of mailing. If Public Notification Sign is prohibited by local ordinance or code, evidence of the applicable ordinance or code must be submitted in the Application.

(i) All addresses required for notification by local zoning notification requirements. For example, if the local zoning notification requirement is notification to all those addresses within 200 feet, then that would be the distance used for this purpose; or

(ii) For Developments located in communities that do not have zoning, communities that do not require a zoning notification or those located outside of a municipality, all addresses located within 1,000 feet of any part of the proposed Development Site.

(C) If any of the Units in the Development are occupied at the time of Application, then the Applicant must certify that it has notified each tenant at the Development of all the information otherwise required on the sign, including the Department's public hearing schedule for comment on submitted Applications.

(9) Evidence of the Development's proposed ownership structure and the Applicant's previous experience as described in subparagraphs (A) - (D) of this paragraph.

(A) Chart which clearly illustrates the complete organizational structure of the final proposed Development Owner and of any Developer or Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner or the Developer or Guarantor, as applicable, whether directly or through one or more subsidiaries. Nonprofit entities, public housing authorities, publicly traded corporations, individual board members, and executive directors must be included in this exhibit.

(B) Each Applicant, Development Owner, Developer or Guarantor, or any entity shown on an organizational chart as described in subparagraph (A) of this paragraph that has ownership interest in the Development Owner, Developer or Guarantor, shall provide the following documentation, as applicable:

(i) For entities that are not yet formed but are to be formed either in or outside of the state of Texas, a certificate of reservation of the entity name from the Texas Secretary of State; or

(ii) For existing entities whether formed in or outside of the state of Texas, evidence that the entity has the authority to do business in Texas or has applied for such authority in the form of a Certificate of Filing from the Texas Secretary of State.

(C) Evidence that each entity shown on the organizational chart described in subparagraph (A) of this paragraph that has ownership interest in the Development Owner, Developer or Guarantor, has provided a copy of the completed and executed Previous Participation and Background Certification Form to the Department. Nonprofit entities, public housing authorities and publicly traded corporations are required to submit documentation for the entities involved; documentation for individual board members and executive directors is required for this exhibit. Any Person receiving more than 10% of the Developer fee will also be required to submit documents for this exhibit. The 2009 versions of these forms, as required in the Uniform Application, must be submitted. Units of local government are also required to submit this document. The form must include a list of all developments that are, or were, previously under ownership or Control of the Person. All participation in any TDHCA funded or monitored activity, including non-housing activities, must be disclosed.

(D) Evidence, in the form of a certification, that one of the Development Owner's General Partners, the Developer or their Principals has a record of successfully constructing or developing residential units in the capacity of owner, General Partner or Developer. Evidence must be a certification from the Department that the Person with the experience satisfies this exhibit, as further described under subsection (g)(1) of this section. Applicants must request this certification at least fourteen (14) days prior to the close of the Application Acceptance Period. Applicants must ensure that the Person whose name is on the certification appears in the organizational chart provided in subparagraph (A) of this paragraph.

(10) Evidence of the Development's projected income and operating expenses as described in subparagraphs (A) - (D) of this paragraph:

(A) All Developments must provide a 30-year proforma estimate of operating expenses and supporting documentation used to generate projections (operating statements from comparable properties);

(B) If rental assistance, an operating subsidy, an annuity, or an interest rate reduction payment is proposed to exist or continue for the Development, any related contract or other agreement securing those funds or proof of application for such funds must be provided, which at a minimum identifies the source and annual amount of the funds, the number of Units receiving the funds, and the term and expiration date of the contract or other agreement; (§2306.6705(4))

(C) Applicant must provide documentation from the source of the "Utility Allowance" estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate;

(D) Occupied Developments undergoing Rehabilitation must also submit the items described in clauses (i) - (iv) of this subparagraph;

(i) The items in subclauses (I) and (II) of this clause are required unless the current property owner is unwilling to provide

the required documentation. In that case, submit a signed statement as to the Applicant's inability to provide all documentation as described;

(I) Submit at least one of the following:

(-a-) Historical monthly operating statements of the subject Development for twelve (12) consecutive months ending not more than three (3) months from the first day of the Application Acceptance Period;

(-b-) The two most recent consecutive annual operating statement summaries;

(-c-) The most recent consecutive six (6) months of operating statements and the most recent available annual operating summary;

(-d-) All monthly or annual operating summaries available and a written statement from the seller refusing to supply any other summaries or expressing the inability to supply any other summaries, and any other supporting documentation used to generate projections may be provided; and

(II) A rent roll not more than six (6) months old as of the first day the Application Acceptance Period, that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, tenant names or vacancy, and dates of first occupancy and expiration of lease;

(ii) A written explanation of the process used to notify and consult with the tenants in preparing the Application; (§2306.6705(6))

(iii) For Intergenerational Housing Applications or Qualified Elderly Developments, identification of the number of existing tenants qualified under the target population elected under this title;

(iv) A relocation plan outlining relocation requirements and a budget with an identified funding source; and (§2306.6705(6))

(v) If applicable, evidence that the relocation plan has been submitted to the appropriate legal or governmental agency. (§2306.6705(6))

(11) Applications involving Nonprofit General Partners and Qualified Nonprofit Developments.

(A) All Applications involving a nonprofit General Partner, regardless of the Set-Aside applied under, in which the Development will receive some financial or tax benefit for the involvement of the nonprofit General Partner, must submit all of the documents described in clauses (i) and (ii) of this subparagraph and indicate the nonprofit status on the carryover documentation and IRS Forms 8609: (§2306.6706)

(i) An IRS determination letter which states that the nonprofit organization is a §501(c)(3) or (4) entity; and

(ii) The "Nonprofit Participation Exhibit."

(B) Additionally, all Applications applying under the Nonprofit Set-Aside, established under §49.7(b)(1) of this chapter, must also provide the following information with respect to the Qualified Nonprofit Organization as described in clauses (i) - (iii) of this subparagraph.

(i) A Third Party legal opinion stating:

(I) That the nonprofit organization is not affiliated with or Controlled by a for-profit organization and the basis for that opinion; and

(II) That the nonprofit organization is eligible, as further described, for a Housing Credit Allocation from the Nonprofit Set-Aside and the basis for that opinion. Eligibility is contingent upon the non-profit organization Controlling the Development, or if the organization's Application is filed on behalf of a limited partnership, or limited liability company, the Qualified Nonprofit Organization must be the controlling Managing Member; and otherwise meet the requirements of the Code, §42(h)(5); and

(III) That one of the exempt purposes of the nonprofit organization is to provide low-income housing; and

(IV) That the nonprofit organization prohibits a member of its board of directors, other than a chief staff member serving concurrently as a member of the board, from receiving material compensation for service on the board; and

(V) That the Qualified Nonprofit Development will have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or co-Developer as evidenced in the development agreement; and

(ii) A copy of the nonprofit organization's most recent audited financial statement; and

(iii) Evidence in the form of a certification that a majority of the members of the nonprofit organization's board of directors principally reside:

(I) In this state, if the Development is located in a Rural Area; or

(II) Not more than ninety (90) miles from the Development, if the Development is not located in a Rural Area.

(12) Applicants applying for acquisition credits must provide:

(A) An appraisal meeting the requirements of paragraph (14)(D) of this subsection; and

(B) An "Acquisition of Existing Buildings Form."

(13) Evidence of Financial Statement and Authorization to Release Credit Information. The financial statements and authorization to release credit information must be unbound and clearly labeled. A "Financial Statement and Authorization to Release Credit Information" must be completed and signed for any General Partner, Developer or Guarantor and any Person that has an ownership interest of 10% or more in the Development Owner, General Partner, Developer, or Guarantor. Nonprofit entities, public housing authorities and publicly traded corporations are only required to submit documentation for the entities involved; documentation for individual board members and executive directors is not required for this exhibit.

(A) Financial statements for an individual must not be older than six (6) months from the first day of the Application Acceptance Period.

(B) Financial statements for partnerships or corporations should be for the most recent fiscal year ended ninety (90) days from the first day of the Application Acceptance Period. An audited financial statement should be provided, if available, and all partnership or corporate financials must be certified. Financial statements are required for an entity even if the entity is wholly-owned by a Person who has submitted this document as an individual.

(C) Entities that have not yet been formed and entities that have been formed recently but have no assets, liabilities, or net worth are not required to submit this documentation, but must submit a statement with their Application that this is the case.

(14) Supplemental Threshold Reports. All Applications must include documents under subparagraphs (A) and (B) of this para-

graph. If required under paragraph (6) of this subsection, a Property Condition Assessment as described in subparagraph (C) of this paragraph must be submitted. If required under paragraph (7) or (12) of this subsection, an appraisal as described in subparagraph (D) of this paragraph must be submitted. All submissions must meet the requirements stated in subparagraphs (E) - (G) of this paragraph.

(A) A Phase I Environmental Site Assessment (ESA) report:

(i) Prepared by a qualified Third Party;

(ii) Dated not more than twelve (12) months prior to the first day of the Application Acceptance Period. In the event that a Phase I Environmental Site Assessment on the Development is more than twelve (12) months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated letter or updated report dated not more than three (3) months prior to the first day of the Application Acceptance Period from the Person or organization which prepared the initial assessment confirming that the site has been re-inspected and reaffirming the conclusions of the initial report or identifying the changes since the initial report;

(iii) Prepared in accordance with the Department's Environmental Site Assessment Rules and Guidelines, §1.35 of this title; and

(iv) Developments whose funds have been obligated by TRDO-USDA will not be required to supply this information; however, the Applicants of such Developments are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(B) A comprehensive Market Analysis report:

(i) Prepared by a Third Party Qualified Market Analyst approved by the Department in accordance with the approval process outlined in the Market Analysis Rules and Guidelines, §1.33 of this title;

(ii) Dated not more than six (6) months prior to the first day of the Application Acceptance Period. In the event that a Market Analysis is more than six (6) months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated Market Analysis from the Person or organization which prepared the initial report; however the Department will not accept any Market Analysis which is more than twelve (12) months old as of the first day of the Application Acceptance Period;

(iii) Prepared in accordance with the methodology prescribed in the Department's Market Analysis Rules and Guidelines, §1.33 of this title; and

(iv) For Applications in the TRDO-USDA Set-Aside proposing acquisition and Rehabilitation with residential structures at or above 80% occupancy at the time of Application Submission, the appraisal, required under paragraph (7) or (12) of this subsection and prepared in accordance with the Uniform Standards of Professional Appraisal Practice and the Department's Appraisal Rules and Guidelines, §1.34 of this title, will satisfy the requirement for a Market Analysis; however the Department may request additional information as needed. (§2306.67055, §42(m)(1)(A)(iii))

(C) A Property Condition Assessment (PCA) report (required for Rehabilitation, reconstruction and Adaptive Reuse Developments):

(i) Prepared by a qualified Third Party;

(ii) Dated not more than six (6) months prior to the first day of the Application Acceptance Period;

(iii) Prepared in accordance with the Department's Property Condition and Assessment Rules and Guidelines, §1.36 of this title; and

(iv) For Developments which require a capital needs assessment from TRDO-USDA, the capital needs assessment may be substituted and may be more than six (6) months old, as long as TRDO-USDA has confirmed in writing that the existing capital needs assessment is still acceptable and it meets the requirements of §1.36 of this title.

(D) An appraisal report:

(i) Prepared by a qualified Third Party;

(ii) Dated not more than six (6) months prior to the first day of the Application Acceptance Period. In the event that an appraisal is more than six (6) months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated appraisal from the Person or organization which prepared the initial report; however the Department will not accept any appraisal which is more than twelve (12) months old as of the first day of the Application Acceptance Period;

(iii) Prepared in accordance with the Uniform Standards of Professional Appraisal Practice and the Department's Appraisal Rules and Guidelines, §1.34 of this title; and

(iv) For Developments that require an appraisal from TRDO-USDA, the appraisal may be more than six (6) months old, as long as TRDO-USDA has confirmed in writing that the existing appraisal is still acceptable.

(E) Inserted at the front of each of these reports must be a transmittal letter from the individual preparing the report that states that the Department is granted full authority to rely on the findings and conclusions of the report. The transmittal letter must also state the report preparer has read and understood the Department rules specific to the report found at §§1.33 - 1.36 of this title.

(F) All Applicants acknowledge by virtue of filing an Application that the Department is not bound by any opinion expressed in the report. The Department may determine from time to time that information not required in the Department's Rules and Guidelines will be relevant to the Department's evaluation of the need for the Development and the allocation of the requested Housing Credit Allocation Amount. The Department may request additional information from the report provider or revisions to the report to meet this need. In instances of non-response by the report provider, the Department may substitute in-house analysis.

(G) The requirements for each of the reports identified in subparagraphs (A) - (C) of this paragraph can be satisfied in either of the methods identified in clause (i) or (ii) of this subparagraph and meet the requirements of clause (iii) of this subparagraph.

(i) Upon Application submission, the documentation for each of these exhibits may be submitted in its entirety; or

(ii) Upon Application submission, the Applicant may provide evidence in the form of an executed engagement letter with the party performing each of the individual reports that the required exhibit has been commissioned to be performed and that the delivery date will be no later than April 1, 2009. In addition to the submission of the engagement letter with the Application, a map must be provided that reflects the Qualified Market Analyst's intended market area. Subsequently, the entire exhibit must be submitted on

or before 5:00 p.m. CDT, April 1, 2009. If the entire exhibit is not received by that time, the Application will be terminated and will be removed from consideration;

(iii) A single hard copy of the report and a searchable soft copy in the format of a single file containing all information and exhibits in the hard copy report, presented in the order they appear in the hard copy report on a CD-R clearly labeled with the report type, Development name, and Development location are required.

(15) Self-Scoring. Applicant's self-score must be completed on the "Application Self-Scoring Form." An Applicant may not adjust the Application Self Scoring Form, after the submission of the Application, without a request from the Department as a result of an Administrative Deficiency.

(i) Selection Criteria. All Applications will be scored and ranked using the point system identified in this subsection. Unless otherwise stated, do not round calculations. Points other than those provided in paragraphs (2) and (6) of this subsection will not be awarded unless requested in the Self Scoring Form. All Applications, with the exception of TRDO-USDA Applications, must receive a final score totaling a minimum of 118, not including any points awarded or deducted pursuant to paragraphs (2) and (6) of this subsection to be eligible for an allocation of Housing Tax Credits. Maximum Total Points: 240.

(1) Financial Feasibility of the Development. Financial Feasibility of the Development based on the supporting financial data required in the Application that will include a Development underwriting pro forma from the permanent or construction lender. (§2306.6710(b)(1)(A)). Applications may qualify to receive 28 points for this item. No partial points will be awarded. Evidence will include the documentation required for this exhibit, as reflected in the Application submitted, in addition to the commitment letter required under subsection (h)(7)(C) of this section. The supporting financial data shall include:

(A) A fifteen year pro forma prepared by the permanent or construction lender:

(i) Specifically identifying each of the first five (5) years and every fifth year thereafter;

(ii) Specifically identifying underlying assumptions including, but not limited to general growth factor applied to income and expense; and

(iii) Indicating that the Development maintains a minimum 1.15 debt coverage ratio throughout the initial fifteen (15) years proposed for all third party lenders that require scheduled repayment; and

(B) A statement in the commitment letter, or other form deemed acceptable by the Department, indicating that the lender's assessment finds that the Development will be feasible for fifteen (15) years.

(C) For Developments receiving financing from TRDO-USDA, the form entitled "Sources and Uses Comprehensive Evaluation for Multi-Family Housing Loans" or other form deemed acceptable by the Department shall meet the requirements of this section.

(2) Quantifiable Community Participation from Neighborhood Organizations on Record with the State or County and Whose Boundaries Contain the Proposed Development Site. Points will be awarded based on written statements of support or opposition from Neighborhood Organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development site. (§2306.6710(b)(1)(B); §2306.6725(a)(2)). It is possible for points to be awarded or deducted based on written statements from organizations that were not identified by the process utilized for notification purposes under subsection (h)(8)(A)(ii) of this section if the organization provides the information and documentation required in subparagraphs (A) - (C) of this paragraph. It is also possible that neighborhood organizations that were initially identified as appropriate organizations for purposes of the notification requirements will subsequently be determined by the Department not to meet the requirements for scoring. If an organization is determined not to be qualified under this paragraph, the organization may qualify under paragraph (18)(B) of this subsection.

(A) Basic Submission Requirements for Scoring. Each Neighborhood Organization may submit one letter (and enclosures) that represents the organization's input. In order to receive a point score, the letter (and enclosures) must be received, by the Department, or postmarked, if mailed by the U.S. Postal Service, no later than February 27, 2009, for letters relating to Applications that submitted a Pre-Application, or April 1, 2009 if a Pre-Application was not submitted. Letters should be addressed to the Texas Department of Housing and Community Affairs, "Attention: Director of Multifamily Finance (Neighborhood Input)." Letters received after the applicable deadline will be summarized for the Board's information and consideration, but will not affect the score for the Application. The organization's letter (and enclosures) must:

(i) State the name and location of the proposed single Development;

(ii) Certify that the letter is signed by the persons with the authority to sign on behalf of the neighborhood organization, and provide:

(I) the street and/or mailing addresses;

(II) day and evening phone numbers;

(III) and e-mail addresses and/or facsimile numbers for the signer of the letter and one additional contact for the organization;

(iii) Certify that the organization has boundaries, and that the boundaries in effect February 27, 2009 contain the proposed Development Site;

(iv) Certify that the organization meets the definition of "Neighborhood Organization" as defined in §49.3(63) of this chapter. For the purposes of this section, a "Neighborhood Organization" is defined as an organization of persons living near one another within the organization's defined boundaries in effect February 27, 2009 that contain the proposed Development site and that has a primary purpose of working to maintain or improve the general welfare of the neighborhood. "Neighborhood Organizations" include homeowners associations, property owners associations, and resident councils in which the council is commenting on the Rehabilitation or reconstruction of the property occupied by the residents. "Neighborhood Organizations" do not include broader based "community" organizations;

(v) Include documentation showing that the organization is on record as of February 27, 2009 with the state or county in which the Development is proposed to be located. The receipt of a QCP letter, by the Department on or before February 27, 2009, that meets the requirements outlined in the QCP neighborhood information packet and the 2009 QAP, will constitute being on record with the State. The Neighborhood Organization letter must be signed by two officials or board members of the Neighborhood Organization and must include in its letter, a contact name with a mailing address and phone number of the persons signing the letter; one additional contact for the organi-

zation a written description and map of the organization's geographical boundaries; and proof that the boundaries described were in effect as of February 27, 2009. This request must be received no later than February 27, 2009. Acceptance of this documentation will be subject to Department approval. The Department is permitted to issue a deficiency notice for this registration process and if satisfied, the organization will still be deemed to be timely placed on record with the state;

(vi) Accurately certify that the Neighborhood Organization was not formed by any Applicant, Developer, or any employee or agent of any Applicant (the seller of land is not considered, with the exception of an identity of interest, to be an agent of the Application) in the 2009 Competitive Housing Tax Credit Application Round, that the organization and any member did not accept money or a gift to cause the Neighborhood Organization to take its position of support or opposition, and has not provided any assistance other than education and information sharing to the Neighborhood Organization to meet the requirements of this subparagraph for any Application in the Application Round (i.e. hosting a public meeting, providing the "TDHCA Information Packet for Neighborhoods" to the Neighborhood Organization, or referring the Neighborhood Organization to TDHCA staff for guidance). Applicants may not provide any "production" assistance to meet these requirements for any Application in the Application Round (i.e. use of fax machines owned by the Applicant, use of legal counsel related to the Applicant, or assistance drafting a letter for the purposes of this subparagraph). Any deficiency notices issued to the Neighborhood Organization will also be sent to the Applicant for information purposes only. Applicants may not provide delivery assistance of any communication between the Neighborhood Organization and the Department and Applicants may not assist the Neighborhood Organization in preparing its response to a deficiency notice. Applicants may provide information about the deficiency notice process or deadlines to a Neighborhood Organization;

(vii) While not required, the organization is encouraged to hold a meeting to which all the members of the organization are invited to consider whether the organization should support, oppose, or be neutral on the proposed Development, and to have the membership vote on whether the organization should support, oppose, or be neutral on the proposed Development. The organization is also encouraged to invite the Developer or Applicant to this meeting; and

(viii) Letters from Neighborhood Organizations, and subsequent correspondence from Neighborhood Organizations, may not be provided via the Applicant which includes facsimile and e-mail communication.

(B) Scoring of Letters (and Enclosures). The input must clearly and concisely state each reason for the Neighborhood Organization's support for or opposition to the proposed Development.

(i) The score awarded for each letter for this exhibit will range from a maximum of +24 for the position support to +12 for the neutral position to 0 for a position of opposition. The number of points to be allocated to each organization's letter will be based on the organization's letter and evidence enclosed with the letter. The final score will be determined by the Executive Director. The Department may investigate a matter and contact the Applicant and Neighborhood Organizations for more information. The Department may consider any relevant information specified in letters from other Neighborhood Organizations regarding a Development in determining a score.

(ii) The Department highly values quality public input addressed to the merits of a Development. Input that points out matters that are specific to the neighborhood, the proposed site, the proposed Development, or Developer are valued. If a proposed Development is permitted by the existing or pending zoning or absence of zoning, concerns addressed by the allowable land use that are related to any multifamily development may generally be considered to have been addressed at the local level through the land use planning process. Input concerning positive efforts or the lack of efforts by the Applicant to inform and communicate with the neighborhood about the proposed Development is highly valued. If the Neighborhood Organization refuses to communicate with the Applicant the efforts of the Applicant will not be considered negative. Input that evidences unlawful discrimination against classes of persons protected by Fair Housing law or the scoring of which the Department determines to be contrary to the Department's efforts to affirmatively further fair housing will not be considered.

(iii) In general, letters that meet the requirements of this paragraph and:

(I) Establish at least one reason for support or opposition will be scored the maximum points for either support (+24 points) or opposition (zero); or

(II) That do not establish a reason for support or opposition or that are unclear will be considered ineligible and scored as neutral (+12 points).

(iv) If an Application receives multiple eligible letters, the average score of all eligible letters will be applied to the Application.

(v) Applications for which no letters from Neighborhood Organizations are scored will receive a neutral score of +12 points.

(C) Basic Submission Deficiencies. The Department is authorized but not required to request that the Neighborhood Organization provide additional information or documentation the Department deems relevant to clarify information contained in the organization's letter (and enclosures). If the Department determines to request additional information from an organization, it will do so by e-mail or facsimile to the e-mail addresses or facsimile number provided with the organization's letter. If the deficiencies are not clarified or corrected in the Department's determination within five (5) business days from the date the e-mail or facsimile is sent to the organization, the organization's letter will not be considered further for scoring and the organization will be so advised. This potential deficiency process does not extend any deadline required above for the "Quantifiable Community Participation" process. An organization may not submit additional information or documentation after the applicable deadlines except in response to an e-mail or facsimile from the Department specifically requesting additional information.

(3) The Income Levels of Tenants of the Development. Applications may qualify to receive up to 22 points for qualifying under only one of subparagraphs (A) - (F) of this paragraph. To qualify for these points, the household incomes must not be higher than permitted by the AMGI level (must round to the next highest whole Unit, no less than one Unit). If a Development includes market rate or non-restricted Units, to qualify for these points at least 10% of all the Units that are not Low-Income Units (i.e. market rate or non-restricted Units) in the Development must be set-aside with incomes at or below 80% of AMGI. The Development Owner, upon making selections for this exhibit, will set aside Units at the levels of AMGI and will maintain the percentage of such Units continuously over the compliance and extended use period as specified in the LURA. These income levels require corresponding rent levels that do not exceed 30% of the income limitation in accordance with §42(g), Internal Revenue Code. (§§2306.111(g)(3)(B); 2306.111(g)(3)(E); 2306.6710(b)(1)(C); 2306.6710(e); and 42(m)(1)(B)(ii)(I))

(A) 22 points if at least 80% of the Low-Income Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(B) 22 points if at least 40% of the Low-Income Units in the Development are set-aside with incomes at or below a combination of 50% and 30% of AMGI in which at least 5% of the Low-Income Units are at or below 30% of AMGI; or

(C) 20 points if at least 60% of the Low-Income Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(D) 18 points if at least 10% of the Low-Income Units in the Development are set-aside with incomes at or below 30% of AMGI; or

(E) 16 points if at least 40% of the Low-Income Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(F) 14 points if at least 35% of the Low-Income Units in the Development are set-aside with incomes at or below 50% of AMGI.

(4) The Size and Quality of the Units (Development Characteristics). Applications may qualify to receive up to 20 points. Applications may qualify for points under both subparagraphs (A) and (B) of this paragraph. (§2306.6710(b)(1)(D) and §42(m)(1)(C)(iii))

(A) Size of the Units. Applications may qualify to receive 6 points. The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Six points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction), Developments receiving funding from TRDO-USDA, or Developments proposing Single Room Occupancy without meeting these square footage minimums if requested in the Self Scoring Form. The square feet of all of the Units in the Development, for each type of Unit, must be at least the minimum noted in clauses (i) - (v) of this subparagraph. Changes to an Application during any phase of the review process that decreases the square footage below the minimums noted in clauses (i) - (v) of this subparagraph, will be re-evaluated and may result in a reduction of the Application score.

(i) 600 square feet for an efficiency Unit;

(ii) 700 square feet for a non-elderly one Bedroom Unit; 600 square feet for an elderly one Bedroom Unit;

(iii) 950 square feet for a non-elderly two Bedroom Unit; 750 square feet for an elderly two Bedroom Unit;

(iv) 1,050 square feet for a three Bedroom Unit; and

(v) 1,250 square feet for a four Bedroom Unit.

(B) Quality of the Units. Applications may qualify to receive 14 points. Applications in which Developments provide specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in clauses (i) - (xix) of this subparagraph, not to exceed 14 points in total. Applications involving scattered site Developments must have all of the Units located with a specific amenity to count for points. Applications involving Rehabilitation (excluding reconstruction) or Single Room Occupancy may receive 1.5 points for each point item, not to exceed 14 points in total (do not round).

(i) Covered entries (1 point);

(ii) Nine foot ceilings in living room and all bedrooms (at minimum) (1 point);

(iii) Microwave ovens (1 point);

(iv) Self-cleaning or continuous cleaning ovens (1 point);

(v) Ceiling fixtures in all rooms (light with ceiling fan in living area and all bedrooms) (1 point);

(vi) Refrigerator with icemaker (1 point);

(vii) Laundry connections (2 points);

(viii) Storage room or closet, of approximately 9 square feet or greater, which does not include bedroom, entryway or linen closets--does not need to be in the Unit but must be on the property site (1 point);

(ix) Laundry equipment (washers and dryers) for each individual unit including a front loading washer and dryer in required UFAS compliant Units (3 points);

(x) Thirty year architectural shingle roofing (1 point);

(xi) Covered patios or covered balconies (1 point);

(xii) Covered parking (including garages) of at least one covered space per Unit (2 points);

(xiii) 100% masonry on exterior, which can include stucco, cementitious board products, concrete brick and mortarless concrete masonry, but not EIFS synthetic stucco (3 points) (Applicants may not select this item if clause (xiv) of this subparagraph is selected);

(xiv) Greater than 75% masonry on exterior, which can include stucco and cementitious board products, concrete brick and mortarless concrete masonry, but not EIFS synthetic stucco (1 point) (Applicants may not select this item if clause (xiii) of this subparagraph is selected);

(xv) Use of energy efficient alternative construction materials (for example, Structural Insulated Panel construction) with wall insulation at a minimum of R-20 (3 points);

(xvi) R-15 Walls/R-30 Ceilings (rating of wall system) (3 points);

(xvii) 14 SEER HVAC or evaporative coolers in dry climates for New Construction, Adaptive Reuse, and reconstruction or radiant barrier in the attic for Rehabilitation (excluding reconstruction) (3 points);

(xviii) High Speed Internet service to all Units at no cost to residents (2 points); or

(xix) Fire sprinklers in all Units (2 points).

(5) The Commitment of Development Funding by Local Political Subdivisions. Applications may qualify to receive up to 18 points for qualifying under this paragraph provided for under Development Funding. (§2306.6710(b)(1)(E))

(A) Basic Submission Requirements for Scoring. Evidence of the following must be submitted in accordance with the Application Submission Procedures Manual (ASPM).

(i) The loans, grant(s) or in-kind contribution(s) must be attributed to the Total Housing Development Costs, as defined in this chapter, unless otherwise stipulated in this section.

(ii) An Applicant may submit enough sources to substantiate the point request, and all sources must be included in the Sources and Uses form. For example, if an Applicant is requesting 18

points, five sources may be submitted if each is for an amount equal to 1% of the Total Housing Development Cost.

(iii) An Applicant may substitute any source in response to a Deficiency Notice or after the Application has been submitted to the Department.

(iv) A loan does not qualify as an eligible source unless it has a minimum term of the later of 1-year or the Placed in Service date, and the interest rate must be at the Applicable Federal Rate (AFR) or below (at the time of loan closing).

(v) In-kind contributions such as donation of land, tax exemptions, or waivers of fees such as building permits, water and sewer tap fees, or similar contributions are only eligible for points if the in-kind contribution provides a tangible economic benefit that results in a quantifiable Total Housing Development Cost reduction to benefit the Development will be acceptable to qualify for these points. The quantified value of the Total Housing Development Cost reduction may only include the value during the period the contribution or waiver is received and/or assessed. Donations of land must be under the control of the Applicant, pursuant to subsection (h)(7) of this section to qualify. The value of in-kind contributions may only include the time period between award, or August 1, 2009 and the Development's Placed in Service date, with the exception of contributions of land. The full value of land contributions, as established by the appraisal required pursuant to clause (viii) of this subparagraph. Contributions in the form of tax exemptions or abatements may only count for points if the contribution is in addition to any tax exemption or abatement required under statute.

(vi) To the extent that a Notice of Funding Availability (NOFA) is released and funds are available, funds from TDHCA's HOME Investment Partnerships (HOME) Program will qualify if a resolution, dated on or before the date the Application Acceptance Period ends, is submitted with the Application from the Local Political Subdivision authorizing the Applicant to act on behalf of the Local Political Subdivision in applying for HOME Funds from TDHCA for the particular Application. TDHCA's HOME funds may be substituted for a source originally submitted with the Application, provided the HOME funds substituted are from a NOFA released after the Application Acceptance Period ends and a resolution is submitted with the substitution documentation from the Local Political Subdivision authorizing the Applicant to act on behalf of the Local Political Subdivision in applying for HOME Funds from TDHCA for the particular Application.

(vii) Development based rental subsidies may qualify under this section if evidence of the remaining value of the contract is submitted from the Local Political Subdivision. The value of the contract does not include past subsidies.

(viii) Evidence to be submitted with the Application must include a copy of the commitment of funds; a copy of the application to the funding entity and a letter from the funding entity indicating that the application was received; or a certification of intent to apply for funding that indicates the funding entity and program to which the application will be submitted, the loan amount to be applied for and the specific proposed terms. For in-kind contributions, evidence must be submitted in the Application from Local Political Subdivision substantiating the value of the in-kind contributions. For in-kind contributions of land, evidence of the value of the contribution must be in the form of an appraisal.

(ix) If not already provided, at the time the executed Commitment Notice is required to be submitted, the Applicant or Development Owner must provide evidence of a commitment approved by the Governing Body of the Local Political Subdivision for the Development Funding to the Department. If the funding commitment from the Local Political Subdivision has not been received by the date the Department's Commitment Notice is to be submitted, the Application will be evaluated to determine if the loss of these points would have resulted in the Department's not committing the tax credits. If the loss of points would have made the Application noncompetitive, the Commitment Notice will be rescinded and the credits reallocated. If the Application would still be competitive even with the loss of points and the loss would not have impacted the recommendation for an award, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the Local Political Subdivision's Development Funding, the Commitment Notice will be rescinded and the credits reallocated.

(x) Funding commitments from a Local Political Subdivision will not be considered final unless the Local Political Subdivision attests to the fact that any funds committed were not first provided to the Local Political Subdivision by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application, unless the Applicant itself is a Local Political Subdivision or subsidiary.

(B) Scoring. Points will be determined on a sliding scale based on the percentage of the Total Housing Development Costs of the Development, as reflected in the in the Development Cost Schedule. If a revised Development Cost Schedule is submitted to the Department in response to a deficiency notice at anytime during the review process, the Revised Development Cost Schedule will be utilized for this calculation, and Applicants will be notified of the revised score, consistent with subsection (e) of this section. Do not round for the following calculations. The "total contribution" is the total combined value of qualifying loan(s), grants or in-kind contributions from a Local Political Subdivision pursuant to subparagraph (A) of this paragraph.

(i) A total contribution equal to or greater than 1% (for Urban Developments) and 0.5% (for Rural Developments and Developments located in non-participating jurisdictions) of the Total Housing Development Cost of the Development receives 6 points; or

(ii) A total contribution equal to or greater than 2.5% (for Urban Developments) and 1.5% (for Rural Developments and Developments located in non-participating jurisdictions) of the Total Housing Development Cost of the Development receives 12 points; or

(iii) A total contribution equal to or greater than 5% (for Urban Developments) and 3% (for Rural Developments and Developments located in non-participating jurisdictions) of the Total Housing Development Cost of the Development receives 18 points.

(6) The Level of Community Support from State Representative or State Senator. The level of community support for the Application, evaluated on the basis of written statements received from the State Representative or State Senator that represents the district containing the proposed Development Site. (§2306.6710(b)(1)(F) and §2306.6725(a)(2)). Applications may qualify to receive 14 points for this item. Letters must identify the specific Development and must clearly state support for or opposition to the specific Development. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or the State Representative or Senator on or before 5:00 p.m. (CDT) April 1, 2009. A State Representative or State Senator may withdraw (in writing) a letter that is submitted by the April 1st deadline on or before June 15, 2009 but may not submit a new letter. The previous position of support or opposition that is withdrawn will be scored as neutral (0 points). State Representatives or Senators to be considered are those State Representatives or Senators in office at the time the Application is submitted. Letters of support from State Representatives or Senators that do not represent the district containing the proposed Development Site will

not qualify for points under this Exhibit. Neutral letters, or letters that do not specifically refer to the Development, will receive neither positive nor negative points. Letters from State of Texas Representative or Senator: support letters are +14 points; opposition letters are -14 points for a maximum of either 14 or -14 points. If one letter is received in support and one letter is received in opposition the score would be 0 points.

(7) The Rent Levels of the Units. Applications may qualify to receive up to 12 points for qualifying under this exhibit. (§2306.6710(b)(1)(G)). Provided the Application has qualified for points under paragraph (3) of this subsection, Income Levels of Tenants of the Development, an Application may qualify for points under this subsection by providing additional Low-Income Units at 50% of AMGI (must round up to the next whole Unit, not less than one Unit), as follows:

(A) An Application may receive 12 points if the Development provides an additional 10% of all Low-Income Units in excess of those committed in paragraph (3) of this subsection at rents and incomes at or below 50% of AMGI; or

(B) An Application may receive 6 points if the Development provides an additional 5% of all Low-Income Units in excess of those committed in paragraph (3) of this subsection at rents and incomes at or below 50% of AMGI.

(8) The Cost of the Development by Square Foot (Development Characteristics). Applications may qualify to receive 10 points for this item. (§2306.6710(b)(1)(H); §42(m)(1)(C)(iii)). For this exhibit, costs shall be defined as construction costs, including site work, direct hard costs, contingency, contractor profit, overhead and general requirements, as represented in the Development Cost Schedule. This calculation does not include indirect construction costs. The calculation will be costs per square foot of net rentable area (NRA). For the purposes of this paragraph only, if a building is in a Qualified Elderly Development or is an age restricted building in an Intergenerational Housing Development with an elevator or a high rise building with four or more stories serving any population, the NRA may include elevator served interior corridors. If the proposed Development is a Single Room Occupancy Development, the NRA may include elevator served interior corridors and may include up to 50 square feet of common area per Unit. As it relates to this paragraph, an interior corridor is a corridor that is enclosed, heated and/or cooled and otherwise finished space. The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule of the Application. Developments qualify for 10 points if their costs do not exceed $95 per square foot for Qualified Elderly, single family design, transitional, and Single Room Occupancy Developments (transitional housing for the homeless and Single Room Occupancy units as provided in the Code, §42(i)(3)(B)(iii) and (iv)), unless located in a "First Tier County" in which case their costs do not exceed $97 per square foot; and $85 for all other Developments, unless designated as "First Tier" by the Texas Department of Insurance, in which case their costs do not exceed $87 per square foot. For 2008, the First Tier counties are Aransas, Brazoria, Calhoun, Chambers, Galveston, Jefferson, Kenedy, Kleberg, Matagorda, Nueces, San Patricio, and Willacy. There are also specifically designated First Tier communities in Harris County that are east of State Highway 146, and evidence in the Application must include a map with the Development Site designated clearly within the community. These communities are Pasadena, Morgan's Point, Shoreacres, Seabrook and La Porte. Intergenerational Housing Developments will receive 10 points if costs described above do not exceed the square footage limit for elderly and non-elderly Units as determined by using the NRA attributable to the respective elderly and non-elderly Units. The Department will determine if points will be awarded by multiplying the NRA for elderly Units by the applicable square footage limit for the elderly Units and adding that total to the result of the multiplication of the NRA for family Units by the applicable non-elderly square footage limit. If this maximum cost amount is equal to, or greater than the total of the costs identified above for the Application, points will be awarded (10 points).

(9) The Services to be Provided to Tenants of the Development. Applications may qualify to receive up to 8 points. (§2306.6710(b)(1)(I) and §2306.6725(a)(1))

(A) The Applicant must certify that the Development will provide a combination of special supportive services appropriate for the proposed tenants. The provision of supportive services will be included in the LURA as selected from the list of services identified in this paragraph. No fees may be charged to the tenants for any of the services. Services must be provided on-site or transportation to off-site services must be provided (maximum of 7 points).

(i) Applications will be awarded points for selecting services listed in clause (ii) of this subparagraph based on the following scoring range:

(I) Two points will be awarded for providing two of the services; or

(II) Four points will be awarded for providing four of the services; or

(III) Seven points will be awarded for providing six of the services.

(ii) Service options include child care; transportation; basic adult education; legal assistance; counseling services; GED preparation; English as a second language classes; vocational training; home buyer education; credit counseling; financial planning assistance or courses; health screening services; health and nutritional courses; organized team sports programs or youth programs; scholastic tutoring; any other programs described under Title IV-A of the Social Security Act (42 U.S.C. §§601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families; or any other services approved in writing by the Department.

(B) In addition, Applications will receive 1 point for providing Notary Public Services to tenants at no cost to the tenant during regular business hours. If this point is selected, this requirement will be included in the LURA.

(10) Declared Disaster Areas (§2306.6710(b)(1)). Applications may receive 7 points, if at time the complete Application is submitted or at any time within the two-year period preceding the date of submission, the proposed Development site is located in a Disaster Area as defined in §49.3(38) of this chapter.

(11) Rehabilitation, (which includes reconstruction) or Adaptive Reuse. Applications may qualify to receive 6 points. Applications proposing to build solely Rehabilitation (excluding New Construction of non-residential buildings), solely reconstruction (excluding New Construction of non-residential buildings), or solely Adaptive Reuse qualify for points.

(12) Housing Needs Characteristics. (§42(m)(1)(C)(ii)). Applications may qualify to receive up to 6 points (if the Development Site is located in an Area with a certain Affordable Housing Need Score). Each Application may receive a score if correctly requested in the self score form based on objective measures of housing need in

the Area where the Development is located. This Affordable Housing Need Score for each Area will be published in a Site Demographic Characteristics table in the Reference Manual.

(13) Community Revitalization (Development Characteristics) (§42(m)(1)(C)(iii)) or Historic Preservation. Applications may qualify to receive 6 points for either subparagraph (A) or (B) of this paragraph.

(A) The Development includes the use of an Existing Residential Development and proposes any Rehabilitation or any Reconstruction that is part of a Community Revitalization Plan. Evidence of the Community Revitalization Plan (such evidence must include an ordinance, resolution, or otherwise recorded documentation of a vote taken by the local elected Governing Body specifically adopting the Community Revitalization Plan) and a letter from the chief executive officer or other local official with appropriate jurisdiction of local Governing Body stating that the Development Site is located within the targeted development areas outlined in the Community Revitalization Plan must be submitted; or

(B) The Development includes the use of an existing building that is designated as historic by a federal or state Entity and proposes Rehabilitation (including reconstruction) or Adaptive Reuse. The Development itself must have the designation; points in this subparagraph are not available for Developments simply located within historic districts or areas that do not have a designation on the building. The Development must include the historic building. Evidence will include proof of the historic designation from the appropriate Governmental Entity.

(14) Pre-Application Participation Incentive Points. (§2306.6704). Applications that submitted a Pre-Application during the Pre-Application Acceptance Period and meet the requirements of this paragraph will qualify to receive 6 points for this item. To be eligible for these points, the Application must:

(A) Be for the identical Development Site, or reduced portion of the Development Site as the proposed Development Site under control in the Pre-Application;

(B) Have met the Pre-Application Threshold Criteria;

(C) Be serving the same target population (family, Intergenerational Housing, or elderly) as in the Pre-Application;

(D) Be applying for the same Set-Asides as indicated in the Pre-Application (Set-Asides can be dropped between Pre-Application and Application, but no Set-Asides can be added); and

(E) Be awarded by the Department an Application score that is not more than 5% greater or less than the number of points awarded by the Department at Pre-Application, with the exclusion of points for support and opposition under paragraphs (2), (6), and (18) of this of this subsection. The Application score used to determine whether the Application score is 5% greater or less than the number of points awarded at Pre-Application will also include all point losses under subsection (d)(4) of this section. An Applicant must choose, at the time of Application either clause (i) or (ii) of this subparagraph:

(i) To request the Pre-Application points and have the Department cap the Application score at no greater than the 5% increase regardless of the total points accumulated in the scoring evaluation. This allows an Applicant to avoid penalty for increasing the point structure outside the 5% range from Pre-Application to Application; or

(ii) To request that the Pre-Application points be forfeited and that the Department evaluate the Application as requested in the self-scoring sheet.

(15) Economic Development Initiatives. A Development that is located in one of the following two areas may qualify to receive 4 points. For the purpose of this paragraph, "area" shall mean the boundaries of any zone or community in subparagraph (A) of this paragraph or the area in which funds in subparagraph (B) of this paragraph must be used:

(A) A Designated State or Federal Empowerment/Enterprise Zone, Urban Enterprise Community, or Urban Enhanced Enterprise Community. To be eligible for these points, Applicants must submit a letter and a map of the zoned area from a city/county official stating that the proposed Development is located within such a designated zone or area; is eligible to receive the state or federal economic development grants or loans associated with such designations; and the city/county still has available funds in such program. The letter should be no older than six (6) months from the first day of the Application Acceptance Period. (General Appropriation Act, Article VII, Rider 3; §2306.127); or

(B) An area that has received an award within the three year period prior to November 1, 2008, from the Texas Capital Fund, Texas or Federal Enterprise Zone Fund, Texas Leverage Fund, Industrial Revenue Bond Program, Emerging Technologies, Skills Development, Rural Business Enterprise Grants, Certified Development Company Loans, or Micro Loan Program or other state or federally funded economic development initiatives (This excludes limited highway improvement and roadwork projects, but does include broader regional transportation initiatives targeted to expanding economic development). Grants that qualify in these areas are included in the Application Reference Manual;

(C) Points under subparagraphs (A) and (B) of this paragraph will not be granted if more than 3 Developments received an award of Housing Tax Credits in the applicable area in the seven (7) years prior to the Application Acceptance Period. The Applicant must provide evidence of the boundaries of the area, as required in the Application and Application Submission Procedures Manual.

(16) Development Location. (§2306.6725(a)(4); §42(m)(1)(C)(i)). Applications may qualify to receive 4 points. Evidence, not more than six (6) months old from the first day of the Application Acceptance Period, that the Development Site is located within one of the geographical areas described in subparagraphs (A) - (F) of this paragraph. Areas qualifying under any one of the subparagraphs (A) - (F) of this paragraph will receive 4 points. An Application may only receive points under one of the subparagraphs (A) - (F) of this paragraph.

(A) A geographical Area which is an Economically Distressed Area; a Colonia; or a Difficult Development Area (DDA) as specifically designated by the Secretary of HUD at the time of Application submission (these census tracts are designated in the 2009 Housing Tax Credit Site Demographic Characteristics included in the application materials). (§2306.127)

(B) The Development is located in a county that has received an award within the three (3) years prior to November 1, 2008, within the past three (3) years, from the Texas Department of Agriculture's Rural Municipal Finance Program or Real Estate Development and Infrastructure Program. Cities which have received one of these awards are categorized as awards to the county as a whole so Developments located in a different city than the city awarded, but in the same county, will still be eligible for these points.

(C) The Development is located in a census tract which has a median family income (MFI), as published by the United States Bureau of the Census (U.S. Census) that is higher than the median family income for the county in which the census tract is located. This

comparison shall be made using the most recent data available as of the date the Application Round opens the year preceding the applicable program year. Developments eligible for these points must submit evidence documenting the median income for both the census tract and the county. These Census Tracts are outlined in the 2008 Housing Tax Credit Site Demographic Characteristics Report.

(D) The proposed Development will serve families with children (at least 70% of the Units must have an eligible bedroom mix of two bedrooms or more) and is proposed to be located in an elementary school attendance zone of an elementary school that has an academic rating of "Exemplary" or "Recognized," or comparable rating if the rating system changes. The date for consideration of the attendance zone is that in existence as of the opening date of the Application Round and the academic rating is the most current rating determined by the Texas Education Agency as of that same date. (§42(m)(1)(C)(vii))

(E) The proposed Development will expand affordable housing opportunities for low-income families with children outside of poverty areas. This must be demonstrated by showing that the Development will serve families with children (at least 70% of the Units must have an eligible bedroom mix of two bedrooms or more) and that the census tract in which the Development is proposed to be located has no greater than 10% poverty population according to the most recent census data. Intergenerational Developments may qualify for points if 70% of the non-elderly Units in the Development have an eligible bedroom mix of two bedrooms or more. (§42(m)(1)(C)(vii)). These Census Tracts are outlined in the 2009 Housing Tax Credit Site Demographic Characteristics Report.

(F) The proposed Development is located in an Urban Core, on a site that is properly zoned for the intended use.

(17) Green Building Initiatives. Application may qualify to receive up to 6 points for providing green building amenities (points under this paragraph may not be requested for the same items utilized for points under subsection (h)(4)(A)(ii)(XXV) of this section, Threshold Amenities) (Rehabilitation Developments will receive 1.5 points for each point requested for the green building amenities):

(A) evaporative coolers (for use in designated counties listed in the Application Materials, 2009 Housing Tax Credit Site Demographics Information) (1 point);

(B) passive solar heating/cooling (3 points maximum);

(i) Two points if the glazing area on the north- and south-facing walls of the building is at least 50% greater than the sum of the glazing area on the east- and west-facing walls; and the east-west axis of the building is within 15 degrees of due east-west;

(ii) One point if in addition to the east-west axis of the building oriented within 15 degrees of due east-west, utilize a narrow floor plate (less than 40 feet), single loaded corridors and open floor plan to optimize daylight penetration and passive ventilation (note: to qualify for this particular point, application must also implement the 15 degree building orientation option in clause (i) of this subparagraph); and 100% of HVAC condenser units are shaded so they are fully shaded 75% of the time during summer months (May through August); and solar screens or solar film on all East, West, and South Windows with building oriented to east-west axis within 15 degrees of due east-west, west-south axis within 15 degrees of due west-south, and south-east axis within 15 degrees of due south-east;

(C) water conserving features (2 points maximum, 1 point for each):

(i) Install low-flow toilets using less than or equal to 1.6 gallons per flush, or high efficiency toilets using less than or equal to 1.28 gallons/flush;

(ii) Install bathroom lavatory faucets and showerheads that do not exceed 2.0 gallons/minute and kitchen faucets that do not exceed 1.5 gallons/minute. Applies to all fixtures throughout development. Rehab projects may choose to install compliant faucet aerators instead of replacing entire faucets;

(D) solar water heaters (Solar water heaters designed to provide at least 25% of the average energy used to heat domestic water throughout the entire development.) (2 points);

(E) irrigation and landscaping (must implement both of the following) (2 points);

(i) collected water (at least 50%) for irrigation purposes;

(ii) selection of native trees and plants that are appropriate to the site's soils and microclimate and locate then to allow for shading in the summer and allow for heat gain in the winter;

(F) sub-metered utility meters (2 points maximum);

(i) Sub-metered utility meters on rehab project without existing sub-meters or new construction senior project (2 points); or

(ii) Sub-metered utility meters on new construction project (excluding new construction senior project) (1 point);

(G) energy efficiency (4 points maximum);

(i) Three points if Energy Elements include Energy-Star qualified windows and glass doors; and Exterior envelope insulation, vapor barriers and air barriers greater than or equal to Energy Star air barrier and insulation criteria; and HVAC, domestic hot water heater, or insulation that exceeds Energy Star standards or exceeds the IRC 2006; or

(ii) Four points if the project promotes energy efficiency by meeting the requirements of Energy Star for Homes by either complying with the appropriate builder option package or a HERS score of 85;

(H) thermally and draft efficient doors (SHGC of 0.40 or lower and U-value specified by climate zone according to the 2006 IECC) (2 points);

(I) photovoltaic panels for electricity and design and wiring for the use of such panels (3 points maximum);

(i) Photovoltaic panels that total 10 kW (1 point);

(ii) Photovoltaic panels that total 20 kW (2 points);

(iii) Photovoltaic panels that total 30 kW (3 points);

(J) construction waste management and implementation of EPA's Best Management Practices for erosion and sedimentation control during construction (1 point);

(K) recycling service provided throughout the compliance period (1 point);

(L) water permeable walkways (at least 20% of walkways and parking) (1 point);

(M) bamboo flooring, wool carpet, linoleum flooring, straw board, poplar OSB, or cotton batt insulation (50% of flooring on the ground floor of the development must be finished concrete and/or ceramic tile. 50% of the flooring on upper floors must be ceramic tile

and/or a flooring material that is Floor Score Certified (developed by the Resilient Floor Covering Institute), applied with a Floor Score Certified adhesive and comes with a minimum 7-year wear through warranty (2 points).

(18) Demonstration of Community Input other than Quantifiable Community Participation: if an Application was awarded 12 points under paragraph (2) of this subsection, then that Application may receive up to 6 points for letters that qualify for points under subparagraph (A), (B) or (C) of this paragraph. An Application may not receive points under more than one of the subparagraphs (A) - (C) of this paragraph. All letters must be received by February 27, 2009 for the Application to receive these points. At no time will the Application receive a score lower than zero for this item.

(A) An Application may receive two points (maximum of 6 points) for each letter of support submitted from a community or civic organization that serves the community in which the Development Site is located. Letters of support must identify the specific Development and must state support of the specific Development at the proposed location. The community or civic organization must provide some documentation of its existence in the community in which the Development is located to include, but not be limited to, listing of services and/or members, brochures, annual reports, etc. Letters of support from organizations that are not active in the area that includes the location of the Development will not be counted. For purposes of this subparagraph, community and civic organizations do not include neighborhood organizations, governmental entities (excluding Special Management Districts), taxing entities or educational activities. Organizations that were created by a governmental entity or derive their source of creation from a governmental entity do not qualify under this item. For purposes of this item, educational activities include school districts, trade and vocational schools, charter schools and depending on how characterized could include day care centers; it would not include a PTA or PTO as that is a service organization even though it supports an educational activity. Should an Applicant elect this option and the Application receives letters in opposition by February 27, 2009, then two points will be subtracted from the score for each letter in opposition, provided that the letter is from an organization serving the community.

(B) An Application may receive 6 points for a letter of support, from a property owners association created for a master planned community whose boundaries include the development site that does not meet the requirements of a Neighborhood Organization for points under paragraph (2) of this subsection.

(C) An Application may receive 6 points for a letter of support from a Special Management District, whose boundaries, as of February 27, 2009, include the Development Site and for which there is not a Neighborhood Organization on record with the county or state.

(19) Developments in Census Tracts with No Other Existing Same Type Developments Supported by Tax Credits: The Application may receive 6 points if the proposed Development is located in a census tract in which there are no other existing Developments supported by Housing Tax Credits that serve the same type of household, regardless of whether the development serves families, or elderly individuals (Intergenerational Housing is not a type of household as it relates to this paragraph). Applicant must provide evidence of the census tract in which the Development is located. (§2306.6725(b)(2)). These Census Tracts are outlined in the 2009 Housing Tax Credit Site Demographic Characteristics Report.

(20) Tenant Populations with Special Housing Needs. Applications may qualify to receive 4 points for this item. (§42(m)(1)(C)(v)). The Department will award these points to Applications in which at least 10% of the Units are set aside for Persons with Special Needs. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to affirmatively market Units to Persons with Special Needs. In addition, the Department will require a minimum twelve-month period during which Units must either be occupied by Persons with Special Needs or held vacant. The twelve (12) month period will begin on the date each building receives its certificate of occupancy. For buildings that do not receive a Certificate of Occupancy, the twelve-month period will begin on the placed in service date as provided in the Cost Certification manual. After the twelve-month period, the Development Owner will no longer be required to hold Units vacant for households with special needs, but will be required to continue to affirmatively market Units to household with special needs.

(21) Length of Affordability Period. Applications may qualify to receive up to 4 points. (§§2306.6725(a)(5); 2306.111(g)(3)(C); 2306.185(a)(1) and (c); 2306.6710(e)(2); and 42(m)(1)(B)(ii)(II)). In accordance with the Code, each Development is required to maintain its affordability for a 15-year compliance period and, subject to certain exceptions, an additional 15-year extended use period. Development Owners that are willing to extend the affordability period for a Development beyond the thirty (30) years required in the Code may receive points as follows:

(A) Add five (5) years of affordability after the extended use period for a total affordability period of thirty-five (35) years (2 points); or

(B) Add ten (10) years of affordability after the extended use period for a total affordability period of forty (40) years. (4 points)

(22) Site Characteristics. Development Sites, including scattered sites, will be evaluated based on proximity to amenities, the presence of positive site features and the absence of negative site features. Sites will be rated based on the criteria in subparagraphs (A) and (B) of this paragraph.

(A) Proximity of site to amenities. Developments Sites located within a one mile radius (two-mile radius for Developments competing for a Rural Regional Allocation) of at least three services appropriate to the target population will receive four points. A site located within one-quarter mile of public transportation that is accessible to all residents including Persons With Disabilities and/or located within a community that has "on demand" transportation, special transit service, or specialized elderly transportation for Qualified Elderly Developments, will receive full points regardless of the proximity to amenities, as long as the Applicant provides appropriate evidence of the transportation services used to satisfy this requirement. If a Development is providing its own specialized van or on demand service, then this will be a requirement of the LURA. Only one service of each type listed in clauses (i) - (xiv) of this subparagraph will count towards the points. A map must be included identifying the Development Site and the location of the services. The services must be identified by name on the map. If the services are not identified by name, points will not be awarded. All services must exist or, if under construction, must be at least 50% complete by the date the Application is submitted. (4 points)

(i) Full service grocery store or supermarket.

(ii) Pharmacy.

(iii) Convenience Store/Mini-market.

(iv) Department or Retail Merchandise Store.

(v) Bank/Credit Union.

(vi) Restaurant (including fast food).

(vii) Indoor public recreation facilities, such as civic centers, community centers, and libraries.

(viii) Outdoor public recreation facilities such as parks, golf courses, and swimming pools.

(ix) Hospital/medical clinic.

(x) Medical offices (physician, dentistry, optometry).

(xi) Public Schools (only eligible for Developments that are not Qualified Elderly Developments).

(xii) Senior Center.

(xiii) Dry cleaners.

(xiv) Family video rental (Blockbuster, Hollywood Video, Movie Gallery).

(B) Negative Site Features. Development Sites with the following negative characteristics will have points deducted from their score. For purpose of this exhibit, the term 'adjacent' is interpreted as sharing a boundary with the Development Site. The distances are to be measured from all boundaries of the Development Site to all boundaries of the property containing the negative site feature. If an Applicant negligently fails to note a negative feature, double points will be deducted from the score or the Application may be terminated. If none of these negative features exist, the Applicant must sign a certification to that effect. (-6 points)

(i) Developments located adjacent to or within 300 feet of junkyards will have 1 point deducted from their score.

(ii) Developments located adjacent to or within 300 feet of active railroad tracks will have 1 point deducted from their score, unless the Applicant provides evidence that the city/community has adopted a Railroad Quiet Zone or the railroad in question is commuter or light rail. Rural Developments funded through TRDO-USDA are exempt from this point deduction.

(iii) Developments located adjacent to or within 300 feet of heavy industrial uses such as manufacturing plants will have 1 point deducted from their score.

(iv) Developments located adjacent to or within 300 feet of a solid waste or sanitary landfills will have 1 point deducted from their score.

(v) Developments where the buildings are located within the "fall line" of high voltage transmission power lines will have 1 point deducted from their score.

(vi) Developments where the buildings are located within the accident zones or clear zones for commercial or military airports will have 1 point deducted from their score.

(23) Development Size. The Development consists of not more than 36 Units (3 points).

(24) Qualified Census Tracts with Revitalization. Applications may qualify to receive 1 point for this item. (§42(m)(1)(B)(ii)(III)). Applications will receive the points for this item if the Development is located within a Qualified Census Tract and contributes to a concerted Community Revitalization Plan. Evidence of the Community Revitalization Plan (such evidence must include an ordinance, resolution, or otherwise recorded documentation of a vote taken by the local elected Governing Body specifically adopting the Community Revitalization Plan) and a letter from the chief executive officer or other local official with appropriate jurisdiction of the local Governing Body stating that the Development Site is located within the targeted development areas outlined in the Community Revitalization Plan must be submitted.

(25) Sponsor Characteristics. Applications may qualify to receive a maximum of 2 points for this item for qualifying under either subparagraph (A) or (B) of this paragraph. (§42(m)(1)(C)(iv))

(A) An Application will receive these two points for submitting a plan to use Historically Underutilized Businesses (HUB) in the development process consistent with the Historically Underutilized Business Guidelines for contracting with the State of Texas. The Applicant will be required to submit a report of the success of the plan as part of the cost certification documentation, in order to receive IRS Forms 8609.

(B) An Application will receive these points if there is evidence that a HUB that does not meet the experience requirements under subsection (g) of this section, as certified by the Texas Comptroller of Public Accounts, has at least 51% ownership interest in the General Partner and materially participates in the Development and operation of the Development throughout the Compliance Period. To qualify for these points, the Applicant must submit a certification from the Texas Comptroller of Public Accounts that the Person is a HUB at the close of the Application Acceptance Period. The HUB will be disqualified from receiving these points if any Principal of the HUB has developed, and received 8609's for, more than two Developments involving tax credits. Additionally, to qualify for these points, the HUB must partner with an experienced Developer (as defined by subsection (g) of this section); the experienced Developer, as an Affiliate, will not be subject to the credit limit described under §49.6(d) of this chapter for one Application per Application Round. For purposes of this section the experienced Developer may not be a Related Party to the HUB.

(26) Developments Intended for Eventual Tenant Ownership--Right of First Refusal. Applications may qualify to receive 1 point for this item. (§2306.6725(b)(1); §42(m)(1)(C)(viii)). Evidence that Development Owner agrees to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period for the minimum purchase price provided in, and in accordance with the requirements of, §42(i)(7) of the Code (the "Minimum Purchase Price"), to a Qualified Nonprofit Organization, the Department, or either an individual tenant with respect to a single family building, or a tenant cooperative, a resident management corporation in the Development or other association of tenants in the Development with respect to multifamily developments (together, in all such cases, including the tenants of a single family building, a "Tenant Organization"). Development Owner may qualify for these points by providing the right of first refusal in the following terms.

(A) Upon the earlier to occur of:

(i) The Development Owner's determination to sell the Development; or

(ii) The Development Owner's request to the Department, pursuant to §42(h)(6)(E)(II) of the Code, to find a buyer who will purchase the Development pursuant to a "qualified contract" within the meaning of §42(h)(6)(F) of the Code, the Development Owner shall provide a notice of intent to sell the Development ("Notice of Intent") to the Department and to such other parties as the Department may direct at that time. If the Development Owner determines that it will sell the Development at the end of the Compliance Period, the Notice of Intent shall be given no later than two (2) years prior to expiration of the Compliance Period. If the Development Owner determines that it will sell the Development at some point later than the end of the Compliance Period, the Notice of Intent shall be given no later than two (2) years prior to date upon which the Development Owner intends to sell the Development.

(B) During the two (2) years following the giving of Notice of Intent, the Sponsor may enter into an agreement to sell the Development only in accordance with a right of first refusal for sale at the Minimum Purchase Price with parties in the following order of priority:

(i) During the first six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization that is also a community housing development organization, as defined for purposes of the federal HOME Investment Partnerships Program at 24 C.F.R. §92.1 (a "CHDO") and is approved by the Department;

(ii) During the second six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization or a Tenant Organization; and

(iii) During the second year after the Notice of Intent, only with the Department or with a Qualified Nonprofit Organization approved by the Department or a Tenant Organization approved by the Department;

(iv) If, during such two-year period, the Development Owner shall receive an offer to purchase the Development at the Minimum Purchase Price from one of the organizations designated in clauses (i) - (iii) of this subparagraph (within the period(s) appropriate to such organization), the Development Owner shall sell the Development at the Minimum Purchase Price to such organization. If, during such period, the Development Owner shall receive more than one offer to purchase the Development at the Minimum Purchase Price from one or more of the organizations designated in clauses (i) - (iii) of this subparagraph (within the period(s) appropriate to such organizations), the Development Owner shall sell the Development at the Minimum Purchase Price to whichever of such organizations it shall choose.

(C) After whichever occurs the later of:

(i) The end of the Compliance Period; or

(ii) Two (2) years from delivery of a Notice of Intent, the Development Owner may sell the Development without regard to any right of first refusal established by the LURA if no offer to purchase the Development at or above the Minimum Purchase Price has been made by a Qualified Nonprofit Organization, a Tenant Organization or the Department, or a period of one hundred twenty (120) days has expired from the date of acceptance of all such offers as shall have been received without the sale having occurred, provided that the failure(s) to close within any such 120-day period shall not have been caused by the Development Owner or matters related to the title for the Development.

(D) At any time prior to the giving of the Notice of Intent, the Development Owner may enter into an agreement with one or more specific Qualified Nonprofit Organizations and/or Tenant Organizations to provide a right of first refusal to purchase the Development for the Minimum Purchase Price, but any such agreement shall only permit purchase of the Development by such organization in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(E) The Department shall, at the request of the Development Owner, identify in the LURA a Qualified Nonprofit Organization or Tenant Organization which shall hold a limited priority in exercising a right of first refusal to purchase the Development at the Minimum Purchase Price, in accordance with and subject to the priorities set forth in subparagraph (B) of this paragraph.

(F) The Department shall have the right to enforce the Development Owner's obligation to sell the Development as herein contemplated by obtaining a power-of-attorney from the Development Owner to execute such a sale or by obtaining an order for specific performance of such obligation or by such other means or remedy as shall be, in the Department's discretion, appropriate.

(27) Leveraging of Private, State, and Federal Resources. Applications may qualify to receive 1 point for this item. (§2306.6725(a)(3)). Funding sources used for points under paragraph (5) of this subsection, may not be used for this point item.

(A) Evidence must be submitted in the Application that the proposed Development has received or will receive loan(s), grant(s) or in-kind contributions from a private, state or federal resource, which include Capital Grant Funds and HOPE VI funds, that is equal to or greater than 2% (do not round) of the Total Housing Development Costs reflected in the Application.

(B) For in-kind contributions, evidence must be submitted in the Application from a private, state or federal resource which substantiates the value of the in-kind contributions. Development based rental subsidies from private, state or federal resource may qualify under this section if evidence of the remaining value of the contract is submitted from the source. The value of the contract does not include past subsidies.

(C) Qualifying funds awarded through local entities may qualify for points if the original source of the funds is from a private, state or federal source. If qualifying funds awarded through local entities are used for this item, a statement from the local entity must be provided that identifies the original source of funds.

(D) Applicants may only submit enough sources to substantiate the point request, and all sources must be included in the Sources and Uses form. For example, two sources may be submitted if each is for an amount equal to 1% of the Total Housing Development Cost. However, two sources may not be submitted if each source is for an amount equal to 2% of the Total Housing Development Cost.

(E) The funding must be in addition to the primary funding (construction and permanent loans) that is proposed to be utilized and cannot be issued from the same primary funding source or an affiliated source. The provider of the funds must attest to the fact that they are not the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application and attest that none of the funds committed were first provided to the entity by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application, unless the Applicant itself is a Local Political Subdivision.

(F) The Development must have already applied for funding from the funding entity. Evidence to be submitted with the Application must include a copy of the commitment of funds or a copy of the application to the funding entity and a letter from the funding entity indicating that the application was received. At the time the executed Commitment Notice is required to be submitted, the Applicant or Development Owner must provide evidence of a commitment approved by the governing entity of the entity for the sufficient financing to the Department. If the funding commitment from the private, state or federal source, identified in the Application, or qualifying substitute source, has not been received by the date the Department's Commitment Notice is to be submitted, the Application will be evaluated to determine if the loss of these points would have resulted in the Department's not committing the tax credits. If the loss of points would have made the Application noncompetitive, the Commitment Notice will be rescinded and the credits reallocated. If the Application would still be competitive even with the loss of points and the loss would not have impacted the recommendation for an award, the Application will be reevaluated for financial feasibility. If the Application is infeasible without the commitment from the private,

state or federal source, the Commitment Notice will be rescinded and the credits reallocated. Funds from the Department's HOME and Housing Trust Fund sources will only qualify under this category if there is a Notice of Funding Availability (NOFA) out for available funds and the Applicant is eligible under that NOFA.

(G) To qualify for this point, the Rent Schedule must show that at least 3% (not using normal rounding) of all Low-Income Units are designated to serve individuals or families with incomes at or below 30% of AMGI.

(28) Third-Party Funding Commitment Outside of Qualified Census Tracts. Applications may qualify to receive 1 point for this item. (§2306.6710(e)(1)). Evidence that the proposed Development has documented and committed Third-Party funding sources and the Development is located outside of a Qualified Census Tract. The provider of the funds must attest to the fact that they are not the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application and attest that none of the funds committed were first provided to the entity by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application. The commitment of funds (an application alone will not suffice) must already have been received from the Third-Party funding source and must be equal to or greater than 2% (do not round) of the Total Development Costs reflected in the Application. Funds from the Department's HOME and Housing Trust Fund sources will not qualify under this category. The Third-Party funding source cannot be a loan from a commercial lender.

(29) Scoring Criteria Imposing Penalties. (§2306.6710(b)(2))

(A) Penalties will be imposed on an Application if the Applicant has requested an extension of the Carryover or 10% Test deadline, and did not meet the original submission deadline, relating to Developments receiving a Housing Tax Credit commitment made in the Application Round preceding the current round. For each extension request made, the Applicant will receive a 5 point deduction. No penalty points or fees will be deducted for extensions that were requested on Developments that involved Rehabilitation when the Department is the primary lender, or for Developments that involve TRDO-USDA as a lender if TRDO-USDA or the Department is the cause for the Applicant not meeting the deadline.

(B) Penalties will be imposed on an Application if the Developer or Principal of the Applicant has been removed by the lender, equity provider, or limited partners in the past five (5) years for failure to perform its obligations under the loan documents or limited partnership agreement. An affidavit will be provided by the Applicant and the Developer certifying that they have not been removed as described, or requiring that they disclose each instance of removal with a detailed description of the situation. If an Applicant or Developer submits the affidavit, and the Department learns at a later date that a removal did take place as described, then the Application will be terminated and any Allocation made will be rescinded. The Applicant, Developers or Principals of the Applicant that are in court proceedings at the time of Application must disclose this information and the situation will be evaluated on a case-by-case basis. 3 points will be deducted for each instance of removal.

(C) Penalties will be imposed on an Application if Developer or Principal of the Applicant violates the Adherence to Obligations pursuant to subsection (c) of this section.

(j) Tie Breaker Factors.

(1) In the event that two or more Applications receive the same number of points in any given Set-Aside category, Rural Regional Allocation or Urban Regional Allocation, or Uniform State Service Region, and are both practicable and economically feasible, the Department will utilize the factors in this paragraph, in the order they are presented, to determine which Development will receive a preference in consideration for a tax credit commitment.

(A) Applications involving any Rehabilitation or Reconstruction of existing Units will win this first tier tie breaker over Applications involving solely New Construction or Adaptive Reuse.

(B) The Application located in the municipality or, if located outside a municipality, the county that has the lowest state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Round begins as reflected in the Reference Manual will win this second tier tie breaker.

(C) The amount of requested tax credits per square foot of Net Rentable Area (the lower credits per square foot has preference).

(D) Developments that are intended for eventual tenant ownership. Such Developments must utilize a detached single family site plan and building design and have a business plan describing how the Development is intended to convert to tenant ownership at the end of the 15-year compliance period.

(2) This paragraph identifies how ties will be handled when dealing with the restrictions on location identified in §49.5(a)(8) of this chapter, and in dealing with any issues relating to capture rate calculation. When two Tax-Exempt Bond Developments would violate one of these restrictions, and only one Development can be selected, the Department will utilize the reservation docket number issued by the Texas Bond Review Board in making its determination. When two Competitive Housing Tax Credits Applications in the Application Round would violate one of these restrictions, and only one Development can be selected, the Department will utilize the tie breakers identified in paragraph (1) of this subsection. When a Tax-Exempt Bond Development and a Competitive Housing Tax Credit Application in the Application Round would both violate a restriction, the following determination will be used:

(A) Tax-Exempt Bond Developments that receive their reservation from the Bond Review Board on or before April 30, 2009 will take precedence over the Housing Tax Credit Applications in the 2009 Application Round;

(B) Housing Tax Credit Applications approved by the Board for tax credits in July 2009 will take precedence over the Tax-Exempt Bond Developments that received their reservation from the Bond Review Board on or between May 1, 2009 and July 31, 2009; and

(C) After July 31, 2009, a Tax-Exempt Bond Development with a reservation from the Bond Review Board will take precedence over any Housing Tax Credit Application from the 2009 Application Round on the Waiting List. However, if no reservation has been issued by the date the Board approves an allocation to a Development from the Waiting List of Applications in the 2009 Application Round or a forward commitment, then the Waiting List Application or forward commitment will be eligible for its allocation.

(k) Staff Recommendations. (§2306.1112 and §2306.6731). After eligible Applications have been evaluated, ranked and underwritten in accordance with the QAP and the Rules, the Department staff shall make its recommendations to the Executive Award and Review Advisory Committee. The Committee will develop funding priorities and shall make commitment recommendations to the Board. Such recommendations and supporting documentation shall be made in advance of the meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. The Committee will provide writ-

ten, documented recommendations to the Board which will address at a minimum the financial or programmatic viability of each Application and a list of all submitted Applications which enumerates the reason(s) for the Development's proposed selection or denial, including all factors provided in §49.10(a) of this chapter that were used in making this determination.

§49.10. Board Decisions; Waiting List; Forward Commitments.

(a) Board Decisions. The Board's decisions shall be based upon the Department's and the Board's evaluation of the proposed Developments' consistency with the criteria and requirements set forth in this QAP and Rules.

(1) On awarding tax credits, the Board shall document the reasons for each Application's selection, including any discretionary factors used in making its determination, and the reasons for any decision that conflicts with the recommendations made by Department staff. The Board may not make, without good cause, a commitment decision that conflicts with the recommendations of Department staff. Good cause includes the Board's decision to apply discretionary factors. (§§2306.6725(c); 2306.6731; and 42(m)(1)(A)(iv))

(2) In making a determination to allocate tax credits, the Board shall be authorized to not rely solely on the number of points scored by an Application. It shall in addition, be entitled to take into account, as it deems appropriate, the discretionary factors listed in this paragraph. The Board may also apply these discretionary factors to its consideration of Tax-Exempt Bond Developments. If the Board disapproves or fails to act upon an Application, the Department shall issue to the Applicant a written notice stating the reason(s) for the Board's disapproval or failure to act. In making tax credit decisions (including those related to Tax-Exempt Bond Developments), the Board, in its discretion, may evaluate, consider and apply any one or more of the following discretionary factors: (§2306.111(g)(3))

(A) The Developer market study;

(B) The location;

(C) The compliance history of the Developer;

(D) The financial feasibility;

(E) The appropriateness of the Development's size and configuration in relation to the housing needs of the community in which the Development is located;

(F) The Development's proximity to other low-income housing Developments;

(G) The availability of adequate public facilities and services;

(H) The anticipated impact on local school districts;

(I) Zoning and other land use considerations;

(J) Any matter considered by the Board to be relevant to the approval decision and in furtherance of the Department's purposes; and

(K) Other good cause as determined by the Board.

(3) Before the Board approves any Application, the Department shall assess the compliance history of the Applicant with respect to all applicable requirements; and the compliance issues associated with the proposed Development, including compliance information provided by the Texas State Affordable Housing Corporation. The Committee shall provide to the Board a written report regarding the results of the assessments. The written report will be included in the appropriate Development file for Board and Department review. The Board shall fully document and disclose any instances in which the Board approves a Development Application despite any noncompliance associated with the Development or Applicant. (§2306.057)

(b) Waiting List. (§2306.6711(c) and (d)). If the entire State Housing Credit Ceiling for the applicable calendar year has been committed or allocated in accordance with this chapter, the Board shall generate, concurrently with the issuance of commitments, a waiting list of additional Applications ranked by score in descending order of priority based on Set-Aside categories and regional allocation goals. The Board may also apply discretionary factors in determining the Waiting List. If at any time prior to the end of the Application Round, one or more Commitment Notices expire or a sufficient amount of the State Housing Credit Ceiling becomes available, the Board shall issue a Commitment Notice to Applications on the waiting list subject to the amount of returned credits, the regional allocation goals and the Set-Aside categories, including the 10% Nonprofit Set-Aside allocation and 15% At-Risk Set-Aside allocation and 5% TRDO-USDA Set-Aside required under the Code, §42(h)(5). At the end of each calendar year, all Applications which have not received a Commitment Notice shall be deemed terminated. The Applicant may re-apply to the Department during the next Application Acceptance Period.

(c) Forward Commitments. The Board may determine to issue commitments of tax credit authority with respect to Applications from the State Housing Credit Ceiling for the calendar year following the year of issuance (each a "forward commitment") to Applications submitted in accordance with the rules and timelines required under this rule and the Application Submission Procedures Manual. The Board will utilize its discretion in determining the amount of credits to be allocated as forward commitments and the reasons for those commitments considering score and discretionary factors. The Board may utilize the forward commitment authority to allocate credits to TRDO-USDA Developments which are experiencing foreclosure or loan acceleration at any time during the 2009 calendar year, also referred to as Rural Rescue Developments. Applications that are submitted under the 2009 QAP and granted a Forward Commitment of 2010 Housing Tax Credits are considered by the Board to comply with the 2010 QAP by having satisfied the requirements of this 2009 QAP, except for statutorily required QAP changes.

(1) Unless otherwise provided in the Commitment Notice with respect to a Development selected to receive a forward commitment, actions which are required to be performed under this chapter by a particular date within a calendar year shall be performed by such date in the calendar year of the State Housing Credit Ceiling from which the credits are allocated.

(2) Any forward commitment made pursuant to this section shall be made subject to the availability of State Housing Credit Ceiling in the calendar year with respect to which the forward commitment is made. If a forward commitment shall be made with respect to a Development placed in service in the year of such commitment, the forward commitment shall be a "binding commitment" to allocate the applicable credit dollar amount within the meaning of the Code, §42(h)(1)(C).

(3) If tax credit authority shall become available to the Department in a calendar year in which forward commitments have been awarded, the Department may allocate such tax credit authority to any eligible Development which received a forward commitment, in which event the forward commitment shall be canceled with respect to such Development.

§49.11. Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants; Viewing of Pre-Applications and Applications; Confidential Information.

(a) Required Application Notifications, Receipt of Public Comment, and Meetings with Applicants.

(1) Within approximately fourteen (14) days after the close of the Pre-Application Acceptance Period, the Department shall publish a Pre-Application Submission Log on its website. Such log shall contain the Development name, address, Set-Aside, number of Units, requested credits, owner contact name and phone number. (§2306.6717(a)(1))

(2) Approximately thirty (30) days before the close of the Application Acceptance Period, the Department will release the evaluation and assessment of the Pre-Applications on its website.

(3) Not later than fourteen (14) days after the close of the Pre-Application Acceptance Period, or Application Acceptance Period for Applications for which no Pre-Application was submitted, the Department shall: (§2306.1114)

(A) Publish an Application submission log on its website.

(B) Give notice of a proposed Development in writing that provides the information required under clause (i) of this subparagraph to all of the individuals and entities described in clauses (ii) - (x) of this subparagraph. (§2306.6718(a) - (c))

(i) The following information will be provided in these notifications:

(I) The relevant dates affecting the Application including the date on which the Application was filed, the date or dates on which any hearings on the Application will be held and the date by which a decision on the Application will be made;

(II) A summary of relevant facts associated with the Development;

(III) A summary of any public benefits provided as a result of the Development, including rent subsidies and tenant services; and

(IV) The name and contact information of the employee of the Department designated by the director to act as the information officer and liaison with the public regarding the Application.

(ii) Presiding officer of the Governing Body of the political subdivision containing the Development (mayor or county judge) to advise such individual that the Development, or a part thereof, will be located in his/her jurisdiction and request any comments which such individual may have concerning such Development;

(iii) If the Department receives a letter from the mayor or county judge of an affected city or county that expresses opposition to the Development, the Department will give consideration to the objections raised and will offer to visit the proposed site or Development with the mayor or county judge or their designated representative within thirty (30) days of notification. The site visit must occur before the Housing Tax Credit can be approved by the Board. The Department will obtain reimbursement from the Applicant for the necessary travel and expenses at rates consistent with the state authorized rate; (General Appropriation Act, Article VII, Rider 5) (§42(m)(1))

(iv) Any member of the Governing Body of a political subdivision who represents the Area containing the Development. If the Governing Body has single-member districts, then only that member of the Governing Body for that district will be notified, however if the Governing Body has at-large districts, then all members of the Governing Body will be notified;

(v) State representative and state senator who represent the community where the Development is proposed to be located. If the state representative or senator host a community meeting, the Department, if timely notified, will ensure staff are in attendance to provide information regarding the Housing Tax Credit Program; (General Appropriation Act, Article VII, Rider 8(d))

(vi) United States representative who represents the community containing the Development;

(vii) Superintendent of the school district containing the Development;

(viii) Presiding officer of the board of trustees of the school district containing the Development;

(ix) Any Neighborhood Organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development site or otherwise known to the Applicant or Department and on record with the state or county; and

(x) Advocacy organizations, social service agencies, civil rights organizations, tenant organizations, or others who may have an interest in securing the development of affordable housing that are registered on the Department's e-mail list service.

(C) The Department shall maintain an electronic mail notification service that will notify a subscriber, by zip code, of: (§2306.67171)

(i) The receipt of a Pre-Application or Application for a Development Site within such zip code within fourteen (14) days of receipt;

(ii) The publication of materials to be presented to the Board for the Pre-Application or Application referred to in clause (i) of this subparagraph; and

(iii) Any public hearing for the Pre-Application or Application referred to in clause (i) of this subparagraph.

(D) The elected officials identified in subparagraph (B) of this paragraph will be provided an opportunity to comment on the Application during the Application evaluation process. (§42(m)(1))

(4) The Department shall hold at least three public hearings in different Uniform State Service Regions of the state to receive comment on the submitted Applications and on other issues relating to the Housing Tax Credit Program for Competitive Housing Tax Credit Applications under the State Housing Credit Ceiling. (§2306.6717(c))

(5) The Department shall make available on the Department's website information regarding the Housing Tax Credit Program including notice of public hearings, meetings, Application Round opening and closing dates, submitted Applications, and Applications approved for underwriting and recommended to the Board, and shall provide that information to locally affected community groups, local and state elected officials, local housing departments, any appropriate newspapers of general or limited circulation that serve the community in which a proposed Development is to be located, nonprofit and for-profit organizations, on-site property managers of occupied Developments that are the subject of Applications for posting in prominent locations at those Developments, and any other interested persons including community groups, who request the information. (§2306.6717(b))

(6) Approximately forty (40) days prior to the date of the July Board meeting at which the issuance of Commitment Notices shall be discussed, the Department will notify each Applicant of the receipt of any opposition received by the Department relating to his or her Development at that time.

(7) Not later than the third working day after the date of completion of each stage of the Application process, including the results of the Application scoring and underwriting phases and the commitment phase, the results will be posted to the Department's website. (§2306.6717(a)(3))

(8) At least thirty (30) days prior to the date of the July Board meeting at which the issuance of Commitment Notices shall be discussed, the Department will:

(A) Provide the Application scores to the Board; and (§2306.6711(a))

(B) If feasible, post to the Department's website the entire Application, including all supporting documents and exhibits, the Application Log as further described in §49.19(b) of this chapter, a scoring sheet providing details of the Application score, and any other documents relating to the processing of the Application. (§2306.6717(a)(1) and (2))

(9) A summary of comments received by the Department on specific Applications shall be part of the documents required to be reviewed by the Board under this subsection if such comments are received thirty (30) business days prior to the date of the Board Meeting at which the issuance of Commitment Notices or Determination Notices shall be discussed. Comments received after this deadline will not be part of the documentation submitted to the Board. However, a public comment period will be available prior to the Board's decision, at the Board meeting where tax credit commitment decisions will be made.

(10) Not later than the 120th day after the date of the initial issuance of Commitment Notices for Housing Tax Credits, the Department shall provide an Applicant who did not receive a commitment for Housing Tax Credits with an opportunity to meet and discuss with the Department the Application's deficiencies, scoring and underwriting. (§2306.6711(e))

(b) Viewing of Pre-Applications and Applications. Pre-Applications and Applications for tax credits are public information and are available upon request after the Pre-Application and Application Acceptance Periods close, respectively. All Pre-Applications and Applications, including all exhibits and other supporting materials, except Personal Financial Statements and Social Security numbers, will be made available for public disclosure after the Pre-Application and Application periods close, respectively. The content of Personal Financial Statements may still be made available for public disclosure upon request if the Attorney General's office deems it is not protected from disclosure by the Texas Public Information Act.

(c) Confidential Information. The Department may treat the financial statements of any Applicant as confidential and may elect not to disclose those statements to the public. A request for such information shall be processed in accordance with §552.305 of the Texas Government Code. (§2306.6717(d))

§49.12. Tax-Exempt Bond Developments: Filing of Applications; Applicability of Rules; Supportive Services; Financial Feasibility Evaluation; Satisfaction of Requirements.

(a) Filing of Applications for Tax-Exempt Bond Developments. Applications for a Tax-Exempt Bond Development may be submitted to the Department as described in paragraphs (1) and (2) of this subsection:

(1) Applicants which receive advance notice of a Program Year 2009 reservation as a result of the Texas Bond Review Board's (TBRB) lottery for the private activity volume cap must file a complete Application not later than 12:00 p.m. on December 29, 2008. Such filing must be accompanied by the Application fee described in §49.20 of this chapter;

(2) Applicants which receive advance notice of a Program Year 2009 reservation after being placed on the waiting list as a result of the TBRB lottery for private activity volume cap must submit Volume 1 and Volume 2 of the Application and the Application fee described in §49.20 of this chapter prior to the Applicant's bond reservation date as assigned by the TBRB. Those Applications designated as Priority 3 by the TBRB must submit Volumes I and II within fourteen (14) days of the bond reservation date if the Applicant intends to apply for tax credits regardless of the Issuer. Any outstanding documentation required under this section regardless of Priority must be submitted to the Department at least sixty (60) days prior to the Board meeting at which the decision to issue a Determination Notice would be made unless a waiver is requested by the Applicant. The Department staff will have limited discretion to recommend an Application with appropriate justification of the late submission;

(3) Applications involving multiple sites must submit the required information as outlined in the Application Submission Procedures Manual. The Application will be considered to be one Application as identified in Chapter 1372, Texas Government Code.

(b) Applicability of Rules for Tax-Exempt Bond Developments. Tax-Exempt Bond Development Applications are subject to all rules in this chapter, with the only exceptions being the following sections: §49.4 of this chapter (regarding State Housing Credit Ceiling), §49.7 of this chapter (regarding Regional Allocation and Set-Asides), §49.8 of this chapter (regarding Pre-Application), §49.9(d) and (f) of this chapter (regarding Evaluation Processes for Competitive Applications and Rural Rescue Applications), §49.9(i) of this chapter (regarding Selection Criteria), §49.10(b) and (c) of this chapter (regarding Waiting List and Forward Commitments), and §49.14(a) and (b) of this chapter (regarding Carryover and 10% Test). Such Developments requesting a Determination Notice in the current calendar year must meet all Threshold Criteria requirements stipulated in §49.9(h) of this chapter. Such Developments which received a Determination Notice in a prior calendar year must meet all Threshold Criteria requirements stipulated in the QAP and Rules in effect for the calendar year in which the Determination Notice was issued; provided, however, that such Developments shall comply with all procedural requirements for obtaining Department action in the current QAP and Rules; and such other requirements of the QAP and Rules as the Department determines applicable. Applicants will be required to meet all conditions of the Determination Notice by the time the construction loan is closed unless otherwise specified in the Determination Notice. Applicants must meet the requirements identified in §49.15 of this chapter. No later than sixty (60) days following closing of the bonds, the Development Owner must also submit a Management Plan and an Affirmative Marketing Plan (as further described in the Carryover Allocation Procedures Manual), and evidence must be provided at this time of attendance of the Development Owner or management company at Department-approved Fair Housing training relating to leasing and management issues for at least five (5) hours and the Development architect and engineer at Department-approved Fair Housing training relating to design issues for at least five (5) hours. Certifications must not be older than two (2) years. Applications that receive a reservation from the TBRB on or before December 31, 2008 will be required to satisfy the requirements of the 2008 QAP; Applications that receive a reservation from the TBRB on or after January 1, 2009 will be required to satisfy the requirements of the 2009 QAP.

(c) Supportive Services for Tax-Exempt Bond Developments. Tax-Exempt Bond Development Applications must provide an executed agreement with a qualified service provider for the provision of

special supportive services that would otherwise not be available for the tenants. No fees may be charged to the tenants for any of the services. Services must be provided on-site or transportation to off-site services must be provided. The provision of these services will be included in the LURA. Acceptable services as described in paragraphs (1) - (3) of this subsection include:

(1) The services must be in at least one of the following categories: child care, transportation, notary public service, basic adult education, legal assistance, counseling services, GED preparation, English as a second language classes, vocational training, home buyer education, credit counseling, financial planning assistance or courses, health screening services, health and nutritional courses, organized team sports programs, youth programs, scholastic tutoring, social events and activities, community gardens or computer facilities;

(2) Any other program described under Title IV-A of the Social Security Act (42 U.S.C. §§601 et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of out-of wedlock pregnancies; and encourages the formation and maintenance of two-parent families; or

(3) Any other services approved in writing by the Issuer. The plan for tenant supportive services submitted for review and approval of the Issuer must contain a plan for coordination of services with state workforce development and welfare programs. The coordinated effort will vary depending upon the needs of the tenant profile at any given time as outlined in the plan.

(d) Financial Feasibility Evaluation for Tax-Exempt Bond Developments. Code §42(m)(2)(D) requires the bond issuer (if other than the Department) to ensure that a Tax-Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. Treasury Regulations prescribe the occasions upon which this determination must be made. In light of the requirement, issuers may either elect to underwrite the Development for this purpose in accordance with the QAP and the Underwriting Rules and Guidelines, §1.32 of this title or request that the Department perform the function. If the issuer underwrites the Development, the Department will, nonetheless, review the underwriting report and may make such changes in the amount of credits which the Development may be allowed as are appropriate under the Department's guidelines. The Determination Notice issued by the Department and any subsequent IRS Form(s) 8609 will reflect the amount of tax credits for which the Development is determined to be eligible in accordance with this subsection, and the amount of tax credits reflected in the IRS Form 8609 may be greater or less than the amount set forth in the Determination Notice, based upon the Department's and the bond issuer's determination as of each building's placement in service. Any increase of tax credits, from the amount specified in the Determination Notice, at the time of each building's placement in service will only be permitted if it is determined by the Department, as required by Code §42(m)(2)(D), that the Tax-Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. Increases to the amount of tax credits that exceed 110% of the amount of credits reflected in the Determination Notice are contingent upon approval by the Board. Increases to the amount of tax credits that do not exceed 110% of the amount of credits reflected in the Determination Notice may be approved administratively by the Executive Director.

(e) Satisfaction of Requirements for Tax-Exempt Bond Developments. If the Department staff determines that all requirements of this QAP and Rules have been met, the Department will recommend that the Board authorize the issuance of a Determination Notice. The Board, however, may utilize the discretionary factors identified in §49.10(a) of this chapter in determining if they will authorize the Department to issue a Determination Notice to the Development Owner. The Determination Notice, if authorized by the Board, will confirm that the Development satisfies the requirements of the QAP and Rules in accordance with the Code, §42(m)(1)(D).

(f) Certification of Tax Exempt Applications with New Docket Numbers. Applications that are processed through the Department review and evaluation process and receive an affirmative Board Determination, but do not close the bonds prior to the bond reservation expiration date, and subsequently have that docket number withdrawn from the TBRB, may have their Determination Notice reinstated. The Applicant would need to receive a new docket number from the TBRB. One of the following must apply:

(1) The new docket number must be issued in the same program year as the original docket number and must not be more than four (4) months from the date the original application was withdrawn from the TBRB. The application must remain unchanged. This means that at a minimum, the following cannot have changed: site control, total number of units, unit mix (bedroom sizes and income restrictions), design/site plan documents, financial structure including bond and Housing Tax Credit amounts, development costs, rent schedule, operating expenses, sources and uses, ad valorem tax exemption status, target population, scoring criteria (TDHCA issues) or TBRB priority status including the effect on the inclusive capture rate. Note that the entities involved in the Applicant entity and Developer cannot change; however, the certification can be submitted even if the lender, syndicator or issuer changes, as long as the financing structure and terms remain unchanged. Notifications under §49.9(h)(8) of this chapter are not required to be reissued. In the event that the Department's Board has already approved the Application for tax credits, the Application is not required to be presented to the Board again (unless there is public opposition) and a revised Determination Notice will be issued once notice of the assignment of a new docket number has been provided to the Department and the Department has confirmed that the capture rate and market demand remain acceptable. This certification must be submitted no later than thirty (30) days after the date the TBRB issues the new docket number and no later than thirty (30) days before the anticipated closing. In the event that the Department's Board has not yet approved the Application, the Application will continue to be processed and ultimately provided to the Board for consideration. This certification must be submitted no later than thirty (30) days after the date the TBRB issues the new docket number and no later than forty-five (45) days before the anticipated Department's Board meeting date; or

(2) If there are changing to the Application as referenced in paragraph (1) of this subsection, the Applicant will be required to submit a new Application in full, along with the applicable fees, to be reviewed and evaluated in its entirety for a new determination notice to be issued.

§49.13. Commitment and Determination Notices; Agreement and Election Statement; Documentation Submission Requirements.

(a) Commitment and Determination Notices. If the Board approves an Application for a Housing Tax Credit Allocation, the Department will:

(1) If the Application is for a commitment from the State Housing Credit Ceiling, issue a Commitment Notice to the Development Owner which shall:

(A) Confirm that the Board has approved the Application; and

(B) State the Department's commitment to make a Housing Credit Allocation to the Development Owner in a specified amount, subject to the feasibility determination described in §49.16 of this chapter, and compliance by the Development Owner with the remaining requirements of this chapter and any other terms and conditions set forth therein by the Department. This commitment shall expire on the date specified therein unless the Development Owner indicates acceptance of the commitment by executing the Commitment Notice, pays the required fee specified in §49.20 of this chapter, and satisfies any other conditions set forth therein by the Department. The Commitment Notice expiration date may not be extended;

(2) If the Application regards a Tax-Exempt Bond Development, issue a Determination Notice to the Development Owner which shall:

(A) Confirm the Board's determination that the Development satisfies the requirements of this QAP; and

(B) State the Department's commitment to issue IRS Form(s) 8609 to the Development Owner in a specified amount, subject to the requirements set forth in §49.12 of this chapter and compliance by the Development Owner with all applicable requirements of this chapter and any other terms and conditions set forth therein by the Department. The Determination Notice shall expire on the date specified therein unless the Development Owner indicates acceptance by executing the Determination Notice and paying the required fee specified in §49.20 of this chapter. The Determination Notice shall also expire unless the Development Owner satisfies any conditions set forth therein by the Department. The Determination Notice expiration date may not be extended;

(3) Notify, in writing, the mayor or other equivalent chief executive officer of the municipality in which the Property is located informing him/her of the Board's issuance of a Commitment Notice or Determination Notice, as applicable;

(4) A Commitment or Determination Notice shall not be issued with respect to any Development for an unnecessary amount or where the cost for the total development, acquisition, construction or Rehabilitation exceeds the limitations established from time to time by the Department and the Board, unless the Department staff make a recommendation to the Board based on the need to fulfill the goals of the Housing Tax Credit Program as expressed in this QAP and Rules, and the Board accepts the recommendation. The Department's recommendation to the Board shall be clearly documented;

(5) A Commitment or Determination Notice shall not be issued with respect to the Applicant, the Development Owner, the General Contractor, or any Affiliate of the General Contractor that is active in the ownership or Control of one or more other low-income rental housing properties in the state of Texas administered by the Department that is in Material Noncompliance with the LURA (or any other document containing an Extended Low-income Housing Commitment) or the program rules in effect for such property, as described in Chapter 60 of this title;

(6) The executed Commitment or Determination Notice must be returned to the Department on the date specified within the Commitment Notice or Determination Notice, which shall be no earlier than ten (10) days after the effective date of the Notice.

(b) Agreement and Election Statement. Together with the Development Owner's acceptance of the Carryover Allocation, the Development Owner may execute an Agreement and Election Statement, in the form prescribed by the Department, for the purpose of fixing the Applicable Percentage for the Development as that for the month in which the Carryover Allocation was accepted (or the month the bonds were closed for Tax-Exempt Bond Developments), as provided in the Code, §42(b)(2). Current Treasury Regulations, §1.42-8(a)(1)(v), suggest that in order to permit a Development Owner to make an effective election to fix the Applicable Percentage for a Development (receiving credits from the State Housing Credit Ceiling), the Carryover Allocation Document must be executed by the Department and the Development Owner within the same month. The Department staff will cooperate with a Development Owner, as possible or reasonable; to assure that the Carryover Allocation Document can be so executed.

(c) Documentation Submission Requirements at Commitment of Funds. No later than the date the Commitment Notice or Determination Notice is executed by the Applicant and returned to the Department with the appropriate Commitment or Determination Fee as further described in §49.20(f) of this chapter, the following documents must also be provided to the Department. Failure to provide these documents may cause the Commitment or Determination to be rescinded. For each Applicant all of the following must be provided:

(1) Evidence that the entity has the authority to do business in Texas in the form of a Certificate of Filing from the Texas Secretary of State;

(2) A Certificate of Account Status from the Texas Comptroller of Public Accounts or, if such a Certificate is not available because the entity is newly formed, a statement to such effect; and a Certificate of Organization from the Texas Secretary of State;

(3) Copies of the entity's governing documents, including, but not limited to, its Articles of Incorporation, Articles of Organization, Certificate of Limited Partnership, Bylaws, Regulations and/or Partnership Agreement; and

(4) Evidence that the signer(s) of the Application have the authority to sign on behalf of the Applicant in the form of a corporate resolution or by-laws which indicate same from the sub-entity in Control and that those Persons signing the Application constitute all Persons required to sign or submit such documents.

§49.14. Carryover; 10% Test; Commencement of Substantial Construction.

(a) Carryover. All Developments which received a Commitment Notice, and will not be placed in service and receive IRS Form 8609 in the year the Commitment Notice was issued, must submit the Carryover documentation to the Department no later than November 2 of the year in which the Commitment Notice is issued pursuant to §42(h)(1)(C) of this Code.

(1) Commitments for credits will be terminated if the Carryover documentation, or an approved extension, has not been received by this deadline. In the event that a Development Owner intends to submit the Carryover documentation in any month preceding November of the year in which the Commitment Notice is issued, in order to fix the Applicable Percentage for the Development in that month, it must be submitted no later than the first Friday in the preceding month.

(2) If the financing structure, syndication rate, amount of debt or syndication proceeds are revised at the time of Carryover from what was proposed in the original Application, applicable documentation of such changes must be provided and the Development may be reevaluated by the Department.

(3) The Carryover Allocation format must be properly completed and delivered to the Department as prescribed by the Carryover Allocation Procedures Manual.

(4) All Carryover Allocations will be contingent upon the Development Owner providing evidence that the Development site is still under control of the Development Owner. For purposes of this

paragraph, site control must be identical to the same Development Site that was submitted at the time of Application Submission.

(5) The Department will not execute a Carryover Allocation Agreement with any Owner in Material Noncompliance on October 1, 2009.

(b) 10% Test. No later than eleven (11) months from the date the Carryover Allocation Document is executed by the Department and the Development Owner, more than 10% of the Development Owner's reasonably expected basis must have been incurred pursuant to §42(h)(1)(E)(i) and (ii) of the Internal Revenue Code (as amended by The Housing and Economic Recovery Act of 2008) and Treasury Regulations, §1.42-6. The evidence to support the satisfaction of this requirement must be submitted to the Department no later than December 1 of the year following the execution of the Carryover Allocation Document in a format prescribed by the Department. At the time of submission of the documentation, the Development Owner must also submit a Management Plan and an Affirmative Marketing Plan as further described in the Carryover Allocation Procedures Manual. Evidence must be provided at this time of attendance of the Development Owner or management company at Department-approved Fair Housing training relating to leasing and management issues for at least five (5) hours and the Development architect and engineer at Department-approved Fair Housing training relating to design issues for at least five (5) hours on or before the time the 10% Test Documentation is submitted. Certifications must not be older than two (2) years from the date of submission of the 10% Test Documentation. The 10% Test Documentation will be contingent upon the following, in addition to all other conditions placed upon the Application in the Commitment Notice:

(1) Evidence that the Development Owner has purchased, transferred, leased or otherwise has ownership of, the Development Site;

(2) A current original plat or survey of the land, prepared by a duly licensed Texas Registered Professional Land Surveyor. Such survey shall conform to standards prescribed in the Manual of Practice for Land Surveying in Texas as promulgated and amended from time to time by the Texas Surveyors Association as more fully described in the Carryover Procedures Manual;

(3) For all Developments involving New Construction or Adaptive Reuse, evidence of the availability of all necessary utilities/services to the Development site must be provided. Necessary utilities include natural gas (if applicable), electric, trash, water, and sewer. Such evidence must be a letter or a monthly utility bill from the appropriate municipal/local service provider. If utilities are not already accessible, then the letter must clearly state: an estimated time frame for provision of the utilities, an estimate of the infrastructure cost necessary to obtain service, and an estimate of any portion of that cost that will be borne by the Development Owner. Letters must be from an authorized individual representing the organization which actually provides the services. Such documentation should clearly indicate the Development Site. If utilities are not already accessible (undeveloped areas), then the letter should not be older than three (3) months from the first day of the Application Acceptance Period;

(4) The Development Owner must submit evidence of having commenced and continued substantial construction activities as defined in Chapter 60 of this title.

§49.15. LURA, Cost Certification.

(a) Land Use Restriction Agreement (LURA). The Development Owner must request a LURA from the Department no later than the date specified in Chapter 60 of this title, the Department's Compliance Rules. The Development Owner must complete, date, sign and acknowledge before a notary public the LURA and send the original to the Department for execution. The initial compliance and monitoring fee must be included, accompanied by a statement, signed by the Owner, indicating the start of the Development's Credit Period and the earliest placed in service date for the Development buildings. After receipt of the signed LURA from the Department, the Development Owner shall then record the LURA, along with any and all exhibits attached thereto, in the real property records of the county where the Development is located and return the original document, duly certified as to recordation by the appropriate county official, to the Department no later than the date that the Cost Certification Documentation is submitted to the Department. If any liens (other than mechanics' or materialmen's liens) shall have been recorded against the Development and/or the Property prior to the recording of the LURA, the Development Owner shall obtain the subordination of the rights of any such lienholder, or other effective consent, to the survival of certain obligations contained in the LURA, which are required by §42(h)(6)(E)(ii) of the Code to remain in effect following the foreclosure of any such lien. Receipt of such certified recorded original LURA by the Department is required prior to issuance of IRS Form 8609. A representative of the Department, or assigns, shall physically inspect the Development for compliance with the Application and the representations, warranties, covenants, agreements and undertakings contained therein. Such inspection will be conducted before the IRS Form 8609 is issued for a building, but it shall be conducted in no event later than the end of the second calendar year following the year the last building in the Development is placed in service. The Development Owner for Tax-Exempt Bond Developments shall obtain a subordination agreement wherein the lien of the mortgage is subordinated to the LURA. The LURA shall contain any provision which requires the Development Owner to restrict rents and incomes at any AMGI level, as approved by the Board. The restricted gross rents for any AMGI level outlined in the LURA will be calculated in accordance with §42(g)(2)(A), Internal Revenue Code.

(b) Cost Certification. The Cost Certification Procedures Manual sets forth the documentation required for the Department to perform a feasibility analysis in accordance with §42(m)(2)(C)(i)(II), Internal Revenue Code, and determine the final Credit to be allocated to the Development.

(1) To request IRS Forms 8609, Developments must have:

(A) Placed in Service by December 31 of the year the Commitment Notice was issued if a Carryover Allocation was not requested and received; or December 31 of the second year following the year the Carryover Allocation Agreement was executed;

(B) Scheduled a final construction inspection in accordance with Chapter 60 of this title, the Department's Compliance Monitoring Policies and Procedures;

(C) Informed the Department of and received written approval for all Development amendments in accordance with §49.17(c) of this chapter;

(D) Submitted to the Department the LURA in accordance with subsection (a) of this section;

(E) Paid all applicable Department fees; and

(F) Prepared all Cost Certification documentation as more fully described in the Cost Certification Procedures Manual including:

(i) Carryover Allocation Agreement/Determination Notice and Election Statement;

(ii) Owner's Statement of Certification;

(iii) Owner Summary;

(iv) Evidence of Nonprofit and CHDO Participation;

(v) Evidence of Historically Underutilized Business (HUB) Participation;

(vi) Development Summary;

(vii) As-Built Survey;

(viii) Closing Statement;

(ix) Title Policy;

(x) Evidence of Placement in Service;

(xi) Independent Auditor's Reports;

(xii) Total Development Cost Schedule;

(xiii) AIA Form G702 and G703, Application and Certificate for Payment;

(xiv) Rent Schedule;

(xv) Utility Allowance;

(xvi) Annual Estimated Operating Expenses and 15-Year Proforma;

(xvii) Current Annual Operating Statement and Rent Roll;

(xviii) Final Sources of Funds;

(xix) Executed Limited Partnership Agreement;

(xx) Loan Agreement or Firm Commitment;

(xxi) Architect's Certification of Fair Housing Requirements; and

(xxii) TDHCA Compliance Workshop Certificate.

(2) Required Cost Certification documentation must be received by the Department no later than January 15 following the year the Credit Period begins. Any Developments issued a Commitment Notice or Determination Notice that fails to submit its Cost Certification documentation by this deadline will be reported to the IRS and the Owner will be required to submit a request for extension consistent with §49.20(l) of this chapter;

(3) The Department will perform an initial evaluation of the Cost Certification documentation within forty-five (45) days from the date of receipt and notify the Development Owner in a deficiency letter of all additional required documentation. Any deficiency letters issued to the Development Owner pertaining to the Cost Certification documentation will also be copied to the syndicator. The Department will issue IRS Forms 8609 no later than ninety (90) days from the date that all required documents have been received;

(4) The Department will perform an evaluation to determine if the Applicant is in Material Noncompliance with the LURA (or any other document containing an Extended Low-income Housing Commitment) or the program rules in effect for the subject property, as described in Chapter 60 of this title, prior to issuance of IRS Forms 8609.

§49.16. Housing Credit Allocations.

(a) In making a commitment of a Housing Credit Allocation under this chapter, the Department shall rely upon information contained in the Application to determine whether a building is eligible for the credit under the Code, §42. The Development Owner shall bear full responsibility for claiming the credit and assuring that the Development complies with the requirements of the Code, §42. The Department shall have no responsibility for ensuring that a Development Owner who receives a Housing Credit Allocation from the Department will qualify for the tax credit.

(b) The Housing Credit Allocation Amount shall not exceed the dollar amount the Department determines is necessary for the financial feasibility and the long term viability of the Development throughout the affordability period. (§2306.6711(b)). Such determination shall be made by the Department at the time of issuance of the Commitment Notice or Determination Notice; at the time the Department makes a Housing Credit Allocation; and as of the date each building in a Development is placed in service. Any Housing Credit Allocation Amount specified in a Commitment Notice, Determination Notice or Carryover Allocation Document is subject to change by the Department based upon such determination. Such a determination shall be made by the Department based on its evaluation and procedures, considering the items specified in the Code, §42(m)(2)(B), and the Department in no way or manner represents or warrants to any Applicant, sponsor, investor, lender or other entity that the Development is, in fact, feasible or viable.

(c) The General Contractor hired by the Development Owner must meet specific criteria as defined by the General Appropriation Act, Article VII, Rider 8(c). A General Contractor hired by a Development Owner or a Development Owner, if the Development Owner serves as General Contractor must demonstrate a history of constructing similar types of housing without the use of federal tax credits. Evidence must be submitted to the Department, in accordance with §49.9(h)(4)(I) of this chapter, which sufficiently documents that the General Contractor has constructed some housing without the use of Housing Tax Credits. This documentation will be required as a condition of the Commitment Notice or Carryover Allocation Agreement, and must be complied with prior to commencement of construction and at cost certification and final allocation of credits.

(d) An allocation will be made in the name of the Development Owner identified in the related Commitment Notice or Determination Notice. If an allocation is made to a member or Affiliate of the ownership entity proposed at the time of Application, the Department will transfer the allocation to the ownership entity as consistent with the intention of the Board when the Development was selected for an award of tax credits. Any other transfer of an allocation will be subject to review and approval by the Department consistent with §49.17(c) of this chapter. The approval of any such transfer does not constitute a representation to the effect that such transfer is permissible under §42 of the Code or without adverse consequences thereunder, and the Department may condition its approval upon receipt and approval of complete current documentation regarding the owner including documentation to show consistency with all the criteria for scoring, evaluation and underwriting, among others, which were applicable to the original Applicant.

(e) The Department shall make a Housing Credit Allocation, either in the form of IRS Form 8609, with respect to current year allocations for buildings placed in service, or in the Carryover Allocation Document, for buildings not yet placed in service, to any Development Owner who holds a Commitment Notice which has not expired, and for which all fees as specified in §49.20 of this chapter have been received by the Department and with respect to which all applicable requirements, terms and conditions have been met. For Tax-Exempt Bond Developments, the Housing Credit Allocation shall be made in the form of a Determination Notice. For an IRS Form 8609 to be issued with respect to a building in a Development with a Housing Credit Allocation, satisfactory evidence must be received by the Department that such building is completed and has been placed in service in accordance with the provisions of the Department's Cost Certification Procedures

Manual. The Cost Certification documentation requirements will include a certification and inspection report prepared by a Third-Party accessibility specialist to certify that the Development meets all required accessibility standards. IRS Form 8609 will not be issued until the certifications are received by the Department. The Department shall mail or deliver IRS Form 8609 (or any successor form adopted by the Internal Revenue Service) to the Development Owner, with Part I thereof completed in all respects and signed by an authorized official of the Department. The delivery of the IRS Form 8609 will occur only after the Development Owner has complied with all procedures and requirements listed within the Cost Certification Procedures Manual. Regardless of the year of Application to the Department for Housing Tax Credits, the current year's Cost Certification Procedures Manual must be utilized when filing all cost certification materials. A separate Housing Credit Allocation shall be made with respect to each building within a Development which is eligible for a tax credit; provided, however, that where an allocation is made pursuant to a Carryover Allocation Document on a Development basis in accordance with the Code, §42(h)(1)(F), a housing credit dollar amount shall not be assigned to particular buildings in the Development until the issuance of IRS Form 8609s with respect to such buildings. The Department may delay the issuance of IRS Form 8609 if any Development violates the representations of the Application.

(f) In making a Housing Credit Allocation, the Department shall specify a maximum Applicable Percentage, not to exceed the Applicable Percentage for the building permitted by the Code, §42(b), and a maximum Qualified Basis amount. In specifying the maximum Applicable Percentage and the maximum Qualified Basis amount, the Department shall disregard the first-year conventions described in the Code, §42(f)(2)(A) and §42(f)(3)(B). The Housing Credit Allocation made by the Department shall not exceed the amount necessary to support the extended low-income housing commitment as required by the Code, §42(h)(6)(C)(i).

(g) Development inspections shall be required to show that the Development is built or rehabilitated according to construction Threshold Criteria and Development characteristics identified at application. At a minimum, all Development inspections must meet Uniform Physical Condition Standards (UPCS) as referenced in Treasury Regulation §1.42-5(d)(2)(ii) and include an inspection for quality during the construction process while defects can reasonably be corrected and a final inspection at the time the Development is placed in service. All such Development inspections shall be performed by the Department or by an independent Third Party inspector acceptable to the Department. The Development Owner shall pay all fees and costs of said inspections as described in §49.20 of this chapter. Details regarding the construction inspection process are set forth in the Department Rule Chapter 60 of this title, the Department's Compliance Monitoring Policies and Procedures. (§2306.081; General Appropriation Act, Article VII, Rider 8(b))

(h) After the entire Development is placed in service, which must occur prior to the deadline specified in the Carryover Allocation Document and as further outlined in §49.15 of this chapter, the Development Owner shall be responsible for furnishing the Department with documentation which satisfies the requirements set forth in the Cost Certification Procedures Manual. For purposes of this title, and consistent with IRS Notice 88-116, the placed in service date for a new or existing building used as residential rental property is the date on which the building is ready and available for its specifically assigned function and more specifically when the first Unit in the building is certified as being suitable for occupancy in accordance with state and local law and as certified by the appropriate local authority or registered architect as ready for occupancy. The Cost Certification must be submitted for the entire Development; therefore partial Cost Certifications are not allowed. The Department may require copies of invoices and receipts and statements for materials and labor utilized for the New Construction or Rehabilitation and, if applicable, a closing statement for the acquisition of the Development as well as for the closing of all interim and permanent financing for the Development. If the Development Owner does not fulfill all representations and commitments made in the Application, the Department may make reasonable reductions to the tax credit amount allocated via the IRS Form 8609, may withhold issuance of the IRS Form 8609s until these representations and commitments are met, and/or may terminate the allocation, if appropriate corrective action is not taken by the Development Owner.

(i) The Board at its sole discretion may allocate credits to a Development Owner in addition to those awarded at the time of the initial Carryover Allocation in instances where there is bona fide substantiation of cost overruns and the Department has made a determination that the allocation is needed to maintain the Development's financial viability.

(j) The Department may, at any time and without additional administrative process, determine to award credits to Developments previously evaluated and awarded credits if it determines that such previously awarded credits are or may be invalid and the owner was not responsible for such invalidity.

(k) If an Applicant returns a full credit allocation after the Carryover Allocation deadline required for that allocation, the Department will impose a penalty on the score for any Competitive Housing Tax Credit Applications submitted by that Applicant or any Affiliate of that Applicant for any Application in an Application Round occurring concurrent to the return of credits or if no Application Round is pending the Round immediately following the return of credits unless otherwise exempted in accordance with the Board's policy pursuant to the implementation of The Housing and Economic Recovery Act of 2008, H.R. 3221, in September 2008. The penalty will be assessed in an amount that reduces the Applicant's final awarded score by an additional 20%.

§49.17. Board Reevaluation, Appeals Process; Provision of Information or Challenges Regarding Applications; Amendments; Housing Tax Credit and Ownership Transfers; Sale of Tax Credit Properties; Withdrawals; Cancellations; Alternative Dispute Resolution.

(a) Board Reevaluation. (§2306.6731(b)). Regardless of development stage, the Board shall reevaluate a Development that undergoes a substantial change between the time of initial Board approval of the Development and the time of issuance of a Commitment Notice or Determination Notice for the Development. For the purposes of this subsection, substantial change shall be those items identified in subsection (d)(4) of this section. The Board may revoke any Commitment Notice or Determination Notice issued for a Development that has been unfavorably reevaluated by the Board.

(b) Appeals Process. (§2306.6715). An Applicant may appeal decisions made by the Department as follows.

(1) The decisions that may be appealed are identified in subparagraphs (A) - (D) of this paragraph.

(A) A determination regarding the Application's satisfaction of:

(i) Eligibility Requirements;

(ii) Disqualification or debarment criteria;

(iii) Pre-Application or Application Threshold Criteria;

(iv) Underwriting Criteria;

(B) The scoring of the Application under the Application Selection Criteria; and

(C) A recommendation as to the amount of Housing Tax Credits to be allocated to the Application;

(D) Any Department decision that results in termination of an Application.

(2) An Applicant may not appeal a decision made regarding an Application filed by another Applicant.

(3) An Applicant must file its appeal in writing with the Department not later than the seventh day after the date the Department publishes the results of any stage of the Application evaluation process identified in §49.9 of this chapter. In the appeal, the Applicant must specifically identify the Applicant's grounds for appeal, based on the original Application and additional documentation filed with the original Application. If the appeal relates to the amount of Housing Tax Credits recommended to be allocated, the Department will provide the Applicant with the underwriting report upon request.

(4) The Executive Director of the Department shall respond in writing to the appeal not later than the 14th day after the date of receipt of the appeal. If the Applicant is not satisfied with the Executive Director's response to the appeal, the Applicant may appeal directly in writing to the Board, provided that an appeal filed with the Board under this subsection must be received by the Board before:

(A) The seventh day preceding the date of the Board meeting at which the relevant commitment decision is expected to be made; or

(B) The third day preceding the date of the Board meeting described by subparagraph (A) of this paragraph, if the Executive Director does not respond to the appeal before the date described by subparagraph (A) of this paragraph;

(5) Board review of an appeal under paragraph (4) of this subsection is based on the original Application and additional documentation filed with the original Application. The Board may not review any information not contained in or filed with the original Application. The decision of the Board regarding the appeal is final;

(6) The Department will post to its website an appeal filed with the Department or Board and any other document relating to the processing of the appeal. (§2306.6717(a)(5))

(c) Provision of Information or Challenges Regarding Applications from Unrelated Entities to the Application. The Department will address information or challenges received from unrelated entities to a specific 2009 active Application, utilizing a preponderance of the evidence standard, as stated in paragraphs (1) - (3) of this subsection, provided the information or challenge includes a contact name, telephone number, fax number and e-mail address of the person providing the information or challenge and must be received by the Department no later than June 15, 2009:

(1) Within fourteen (14) business days of the receipt of the information or challenge, the Department will post all information and challenges received (including any identifying information) to the Department's website;

(2) Within seven (7) business days of the receipt of the information or challenge, the Department will notify the Applicant related to the information or challenge. The Applicant will then have seven (7) business days to respond to all information and challenges provided to the Department; and

(3) Within fourteen (14) business days of the receipt of the response from the Applicant, the Department will evaluate all information submitted and other relevant documentation related to the investigation. This information may include information requested by the Department relating to this evaluation. The Department will post its determination summary to its website. Any determinations made by the Department cannot be appealed by any party unrelated to the Applicant.

(d) Amendment of Application Subsequent to Allocation by Board. (§2306.6712 and §2306.6717(a)(4))

(1) If a proposed modification would materially alter a Development approved for an allocation of a Housing Tax Credit, or if the Applicant has altered any selection criteria item for which it received points, the Department shall require the Applicant to file a formal, written request for an amendment to the Application.

(2) The Executive Director of the Department shall require the Department staff assigned to underwrite Applications to evaluate the amendment and provide an analysis and written recommendation to the Board. The appropriate party monitoring compliance during construction in accordance with §49.18 of this chapter shall also provide to the Board an analysis and written recommendation regarding the amendment. For amendments which require Board approval, the amendment request must be received by the Department at least thirty (30) days prior to the Board meeting where the amendment will be considered.

(3) The Board must vote on whether to approve an amendment. The Board by vote may reject an amendment and, if appropriate, rescind a Commitment Notice or terminate the allocation of Housing Tax Credits and reallocate the credits to other Applicants on the Waiting List if the Board determines that the modification proposed in the amendment:

(A) would materially alter the Development in a negative manner; or

(B) would have adversely affected the selection of the Application in the Application Round.

(4) Material alteration of a Development includes, but is not limited to:

(A) a significant modification of the site plan;

(B) a modification of the number of units or bedroom mix of units;

(C) a substantive modification of the scope of tenant services;

(D) a reduction of 3% or more in the square footage of the units or common areas;

(E) a significant modification of the architectural design of the Development;

(F) a modification of the residential density of the Development of at least 5%;

(G) an increase or decrease in the site acreage of greater than 10% from the original site under control and proposed in the Application; and

(H) any other modification considered significant by the Board.

(5) In evaluating the amendment under this subsection, the Department staff shall consider whether the need for the modification proposed in the amendment was:

(A) Reasonably foreseeable by the Applicant at the time the Application was submitted; or

(B) Preventable by the Applicant.

(6) This section shall be administered in a manner that is consistent with the Code, §42.

(7) Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and monitor regarding the amendment will be posted to the Department's website.

(8) In the event that an Applicant or Developer seeks to be released from the commitment to serve the income level of tenants targeted in the Real Estate Analysis Report at the time of the Commitment Notice issuance, as approved by the Board, the following procedure will apply. For amendments that involve a reduction in the total number of Low-Income Units being served, or a reduction in the number of Low-Income Units at any level of AMGI, as approved by the Board, evidence must be presented to the Department that includes written confirmation from the lender and syndicator that the Development is infeasible without the adjustment in Units. The Board may or may not approve the amendment request; however, any affirmative recommendation to the Board is contingent upon concurrence from the Real Estate Analysis Division that the Unit adjustment (or an alternative Unit adjustment) is necessary for the continued feasibility of the Development. Additionally, if it is determined by the Department that the allocation of credits would not have been made in the year of allocation because the loss of low-income targeting points would have resulted in the Application not receiving an allocation, and the amendment is approved by the Board, the approved amendment will carry a penalty that prohibits the Applicant and all Persons or entities with any ownership interest in the Application (excluding any tax credit purchaser/syndicator), from participation in the Housing Tax Credit Program (for both the Competitive Housing Tax Credit Developments and Tax-Exempt Bond Developments) for twenty-four (24) months from the time that the amendment is approved.

(e) Housing Tax Credit and Ownership Transfers. (§2306.6713). A Development Owner may not transfer an allocation of Housing Tax Credits or ownership of a Development supported with an allocation of Housing Tax Credits to any Person including an Affiliate of the Development Owner unless the Development Owner obtains the Executive Director's prior, written approval of the transfer. The Executive Director may not unreasonably withhold approval of the transfer.

(1) Transfers (other than an Affiliate included in the ownership structure) will not be approved prior to the issuance of IRS Forms 8609 unless the Development Owner can provide evidence that a hardship is creating the need for the transfer (potential bankruptcy, removal by a partner, etc.). A Development Owner seeking Executive Director approval of a transfer and the proposed transferee must provide to the Department a copy of any applicable agreement between the parties to the transfer, including any third-party agreement with the Department.

(2) A Development Owner seeking Executive Director approval of a transfer must provide the Department with documentation requested by the Department, including but not limited to, a list of the names of transferees and Related Parties; and detailed information describing the experience and financial capacity of transferees and related parties. All transfer requests must disclose the reason for the request. The Development Owner shall certify to the Executive Director that the tenants in the Development have been notified in writing of the transfer before the 30th day preceding the date of submission of the transfer request to the Department. Not later than the fifth working day after the date the Department receives all necessary information under this section, the Department shall conduct a qualifications review of a transferee to determine the transferee's past compliance with all aspects of the Housing Tax Credit Program, LURAs; and the sufficiency of the transferee's experience with Developments supported with Housing Credit Allocations. If the viable operation of the Development is deemed to be in jeopardy by the Department, the Department may authorize changes that were not contemplated in the Application.

(3) As it relates to the Credit Cap further described in §49.6(d) of this chapter, the credit cap will not be applied in the following circumstances:

(A) In cases of transfers in which the syndicator, investor or limited partner is taking over ownership of the Development and not merely replacing the general partner; or

(B) In cases where the General Partner is being replaced if the award of credits was made at least five (5) years prior to the transfer request date.

(f) Sale of Certain Tax Credit Properties. Consistent with §2306.6726, Texas Government Code, not later than two (2) years before the expiration of the Compliance Period, a Development Owner who agreed to provide a right of first refusal under §2306.6725(b)(1), Texas Government Code and who intends to sell the property shall notify the Department of its intent to sell.

(1) The Development Owner shall notify Qualified Nonprofit Organizations and tenant organizations of the opportunity to purchase the Development. The Development Owner may:

(A) During the first six-month period after notifying the Department, negotiate or enter into a purchase agreement only with a Qualified Nonprofit Organization that is also a community housing development organization as defined by the Federal Home Investment Partnership Program (HOME);

(B) During the second six-month period after notifying the Department, negotiate or enter into a purchase agreement with any Qualified Nonprofit Organization or tenant organization; and

(C) During the year before the expiration of the compliance period, negotiate or enter into a purchase agreement with the Department or any Qualified Nonprofit Organization or tenant organization approved by the Department.

(2) Notwithstanding items for which points were received consistent with §49.9(i) of this chapter, a Development Owner may sell the Development to any purchaser after the expiration of the compliance period if a Qualified Nonprofit Organization or tenant organization does not offer to purchase the Development at the minimum price provided by §42(i)(7), Internal Revenue Code of 1986 (26 U.S.C. §42(i)(7)), and the Department declines to purchase the Development.

(g) Withdrawals. An Applicant may withdraw an Application prior to receiving a Commitment Notice, Determination Notice, Carryover Allocation Document or Housing Credit Allocation, or may cancel a Commitment Notice or Determination Notice by submitting to the Department a notice, as applicable, of withdrawal or cancellation, and making any required statements as to the return of any tax credits allocated to the Development at issue.

(h) Cancellations. The Department may cancel a Commitment Notice, Determination Notice or Carryover Allocation prior to the issuance of IRS Form 8609 with respect to a Development if:

(1) The Applicant or the Development Owner, or the Development, as applicable, fails to meet any of the conditions of such Commitment Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the Applications process for the Development;

(2) Any statement or representation made by the Development Owner or made with respect to the Development Owner or the Development is untrue or misleading;

(3) An event occurs with respect to the Applicant or the Development Owner which would have made the Development's Application ineligible for funding pursuant to §49.5 of this chapter if such event had occurred prior to issuance of the Commitment Notice or Carryover Allocation; or

(4) The Applicant or the Development Owner or the Development, as applicable, fails to comply with these Rules or the procedures or requirements of the Department.

(i) Alternative Dispute Resolution Policy. In accordance with §2306.082, Texas Government Code, it is the Department's policy to encourage the use of appropriate alternative dispute resolution procedures ("ADR") under the Governmental Dispute Resolution Act, Chapter 2009, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation. Except as prohibited by the Department's ex parte communications policy, the Department encourages informal communications between Department staff and Applicants, and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at any time an Applicant or other person would like to engage the Department in an ADR procedure, the person may send a proposal to the Department's Dispute Resolution Coordinator. For additional information on the Department's ADR Policy, see the Department's General Administrative Rule on ADR at §1.17 of this title.

§49.19. Department Records; Application Log; IRS Filings.

(a) Department Records. At all times during each calendar year the Department shall maintain a record of the following:

(1) The cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Commitment Notices during such calendar year;

(2) The cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Carryover Allocation Documents during such calendar year;

(3) The cumulative amount of Housing Credit Allocations made during such calendar year; and

(4) The remaining unused portion of the State Housing Credit Ceiling for such calendar year.

(b) Application Log. (§2306.6702(a)(3) and §2306.6709). The Department shall maintain for each Application an Application Log that tracks the Application from the date of its submission. The Application Log will contain, at a minimum, the information identified in paragraphs (1) - (9) of this subsection.

(1) The names of the Applicant and all General Partners of the Development Owner, the owner contact name and phone number, and full contact information for all members of the Development Team;

(2) The name, physical location, and address of the Development, including the relevant Uniform State Service Region of the state;

(3) The number of Units and the amount of Housing Tax Credits requested for allocation by the Department to the Applicant;

(4) Any Set-Aside category under which the Application is filed;

(5) The requested and awarded score of the Application in each scoring category adopted by the Department under the Qualified Allocation Plan;

(6) Any decision made by the Department or Board regarding the Application, including the Department's decision regarding whether to underwrite the Application and the Board's decision regarding whether to allocate Housing Tax Credits to the Development;

(7) The names of individuals making the decisions described by paragraph (6) of this subsection, including the names of Department staff scoring and underwriting the Application, to be recorded next to the description of the applicable decision;

(8) The amount of Housing Tax Credits allocated to the Development; and

(9) A dated record and summary of any contact between the Department staff, the Board, and the Applicant or any Related Parties.

(c) IRS Filings. The Department shall mail to the Internal Revenue Service, not later than the 28th day of the second calendar month after the close of each calendar year during which the Department makes Housing Credit Allocations, a copy of each completed (as to Part I) IRS Form 8609, the original of which was mailed or delivered by the Department to a Development Owner during such calendar year, along with a single completed IRS Form 8610, Annual Low-income Housing Credit Agencies Report. When a Carryover Allocation is made by the Department, a copy of the Carryover Allocation Agreement will be mailed or faxed to the Development Owner by the Department. The original of the Carryover Allocation Document will be retained by the Department and IRS Form 8610 Schedule A will be filed by the Department with IRS Form 8610 for the year in which the allocation is made. The Department shall be authorized to vary from the requirements of this section to the extent required to adapt to changes in IRS requirements.

§49.20. Program Fees; Refunds; Public Information Requests; Adjustments of Fees and Notification of Fees; Extensions; Penalties.

(a) Timely Payment of Fees. All fees must be paid as stated in this section, unless the Executive Director has granted a waiver for specific extenuating and extraordinary circumstances. To be eligible for a waiver, the Applicant must submit a request for a waiver no later than ten (10) business days prior to the deadlines as stated in this section. Any fees, as further described in this section, that are not timely paid will cause an Applicant to be ineligible to apply for tax credits and additional tax credits and ineligible to submit extension requests, ownership changes and Application amendments. Payments made by check, for which insufficient funds are available, may cause the Application, Commitment or Allocation to be terminated.

(b) Pre-Application Fee. Each Applicant that submits a Pre-Application shall submit to the Department, along with such Pre-Application, a non refundable Pre-Application fee, in the amount of $10 per Unit. Units for the calculation of the Pre-Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Pre-Applications without the specified Pre-Application Fee in the form of a check will not be accepted. Pre-Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the managing General Partner of the Development Owner, or Control the managing General Partner of the Development Owner, will receive a discount of 10% off the calculated Pre-Application fee. (General Appropriation Act, Article VII, Rider 7; §2306.6716(d)). For Tax Exempt Bond Developments with the Department as the issuer, the Applicant shall submit the following fees: $1,000 (payable to TDHCA), $2,000 (payable to Vinson & Elkins, Bond Counsel), and $5,000 (payable to the Texas Bond Review Board).

(c) Application Fee. Each Applicant that submits an Application shall submit to the Department, along with such Application, an Application fee. For Applicants having submitted a Pre-Application which met Pre-Application Threshold and for which a Pre-Application fee was paid, the Application fee will be $20 per Unit. For Applicants not having submitted a Pre-Application, the Application fee will be $30 per Unit. Units for the calculation of the Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Applications without the specified Application Fee in the form of a check will not be accepted. Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the managing General Partner of the Development Owner, or Control the managing General Partner of the Development Owner, will receive a discount of 10% off the calculated Application fee. (General Appropriation Act, Article VII, Rider 7; §2306.6716(d)). For Tax Exempt Bond Developments with the Department as the Issuer the Applicant shall submit a tax credit application fee of $30 per unit and bond application fee of $10,000. For Tax-Exempt Bond Development refunding Applications, with the Department as the issuer, the Application Fee will be $10,000 unless the refunding is not required to have a TEFRA public hearing, in which case the fee will be $5,000. Those Applications utilizing a local issuer only need to submit the tax credit application fee.

(d) Refunds of Pre-Application or Application Fees. (§2306.6716(c)). Upon written request from the Applicant, the Department shall refund the balance of any fees collected for a Pre-Application or Application that is withdrawn by the Applicant or that is not fully processed by the Department. The amount of refund on Pre-Applications not fully processed by the Department will be commensurate with the level of review completed. Intake and data entry will constitute 50% of the review, and Threshold review prior to a deficiency issued will constitute 30% of the review. Deficiencies submitted and reviewed constitute 20% of the review. The amount of refund on Applications not fully processed by the Department will be commensurate with the level of review completed. Intake and data entry will constitute 20% of the review, the site visit will constitute 20% of the review, Eligibility and Selection review will constitute 20%, and Threshold review will constitute 20% of the review, and underwriting review will constitute 20%. The Department must provide the refund to the Applicant not later than the 30th day after the date of request.

(e) Third Party Underwriting Fee. Applicants will be notified in writing prior to the evaluation of a Development by an independent external underwriter in accordance with §49.9(d)(6), (e)(3), and (f)(6) of this chapter if such a review is required. The fee must be received by the Department prior to the engagement of the underwriter. The fees paid by the Development Owner to the Department for the external underwriting will be credited against the commitment fee established in subsection (f) of this section, in the event that a Commitment Notice or Determination Notice is issued by the Department to the Development Owner.

(f) Commitment or Determination Notice Fee. Each Development Owner that receives a Commitment Notice or Determination Notice shall submit to the Department, not later than the expiration date on the Commitment or Determination notice, a Commitment or Determination fee equal to 5% of the annual Housing Credit Allocation amount. The Commitment or Determination fee shall be paid by check. If a Development Owner of an Application awarded Competitive Housing Tax Credits has paid a Commitment Fee and returns the credits by November 1, 2009, the Development Owner may receive a refund of 50% of the Commitment Fee. If a Development Owner of an Application awarded Housing Tax Credits associated with Tax-Exempt Bonds has paid a Determination Fee and is not able close on the bond transaction within ninety (90) days of the issuance date of the Determination Notice, the Development Owner may receive a refund of 50% of the Determination Fee. The Determination Fee will not be refundable after ninety (90) days of the issuance date of the Determination Notice.

(g) Compliance Monitoring Fee. Upon receipt of the cost certification, the Department will invoice the Development Owner for compliance monitoring fees. The amount due will equal $40 per tax credit unit. The fee will be collected, retroactively if applicable, beginning with the first year of the credit period. The invoice must be paid prior to the issuance of form 8609. Subsequent anniversary dates on which the compliance monitoring fee payments are due shall be determined by the month the first building is placed in service. For Tax-Exempt Bond Developments with the Department as the issuer, the annual tax credit compliance fee will be paid annually in advance (for the duration of the compliance or affordability period) and is equal to $40/Unit beginning two (2) years from the first payment date of the bonds; the asset management fee is paid in advance and is equal to $25/Unit beginning two (2) years from the first payment date. Compliance fees may be adjusted from time to time by the Department.

(h) Building Inspection Fee. The Building Inspection Fee must be paid at the time the Commitment Fee is paid. The Building Inspection Fee for all Developments is $750. Inspection fees in excess of $750 may be charged to the Development Owner not to exceed an additional $250 per Development.

(i) Tax-Exempt Bond Credit Increase Request Fee. As further described in §49.12 of this chapter, requests for increases to the credit amounts to be issued on IRS Forms 8609 for Tax-Exempt Bond Developments must be submitted with a request fee equal to 5% of the amount of the credit increase for one year.

(j) Public Information Requests. Public information requests are processed by the Department in accordance with the provisions of the Government Code, Chapter 552. The Department uses the guidelines promulgated by the Office of the Attorney General to determine the cost of copying, and other costs of production.

(k) Periodic Adjustment of Fees by the Department and Notification of Fees. (§2306.6716(b)). All fees charged by the Department in the administration of the tax credit program will be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses. The Department shall publish each year an updated schedule of Application fees that specifies the amount to be charged at each stage of the Application process. Unless otherwise determined by the Department, all revised fees shall apply to all Applications in process and all Developments in operation at the time of such revisions.

(l) Extension and Amendment Requests.

(1) All extension requests relating to the Carryover, Documentation for 10% Test, Substantial Construction Commencement, Placed in Service or Cost Certification requirements shall be submitted to the Department in writing and be accompanied by a mandatory non-refundable extension fee in the form of a check in the amount of $2,500. Such requests must be submitted to the Department no later than the date for which an extension is being requested. All requests for extensions totaling less than six (6) months may be approved by the Executive Director and are not required to have Board approval. For extensions that require Board approval, the extension request must be received by the Department at least fifteen (15) business days prior to the Board meeting where the extension will be considered. The extension request shall specify a requested extension date and the reason why such an extension is required. Carryover extension requests shall not request an extended deadline later than December 1st of the year the Commitment Notice was issued. The Department, in its sole discretion, may consider and grant such extension requests for all items.

If an extension is required at Cost Certification, the fee of $2,500 must be received by the Department to qualify for issuance of Forms 8609.

(2) Amendment requests must be submitted consistent with §49.17(d) of this chapter. Amendment requests shall be submitted to the Department in writing and be accompanied by a mandatory non-refundable amendment fee in the form of a check in the amount of $2,500. The amendment request will not be considered received until the corresponding fee is received.

(3) The Board may waive extension or amendment fees for good cause.

(m) Penalties. Development Owners who have more tax credits allocated to them than they can substantiate through Cost Certification will return those excess tax credits prior to issuance of 8609's. For Competitive Housing Tax Credit Developments, a penalty fee equal to the one year credit amount of the lost credits (10% of the total unused tax credit amount) will be required to be paid by the Owner prior to the issuance of form 8609's if the tax credits are not returned, and 8609's issued, within one hundred eighty (180) days of the end of the first year of the credit period. This penalty fee may be waived without further Board action if the Department recaptures and re-issues the returned tax credits in accordance with §42, Internal Revenue Code.

§49.21. Manner and Place of Filing All Required Documentation.

(a) All Applications, letters, documents, or other papers filed with the Department must be received only between the hours of 8:00 a.m. and 5:00 p.m. on any day which is not a Saturday, Sunday or a holiday established by law for state employees.

(b) All notices, information, correspondence and other communications under this chapter shall be deemed to be duly given if delivered or sent and effective in accordance with this subsection. Such correspondence must reference that the subject matter is pursuant to the Tax Credit Program and must be addressed to the Housing Tax Credit Program, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711-3941 or for hand delivery or courier to 221 East 11th Street, Austin, Texas 78701 or more current address of the Department as released on the Department's website. Every such correspondence required or contemplated by this chapter to be given, delivered or sent by any party may be delivered in person or may be sent by courier, telecopy, express mail, telex, telegraph or postage prepaid certified or registered air mail (or its equivalent under the laws of the country where mailed), addressed to the party for whom it is intended, at the address specified in this subsection. Regardless of method of delivery, documents must be received by the Department no later than 5:00 p.m. for the given deadline date. Notice by courier, express mail, certified mail, or registered mail will be considered received on the date it is officially recorded as delivered by return receipt or equivalent. Notice by telex or telegraph will be deemed given at the time it is recorded by the carrier in the ordinary course of business as having been delivered, but in any event not later than one business day after dispatch. Notice not given in writing will be effective only if acknowledged in writing by a duly authorized officer of the Department.

(c) If required by the Department, Development Owners must comply with all requirements to use the Department's website to provide necessary data to the Department.

§49.22. Waiver and Amendment of Rules.

(a) The Board, in its discretion, may waive any one or more of these Rules if the Board finds that a waiver is appropriate to fulfill the purposes or policies of Chapter 2306, Texas Government Code, or for other good cause, as determined by the Board.

(b) Section 1.13 of this title may be waived for any person seeking any action by filing a request with the Board.

(c) The Department may amend this chapter and the Rules contained herein at any time in accordance with the Texas Government Code, Chapter 2001.

§49.23. Deadlines for Allocation of Housing Tax Credits (§2306.6724).

(a) Not later than September 30 of each year, the Department shall prepare and submit to the Board for adoption the draft QAP required by federal law for use by the Department in setting criteria and priorities for the allocation of tax credits under the Housing Tax Credit program.

(b) The Board shall adopt and submit to the Governor the QAP not later than November 15 of each year.

(c) The Governor shall approve, reject, or modify and approve the QAP not later than December 1 of each year. (§2306.67022; §42(m)(1))

(d) The Board shall annually adopt a manual, corresponding to the QAP, to provide information on how to apply for Housing Tax Credits.

(e) Applications for Housing Tax Credits to be issued a Commitment Notice during the Application Round in a calendar year must be submitted to the Department not later than March 1.

(f) The Board shall review the recommendations of Department staff regarding Applications and shall issue a list of approved Applications each year in accordance with the Qualified Allocation Plan not later than June 30.

(g) The Board shall approve final commitments for allocations of Housing Tax Credits each year in accordance with the Qualified Allocation Plan not later than July 31, unless unforeseen circumstances prohibit action by that date. In any event, the Board shall approve final commitments for allocations of Housing Tax Credits each year in accordance with the Qualified Allocation Plan not later than September 30. Department staff will subsequently issue Commitment Notices based on the Board's approval. Final commitments may be conditioned on various factors approved by the Board, including resolution of contested matters in litigation.

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

Filed with the Office of the Secretary of State on January 26, 2009.

TRD-200900308
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: September 19, 2008
For further information, please call: (512) 475-3916

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 33. STATEMENT OF INVESTMENT OBJECTIVES, POLICIES, AND GUIDELINES OF THE TEXAS PERMANENT SCHOOL FUND

19 TAC §33.65

The State Board of Education (SBOE) adopts an amendment to §33.65, concerning the guarantee program for school district bonds. The amendment is adopted with changes to the proposed text as published in the December 12, 2008, issue of the *Texas Register* (33 TexReg 10124). The section establishes provisions for the administration of the bond guarantee program. The adopted amendment clarifies the policies for administration of the school district bond guarantee program and the procedures a school district must follow when applying for a bond guarantee through this program.

The Texas Education Code (TEC), §7.102(c)(33), authorizes the SBOE to adopt rules for the implementation of the guarantee bond program as authorized in the TEC, Chapter 45, School District Funds, Subchapter C, Guaranteed Bonds. The TEC, §45.063, authorizes the SBOE to adopt rules necessary for the administration of the bond guarantee program. Section 33.65 is the rule the SBOE adopted to implement the program.

Section 33.65 sets out the statutory provisions for the bond guarantee program, provides definitions, and explains the requirements of and policies related to the program's application process. The rule also provides limitations on access to the guarantee program and allows for the commissioner to allocate specific holdings of the Permanent School Fund (PSF) under certain conditions. The rule explains what effect defeasement has on guaranteed bonds and sets out specific program conditions for bonds issued or guaranteed on certain specified dates. The rule also explains program payment conditions and guarantee restrictions.

The adopted amendment modifies the rule in the following ways.

In subsection (b), which defines terms used in the rule, the definition of annual debt service was clarified.

In subsection (c), on data sources, the description of how enrollment increases are determined was clarified. Also, the reasons for which the commissioner may consider adjustments to data values was expanded to include adjusting values that are not reflective of current conditions.

In subsection (d), on application processing, the day of the month on which the commissioner announces prioritization results and processes applications was changed from the tenth business day to the twentieth. The subsection was also changed to reference an initial approval process and a final approval process instead of simply "the approval process." In paragraph (3)(A), the requirements related to district accreditation and eligibility of refunding bonds for guarantee was clarified. Paragraph (3)(E) was modified at adoption to correct a cross-reference within the subsection. In paragraph (4), the description of the process that the commissioner will follow each month to estimate the available capacity of the PSF was clarified. Paragraph (5)(A) was modified to allow the commissioner to increase the amount of the PSF in reserve as necessary. Language was also added to paragraph (5)(A) at adoption to clarify the ability of the SBOE to ratify or reject a decision by the commissioner to increase the amount of capacity held in reserve. In paragraph (7), requirements and policies related to a new initial bond guarantee program approval process were added.

Subsection (e), on application for the guarantee, was modified to add requirements relating to the bond guarantee program application fee to paragraph (1) and requirements relating to a new initial approval process to paragraph (2). A new paragraph (3) was added to subsection (e), setting out the requirements of a new final approval process.

In subsection (f), the amount of debt service per student to which a district seeking bond guarantee approval is limited was raised.

Minor technical corrections and corrections in word usage were made throughout the rule.

Procedural and reporting implications include the following.

A district that received initial bond guarantee program approval will be required to provide a written notice by facsimile or email to the Texas Education Agency (TEA) two business days before issuing a preliminary official statement (POS) for the bonds that would be eligible for the guarantee or two business days before soliciting investment offers, if the bonds would be privately placed without the use of a POS.

A district that then received confirmation from the TEA that the PSF capacity continued to be available will be required to provide written notice to the TEA of the placement of an agenda item on a meeting of the school board of trustees to approve the bond sale no later than two business days before the meeting. If the bond sale were to be completed pursuant to a delegation by the board to a pricing officer or committee, notice will be required to be given no later than two business days before the execution of a bond purchase agreement by such pricing officer or committee. Any locally maintained paperwork requirements will be consistent with the reporting requirements described for the procedural and reporting implications.

The TEA determined that the amendment will have no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

In accordance with the Texas Education Code, §7.102(f), the SBOE approved this rule action for final adoption by a vote of more than two-thirds of its members to specify an effective date earlier than the beginning of the 2009-2010 school year in order to implement the latest policy in a timely manner. The effective date of the adopted amendments is 20 days after filing as adopted.

Following is a summary of the public comment received and corresponding SBOE response regarding the proposed amendment.

Comment. An individual commented that the cross-reference in subsection (d)(3)(E) is incorrect since the proposal modifies the provisions referenced in paragraph (7).

Agency response. The SBOE agreed and corrected subsection (d)(3)(E) at adoption to correct the cross-reference to refer to paragraphs (7) and (9).

The amendment is adopted under the Texas Education Code, §7.102(c)(33), which authorizes the SBOE to adopt rules as necessary for the administration of the guaranteed bond program as provided under TEC, Chapter 45, Subchapter C, and §45.063, which authorizes the SBOE to adopt rules necessary for the administration of the bond guarantee program.

The amendment implements the Texas Education Code, §7.102(c)(33) and §45.063.

§33.65. Guarantee Program for School District Bonds.

(a) Statutory provision. The commissioner of education must administer the guarantee program for school district bonds according

to the provisions of the Texas Education Code (TEC), Chapter 45, Subchapter C.

(b) Definitions. The following definitions apply to the guarantee program for school district bonds.

(1) Annual debt service--Payments of principal and interest on outstanding bonded debt scheduled to occur between September 1 and August 31 during the fiscal year in which the guarantee is sought as reported by the state information depository (SID), if the district has outstanding bonded indebtedness.

(A) The annual debt service will be determined by the current report of the bonded indebtedness of the district as reported by the SID as of the date of the application deadline.

(B) The annual debt service does not include the amount of debt service to be paid on the bonds for which the reservation is sought.

(C) The debt service amounts used in this calculation for variable rate bonds will be those which are published in the final official statement.

(2) Bond order--The order adopted by the governing body of a school district that authorizes the issuance of bonds.

(3) Application deadline--The last business day of the month in which an application for a guarantee is filed. Applications must be received by the Texas Education Agency division responsible for state funding by 5:00 p.m. on the last business day of the month to be considered in that month's application processing.

(4) New money issue--An issuance of bonds for the purposes of constructing, renovating, acquiring, and equipping school buildings; the purchase of property; or the purchase of school buses. Eligibility for the guarantee for new money issues is limited to the issuance of bonds authorized under the TEC, §45.003. A new money issue does not include the issuance of bonds to purchase a facility from a public facility corporation created by the school district or to purchase any property that is currently under a lease-purchase contract under the Local Government Code, Chapter 271, Subchapter A. A new money issue does not include an issuance of bonds to refinance any type maintenance of tax-supported debt. Maintenance tax-supported debt includes, but is not limited to:

(A) time warrants or loans entered under the TEC, Chapter 45, Subchapter E; or

(B) any other type of loan or warrant that is not supported by bond taxes as defined by the TEC, §45.003.

(5) Refunding issue--An issuance of bonds for the purpose of refunding bonds that are supported by bond taxes as defined by the TEC, §45.003. Eligibility for the guarantee for refunding issues is limited to refunding issues that refund bonds that were authorized by a bond election under the TEC, §45.003.

(6) Combination issue--An issuance of bonds for which an application is filed for a guarantee that includes both a new money portion and a refunding portion, as permitted by the Texas Government Code, Chapter 1207. The eligibility of combination issues for the guarantee is limited by the eligibility of the new money and refunding portions as defined in this subsection.

(7) Average daily attendance (ADA)--Total refined average daily attendance as defined by §129.1025 of this title (relating to Adoption By Reference: Student Attendance Accounting Handbook).

(8) Enrollment growth--Growth in student enrollment that has occurred over the previous five years.

(c) Data sources.

(1) The following data sources will be used for purposes of prioritization:

(A) projected ADA as adopted by the legislature for appropriations purposes;

(B) final property values certified by the comptroller of public accounts for the tax year preceding the year in which the bonds will be issued. If final property values are unavailable, the most recent projection of property values by the comptroller will be used;

(C) annual debt service, as defined in subsection (b)(1) of this section, due during the fiscal year in which the proposed debt will be issued. The amount of debt service on the proposed bond issue will not be included in the calculation of annual debt service; and

(D) enrollment increases over the previous five years, which will be determined using enrollment reported to the Public Education Information Management System (PEIMS) for the five-year time period ending in the year before the application date.

(2) The commissioner may consider adjustments to data values determined to be erroneous or not reflective of current conditions before the deadline for receipt of applications for that application cycle.

(d) Application processing. To facilitate prioritization of applications for the guarantee, all applications received during a calendar month will be held until the twentieth business day of the subsequent month. On the twentieth business day of each month, the commissioner of education will announce the results of the prioritization described in paragraph (5) of this subsection and process applications for initial approval of the guarantee up to the available capacity as of the application deadline, subject to the requirements of this subsection.

(1) The school district may not submit an application for a guarantee before the successful passage of an authorizing proposition.

(2) The actual guarantee of the bonds is subject to the initial approval process and the final approval process prescribed in subsection (e) of this section.

(3) Refunding issues must comply with the following requirements to retain eligibility for the guarantee for the refunding bonds.

(A) The district must have an accreditation status of Accredited as defined by §97.1055 of this title (relating to Accreditation Status). If the district has an accreditation status of Accredited-Warned or Accredited-Probation, the commissioner will investigate the underlying reason for the accreditation rating to determine whether the accreditation rating is related to the district's financial soundness. If the accreditation rating is related to the district's financial soundness, the refunding bonds will not be eligible to retain the guarantee. Districts with an accreditation status of Not Accredited-Revoked will not be eligible to retain the guarantee on the refunding bonds.

(B) The bonds to be refunded must have been previously guaranteed by the Permanent School Fund (PSF). Only refunding issues as defined in subsection (b)(5) of this section are eligible for the guarantee.

(C) The district must demonstrate that issuing the refunding bond(s) will result in a present value savings to the district and must not have a maturity date later than the final maturity date of the bonds being refunded. Present value savings is determined by computing the net present value of the difference between each scheduled payment on the original bonds and each scheduled payment on the re-

funding bonds. Present value savings must be computed at the true interest cost of the refunding bonds.

(D) If a district files an application for a combination issue, the application will be treated as a single issue for the purposes of eligibility for the guarantee. A guarantee for the combination issue will be awarded only if both the new money portion and the refunding portion meet all of the eligibility requirements described in this subsection. The district making the application must present data to the commissioner that demonstrates compliance for both the new money portion of the issue and the refunding portion of the issue.

(E) The refunding transaction must comply with the provisions of paragraphs (7) and (9) of this subsection.

(4) The commissioner will estimate the available capacity of the PSF on a monthly basis to provide initial approval to the guarantee of school district bonds. The commissioner will confirm that the PSF has sufficient capacity to guarantee the bonds before the issuance of the final approval for the guarantee in accordance with subsection (e)(3) of this section.

(5) The State Board of Education (SBOE) will establish an amount of capacity to be held in reserve of no less than 5.0% of the fund's capacity. Guarantees will be awarded each month beginning with the districts with the lowest property wealth per ADA until the PSF reaches its net capacity to guarantee bonds, as determined by subtracting the amount to be held in reserve from the total available capacity. The reserved capacity can be used to award guarantees for districts that experience unforeseen catastrophes or emergencies that require the renovation or replacement of school facilities as described in the TEC, §44.031(h).

(A) The amount to be held in reserve may be increased by a majority vote of the SBOE based on changes in the asset allocation and risk in the portfolio and unrealized gains in the portfolio, or by the commissioner as necessary to prudently manage fund capacity. Changes to the amount held in reserve made by the commissioner are to be ratified or rejected by the SBOE at the next meeting for which the item can be posted.

(B) Guarantees will be awarded to applicants based on the fund's capacity to fully guarantee the bond issue for which the guarantee is sought. Applications for bond issues that cannot be fully guaranteed will not receive an award. The amount of bond issue for which the guarantee was requested may not be modified after the monthly application deadline for the purposes of securing the guarantee during the award process.

(6) An application received after the application deadline will be considered a valid application for the subsequent month, unless withdrawn by the submitting district before the end of the subsequent month.

(7) Each district that submits a valid application will be notified of the application status within ten business days of the end of the month following the application deadline. If a district is awarded initial approval for the guarantee as described in subsection (e)(2) of this section, the following must be met.

(A) The district must comply with the provisions for final approval described in subsection (e)(3) of this section to maintain approval for the guarantee.

(B) The bonds must be approved by the Office of the Attorney General within 120 days of the date of the letter granting the approval of the guarantee. The initial approval for the guarantee will expire at the end of the 120-day period. The commissioner may extend the 120-day period, based on extraordinary circumstances, upon receiving a written request from the district prior to the expiration of the 120-day period.

(8) If a district does not receive a guarantee or for any reason does not receive approval of the bonds from the Office of the Attorney General within the specified time period, the district may reapply in a subsequent month. Applications that were denied a guarantee will not be retained for consideration in subsequent months.

(9) If the bonds are not approved by the Office of the Attorney General within 120 days of the date of the letter granting the approval of the guarantee, the commissioner will consider the application withdrawn and the district must reapply for a guarantee.

(10) Districts may not represent the bonds as guaranteed for the purposes of pricing or marketing the bonds prior to the date of the letter granting approval of the guarantee.

(e) Application for the guarantee.

(1) Application process. Districts must apply to the commissioner of education for the guarantee of eligible bonds. The district must submit, in a form specified by the commissioner, the information required under the TEC, §45.055(b), and this section and any additional information the commissioner may require. The application and all additional information required by the commissioner must be received before the application will be processed. The application must be accompanied by a fee to be set by the commissioner and approved by the SBOE.

(A) The fee is due at the time the application for the guarantee is submitted. An application will not be processed until the fee has been received in accordance with the process prescribed by the commissioner for remitting the fee on the application form.

(B) The fee will not be refunded to a district that:

(i) is not approved for the guarantee; or

(ii) does not sell its bonds before the expiration of its approval for the guarantee.

(C) The fee may be transferred to a subsequent application for the guarantee by the district if the district withdraws its application and submits the subsequent application before the expiration of its initial approval for the guarantee.

(2) Initial approval. Under the TEC, §45.056, the commissioner will investigate the applicant school district's accreditation status and financial status. A district must be accredited and financially sound to be eligible for initial approval by the commissioner. The commissioner's review will include the following:

(A) the purpose of the bond issue;

(B) the district's accreditation status as defined by §97.1055 of this title in accordance with the following:

(i) if the district's accreditation status is Accredited, the district will be eligible for consideration for the guarantee;

(ii) if the district's accreditation status is Accredited-Warned or Accredited-Probation, the commissioner will investigate the underlying reason for the accreditation rating to determine whether the accreditation rating is related to the district's financial soundness. If the accreditation rating is related to the district's financial soundness, the district will not be eligible for consideration for the guarantee; or

(iii) if the district's accreditation status is Not Accredited-Revoked, the district will not be eligible for consideration for the guarantee;

(C) the district's compliance with statutes and rules of the Texas Education Agency (TEA); and

(D) the district's financial status and stability, regardless of the district's accreditation rating, including approval of the bonds by the attorney general under the provisions of the TEC, §45.0031 and §45.005.

(3) Final approval. A district must receive final approval before completing the sale of the bonds for which the district has received notification of initial approval.

(A) A district that has received initial approval must provide a written notice to the TEA two working days before issuing a preliminary official statement (POS) for the bonds that are eligible for the guarantee or two business days before soliciting investment offers, if the bonds will be privately placed without the use of a POS.

(i) The district must receive written confirmation from the TEA that the capacity continues to be available before proceeding with the public or private offer to sell bonds.

(ii) The TEA will provide this notification within one business day of receiving the notice of the POS or notice of other solicitation offers to sell the bonds.

(B) A district that received confirmation from the TEA in accordance with subparagraph (A) of this paragraph must provide written notice to the TEA of the placement of an agenda item on a meeting of the school board of trustees to approve the bond sale no later than two business days before the meeting. If the bond sale is completed pursuant to a delegation by the board to a pricing officer or committee, notice must be given to the TEA no later than two business days before the execution of a bond purchase agreement by such pricing officer or committee.

(i) The district must receive written confirmation from the TEA that the capacity continues to be available for the bond sale before the approval of the sale by the school board of trustees or by the pricing officer or committee.

(ii) The TEA will provide this notification within one business day before the date that the district expects to complete the sale by official action of the board or of a pricing officer or committee.

(C) The TEA will process requests for final approval from districts that have received initial approval on a first come, first served basis. Requests for final approval must be received before the expiration of the initial approval.

(D) A district may provide written notification as required by this paragraph by facsimile transmission or by electronic mail in a manner prescribed by the commissioner.

(f) Limitations on access to the guarantee.

(1) The following limitations apply to bonds for which the election authorizing the issuance of bonds was called after July 15, 2004.

(2) The commissioner will limit approval of the guarantee to a district with less than $1,650 of annual debt service per student in ADA at the time of the application for a guarantee. The limitation will not apply to school districts that have enrollment that is at least 25% higher than the enrollment reported five years earlier, based on PEIMS data on enrollment available at the time of application. The annual debt service amount is the amount defined by subsection (b)(1) of this section.

(3) The eligibility of bonds to receive the guarantee is limited to those new money, refunding, and combination issues as defined in subsection (b)(4) - (6) of this section.

(g) Allocation of specific holdings. If necessary to successfully operate the guarantee program, the commissioner may allocate specific holdings of the PSF to specific bond issues guaranteed under this section. This allocation will not prejudice the right of the SBOE to dispose of the holdings according to law and requirements applicable to the fund; however, the SBOE will ensure that holdings of the PSF are available for a substitute allocation sufficient to meet the purposes of the initial allocation. This allocation will not affect any rights of the bond holders under law.

(h) Defeasement. The guarantee will be completely removed when bonds guaranteed by this program are defeased, and such a provision must be specifically stated in the bond resolution. If bonds guaranteed by this program are defeased, the district must notify the commissioner in writing within ten calendar days of the action.

(i) Bonds issued before August 15, 1993. For bonds issued before August 15, 1993, a school district seeking the guarantee of eligible bonds must certify that, on the date of issuance of any bond, no funds received by the district from the Available School Fund (ASF) are reasonably expected to be used directly or indirectly to pay the principal or interest on, or the tender or retirement price of, any bond of the political subdivision or to fund a reserve or placement fund for any such bond.

(j) Bonds guaranteed before December 31, 1993. For bonds guaranteed before December 1, 1993, if a school district cannot pay the maturing or matured principal or interest on a guaranteed bond, the commissioner will cause the amount needed to pay the principal or interest to be transferred to the district's paying agent solely from the PSF and not from the ASF. The commissioner also will direct the comptroller of public accounts to withhold the amount paid, plus interest, from the first state money payable to the district, excluding payments from the ASF.

(k) Bonds issued after August 15, 1993, and guaranteed on or after December 1, 1993. If a school district cannot pay the maturing or matured principal or interest on a guaranteed bond, the commissioner will cause the amount needed to pay the principal or interest to be transferred to the district's paying agent from the PSF. The commissioner also will direct the comptroller of public accounts to withhold the amount paid, plus interest, from the first state money payable to the district, regardless of source, including the ASF.

(l) Payments. For purposes of the provisions of the TEC, Chapter 45, Subchapter C, matured principal and interest payments are limited to amounts due on guaranteed bonds at scheduled maturity, at scheduled interest payment dates, and at dates when bonds are subject to mandatory redemption, including extraordinary mandatory redemption, in accordance with their terms. All such payment dates, including mandatory redemption dates, must be specified in the order or other document pursuant to which the bonds initially are issued. Without limiting the provisions of this subsection, payments attributable to an optional redemption or a right granted to a bondholder to demand payment upon a tender of such bonds in accordance with the terms of the bonds do not constitute matured principal and interest payments.

(m) Guarantee restrictions. The guarantee provided for eligible bonds in accordance with the provisions of the TEC, Chapter 45, Subchapter C, is restricted to matured bond principal and interest. The guarantee does not extend to any obligation of a district under any agreement with a third party relating to bonds that is defined or described in state law as a "bond enhancement agreement" or a "credit

agreement," unless the right to payment of such third party is directly as a result of such third party being a bondholder.

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

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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CHAPTER 101. ASSESSMENT
SUBCHAPTER B. DEVELOPMENT AND ADMINISTRATION OF TESTS

19 TAC §101.23

The State Board of Education (SBOE) adopts an amendment to §101.23, concerning performance standards. The amendment is adopted without changes to the proposed text as published in the December 12, 2008, issue of the *Texas Register* (33 TexReg 10128) and will not be republished. The section sets the standard of satisfactory performance on the Texas Assessment of Knowledge and Skills (TAKS). The adopted amendment sets new performance standards as appropriate for the reading and mathematics assessments in Grades 3-8 based on the implementation of a vertical scale.

Senate Bill (SB) 1031, 80th Texas Legislature, 2007, requires the implementation of a vertical scale to compare the performance of individual students from one grade level to the next beginning with the 2008-2009 school year in the following grades and subjects: TAKS English Grades 3-8 reading; TAKS English Grades 3-8 mathematics; TAKS Spanish Grades 3-6 reading; and TAKS Spanish Grades 3-6 mathematics.

This change to the Texas assessment program requires a performance standards review to determine whether observed differences in performance across grades are appropriate or whether the standards should be adjusted. In the review process, panelists examined the cut scores implemented under the initial standard-setting process in light of updated impact data and other information relevant to the changes in the assessment program. Following their review, the review committees recommended whether a change to the cut scores associated with the performance standards was needed. The TAKS standards included in rule as figures result from a standards review process conducted from July through October 2008.

When the TAKS program was first developed, the Texas Education Agency (TEA) convened a national Technical Advisory Committee (TAC) to advise the SBOE on standard-setting activities. This committee was composed of prominent educational testing experts with experience in standard setting in other major testing programs across the country. The current TAC met in July 2008 to review the standards for the TAKS reading and mathematics assessments in Grades 3-8 and to provide guidance on the proposed standards review process.

In October 2008, TEA conducted four standards review meetings for the English TAKS assessments and two standards review meetings for the Spanish TAKS assessments. The panelists who participated in these review meetings were selected based on recommendations from school districts, stakeholder groups, business leaders, and members of the SBOE.

The 2008 standards review built on the item-mapping method used for the initial TAKS standard setting in 2002. The general process followed by the review panelists is summarized below.

Overview of the standards review process. Meeting facilitators discussed the purpose of setting standards and why this specific review was required for the development of a vertical scale.

Review of current TAKS performance standards on the vertical scale. Panelists examined charts showing the performance standards at each grade level relative to each other on the common vertical scale. Based on this information, panelists discussed differences in performance standards across grades.

Taking the assessment. In a step repeated separately for each grade, the panelists took the TAKS assessments to experience the tests in the same way that students would. After completing each test, panelists scored their responses and discussed the test in terms of content, difficulty, the construct being measured, and the testing experience itself.

Review of 2003 through 2008 impact data. In a step repeated separately for each grade, the panelists studied information about the percent of students (overall and by individual student) classified into each performance level at the panel-recommended standards across the first six TAKS administrations, paying attention to changes in student performance over time.

Round 1. In a step repeated separately for each grade--based on the review and discussion performed above and taking into consideration information about the standard error of measurement--panelists made recommendations about changes to the cut scores on each assessment using the 2008 performance standards as a baseline.

Round 2. In a step repeated separately for each grade, the panelists reviewed their recommendations from Round 1. As part of this process, they received impact data using the revised performance standards as well as feedback on how each panelist's recommendations compared to his or her peers. Following a discussion, each panelist made recommendations in the same manner as in Round 1.

Smoothing. For the English panels only, a "smoothing committee" composed of select panelists evaluated whether the recommended changes to the performance standards were reasonable given the standards set in the other elementary or middle school grade cluster for the same subject area. Based on their evaluation, this committee recommended adjustments to certain results in certain grades.

The panel recommended changing the TAKS standards in the following grades and subjects: *Met the Standard*--Reading (English), Grades 6 and 8; *Met the Standard*--Reading (Spanish), Grade 6; *Met the Standard*--Mathematics (Spanish), Grades 3, 4 and 6; *Commended Performance*--Reading (English), Grades 6 and 8; *Commended Performance*--Reading (Spanish), Grade 6; *Commended Performance*--Mathematics (English), Grades 5, 6

and 8; and *Commended Performance*--Mathematics (Spanish), Grades 4 and 6.

The adopted amendment to 19 TAC §101.23 consolidates the information formerly contained in subsection (b) into an expanded subsection (a). Subsection (a) also includes a new figure (Figure: 19 TAC §101.23(a)) identifying the performance standards established by the SBOE for all the TAKS assessments other than the TAKS reading and mathematics assessments in Grades 3-8. The amended subsection (b) contains a new figure (Figure: 19 TAC §101.23(b)) identifying only the performance standards for the TAKS reading and mathematics assessments in Grades 3-8. Subsection (c) was deleted because it referred to the State Developed Alternative Assessment (SDAA II), which is no longer administered.

The effective date for the adopted rule action is September 1, 2009, which makes the revised standards binding in the 2009-2010 school year. Nevertheless, TEA will report scores based on the vertical scale for the assessments administered in spring 2009 as information only for parents and educators. In order to proceed with this plan, during its January 2009 meeting, the SBOE approved for second reading and final adoption the performance standards prior to the reporting of assessment results in March 2009.

The transition to a vertical scale in the spring of 2009 will impact all student assessment TAKS reporting for Grades 3-8. Beginning in the 2009-2010 school year, TAKS scores for Grades 3-8 reading and mathematics will no longer be reported on the current horizontal scale, which was implemented in 2002-2003.

The TEA determined that the amendment will have no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

No comments were received regarding the proposed amendment.

The amendment is adopted under the Texas Education Code, §39.024, which authorizes the SBOE to determine the level of performance considered to be satisfactory on the assessment instruments. The TEC, §39.036, requires the TEA to develop and implement the vertical scale in the administration of certain assessment instruments.

The amendment implements the Texas Education Code, §39.024 and §39.036.

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

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CHAPTER 111. TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR MATHEMATICS

The State Board of Education (SBOE) adopts amendments to §§111.23, 111.24, 111.33, 111.34, and 111.36, concerning the Texas essential knowledge and skills (TEKS) for mathematics. The amendments are adopted without changes to the proposed text as published in the December 12, 2008, issue of the *Texas Register* (33 TexReg 10130) and will not be republished. The sections establish the TEKS for mathematics courses in middle school and high school. The adopted amendments incorporate approved college readiness standards into the mathematics TEKS.

House Bill 1, passed by the 79th Texas Legislature, Third Called Session, 2006, requires the development of college readiness standards and the incorporation of approved college readiness standards and expectations into the essential knowledge and skills. College readiness standards in English language arts, mathematics, science, and social studies were adopted by the Texas Higher Education Coordinating Board on January 24, 2008. During the May 2008 meeting, the SBOE directed Texas Education Agency (TEA) staff to convene a committee to make recommendations for incorporating approved college readiness standards into the mathematics TEKS. The committee met on August 28-29, 2008, to work on recommendations for amendments to the TEKS for middle school and high school mathematics. Committee recommendations were presented during the discussion at the special September 29, 2008, SBOE meeting, and no further changes were recommended subsequent to that meeting. The SBOE approved the amendments for final adoption in January 2009.

The TEA determined that the amendments will have no direct adverse economic impact for small businesses or microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

In accordance with the Texas Education Code, §7.102(f), the SBOE approved this rule action for final adoption by a vote of more than two-thirds of its members to specify an effective date earlier than the beginning of the 2009-2010 school year. The earlier effective date will allow districts to begin preparing for implementation in the 2009-2010 school year and will provide for appropriate alignment with the new end-of-course exam development schedule. The effective date of the adopted amendments is 20 days after filing as adopted.

No comments were received regarding the proposed amendments.

SUBCHAPTER B. MIDDLE SCHOOL

19 TAC §111.23, §111.24

The amendments are adopted under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments; and §28.008, which authorizes the SBOE to incorporate college readiness standards and expectations approved by the commissioner of education and the Texas Higher Education

Coordinating Board into the essential knowledge and skills identified by the board under §28.002(c).

The amendments implement the Texas Education Code, §§7.102(c)(4), 28.002, and 28.008.

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

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SUBCHAPTER C. HIGH SCHOOL

19 TAC §§111.33, 111.34, 111.36

The amendments are adopted under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments; §28.008, which authorizes the SBOE to incorporate college readiness standards and expectations approved by the commissioner of education and the Texas Higher Education Coordinating Board into the essential knowledge and skills identified by the board under §28.002(c); and §28.025, which authorizes the SBOE to by rule determine curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with the required curriculum under §28.002.

The amendments implement the Texas Education Code, §§7.102(c)(4), 28.002, 28.008, and 28.025.

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

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TITLE 22. EXAMINING BOARDS

PART 10. TEXAS FUNERAL SERVICE COMMISSION

CHAPTER 205. CEMETERIES AND CREMATORIES

22 TAC §205.2

The Texas Funeral Service Commission "Commission" adopts new §205.2, concerning ingress and egress to certain cemeteries in accordance with §711.012(b) and §711.041, Texas Health and Safety Code. The new rule is adopted with changes to the proposed text as published in the October 31, 2008, issue of the *Texas Register* (33 TexReg 8874).

The purpose of new §205.2 is (through the authority granted to the Funeral Service Commission by the Texas Legislature in §711.012(b), Texas Health and Safety Code) to give effect to §711.041, Texas Health and Safety Code which provides that any person who wishes to visit a cemetery or private burial grounds for which no public ingress or egress is available shall have the right to reasonable ingress and egress for the purpose of visiting the cemetery or private burial grounds during reasonable hours for the purposes usually associated with cemetery visits and that the owner or owner of lands surrounding the cemetery or private burial grounds may designate the routes of reasonable ingress and egress.

In summary, new §205.2 sets up a system that encourages voluntary negotiations (resulting in a written agreement) between affected landowners and persons desiring access to cemeteries or private burial grounds for which no public ingress or egress exists. But, if an agreement is not reached, any party to the negotiations may request of the Executive Director of the Texas Funeral Service Commission that the dispute be formally mediated through the Funeral Service Commission's alternative dispute resolution policies and procedures. If the mediation is not successful, the Executive Director of the Commission is required to propose to the Funeral Service Commission for adoption an order setting out a reasonable visitation schedule and a route or routes of reasonable ingress or egress to a cemetery or private burial grounds for which no public ingress or egress is available. A notice and a copy of the order proposed by the Executive Director is required to be sent to all interested parties not less than 30 days before the meeting at which the Funeral Service Commission will consider the adoption of the order proposed by the Executive Director. At the meeting at which the adoption of the order proposed by the Executive Director is considered, each affected party will have the opportunity to offer testimony with respect to the proposed order. At the meeting, the Funeral Service Commission may adopt the order as proposed, adopt the order with changes, or may defer action to a future meeting. A copy of the final order is to be mailed by certified mail to all parties.

Following are the public comments received and corresponding commission response:

TEXAS DEER ASSOCIATION COMMENTS: The officers and members of the Texas Deer Association are concerned about the unanticipated consequences and possible tragic repercussions if the proposed language to the above regulation is not strengthened and clearly adhered to by those wishing to access the cemeteries. Those wishing to access the cemeteries must be aware that, without advance approval and arrangements with landowners, there are real problems and safety issues that must be taken into consideration (hunting, prescribed burning, mechanical or chemical control of brush, etc.). We respect the rights of approved and reasonable access by interested parties and family members to cemeteries, but that public

access cannot be without discretion, respect of, and adherence to, landowner directives, and best interest of all parties in regard to safety and liability. The proposed and permissive language, as written, (i.e., owner may designate the routes of reasonable ingress and egress) seems to only loosely address landowner concerns. We suggest stronger language in regard to making prior arrangements and designated routes of reasonable ingress and egress with the landowner. After all, during hunting season as well as in regard to the above listed possibilities, such access could result in tragic consequences.

COMMISSION RESPONSE: The Commission does not necessarily disagree with the sentiments expressed by the Texas Deer Association. Indeed, the intent of new §205.2 is to encourage parties to reach agreement on the terms of ingress and egress either through informal negotiation or formal mediation and for the Funeral Service Commission to enter a final order only as a last resort. In entering a final order, the Funeral Service Commission would intend to take into consideration insofar as possible the rights and concerns of each party. However, state law in the form of §711.041, Texas Health and Safety Code does provide that any person who wishes to visit a cemetery or private burial grounds for which no public ingress or egress is available shall have the right to reasonable ingress and egress for the purpose of visiting the cemetery or private burial grounds during reasonable hours for the purposes usually associated with cemetery visits and that surrounding landowners may designate the routes of reasonable ingress and egress. Much of the concern of this association appears to be with the provisions of the statute rather than the provisions of new §205.2. The Commission does not believe that new §205.2 needs to be revised to meet the concerns expressed.

EXOTIC WILDLIFE ASSOCIATION COMMENTS: On behalf of the officers and members of the Exotic Wildlife Association, we would like to voice our concerns if the proposed language in the above regulation is not strengthened and strictly adhered to by those wishing access to the cemeteries. That individual wanting access to cemeteries on private property must realize that a whole array of problems exists if advanced notice is not given to the landowner. Liability issues, safety issues, as well as property rights issues are just some of the problems that will exist without stronger language in this regulation. From a personal note, a private cemetery lies within the boundaries of my ranch in Bandera County. The family members always notify us and set up a prearranged time for access. They respect our property rights during the various hunting seasons and in return we maintain the entrance to the cemetery so that it is always in a manicured condition. We understand and respect the rights of family members and other interested parties to reasonable access to cemeteries but public access cannot and should not be without the discretion and directive of the landowner. This only makes sense from a safety and liability standpoint. Language in the regulation that states "owners may designate routes of reasonable ingress and egress" does not fully address landowner's property rights. As a private property rights organization we suggest stronger language that will leave nothing to interpretation regarding prior arrangements and ingress and egress issues with the landowner.

COMMISSION RESPONSE: The Commission does not necessarily disagree with the sentiments expressed by the Texas Exotic Game Association. Indeed, the intent of new §205.2 is to encourage parties to reach agreement on the terms of ingress and egress either through informal negotiation or formal mediation and for the Funeral Services Commission to enter a final order only as a last resort. In entering a final order, the Commission would intend to take into consideration insofar as possible the rights and concerns of each party. However, state law in the form of §711.041, Texas Health and Safety Code does provide that any person who wishes to visit a cemetery or private burial ground for which no public ingress or egress is available shall have the right to reasonable ingress and egress for the purpose of visiting the cemetery or private burial grounds during reasonable hours for the purposes usually associated with cemetery visits and that affected landowners may designate the routes of reasonable ingress and egress. Much of the concern of this association appears to be with the provisions of the statute rather than the provisions of new §205.2. The Commission does not believe that new §205.2 needs to be revised to meet the concerns of the association.

COMMENT: Commenter is writing you today in support of the commission's proposal to add a new rule to 22 TAC Part 10, Chapter 205, §205.2, to better ensure Texans have access to 'cemeteries as they are entitled by law. Recently, a constituent informed commenter about the challenges family members face when trying to visit cemeteries that are completely surrounding by privately owned land and the landowners deny or discourage access. Cemeteries are more than final resting places for the deceased; they play an important part in the cultural and social fabric of a community and how a community remembers and recognizes its past. Whenever Texans are denied access to cemeteries, they are denied an opportunity to honor their family and their history. State law recognizes the importance of access to cemeteries in §711.041(a) Texas Health and Safety Code. However, currently there is no formal enforcement mechanism for this statute beyond filing a civil suit, which can often be costly and time consuming for Texans who want nothing more than to pay their respects to loved ones and relatives who have passed away. It is crucial that state government ensure that Texans have that access to which they are entitled under the law. This proposed rule is a step in the right direction. It aims to protect access while also providing reasonable accommodations for land owners who have land adjoining a cemetery. The commenter strongly supports the proposed rule and would respectfully ask the Texas Funeral Service Commission to approve it.

COMMISSION RESPONSE: Commenter's letter is supportive of new §205.2 as written.

COMMENT: Commenter is writing you today in support of the commission's proposal to add a new rule to 22 TAC Part 10, Chapter 205, §205.2, to better ensure Texans have access to cemeteries as they are entitled by law. Over the past year, commenter's office has received several calls from Texans across the state who all faced a similar circumstance of trying to visit a cemetery that was completely surrounding by privately owned land which the landowners would not let them cross. Cemeteries are more than final resting places for the deceased; they play an important part in the cultural and social fabric of a community and how a community remembers and recognizes its past. Whenever Texans are denied access to cemeteries, they are denied an opportunity to honor their history and those who have passed away. State law recognizes the importance of access to cemeteries in §711.041(a) Texas Health and Safety Code. However, currently there is no formal enforcement mechanism for this statute beyond filing a civil suit, which can often be costly and time consuming for Texans who want nothing more than to pay their respects to loved ones and relatives who have passed away. It is crucial that state government ensure that Texans have that access to which they are entitled under the law. Although commenter intends to file legislation in the next legislative ses-

sion to strengthen Texans' access to cemeteries, commenter believes this rule is a good first step based on current law to protect that access while also providing reasonable accommodations for land owners who have land adjoining a cemetery. Commenter supports the proposed rule and would respectfully ask the Texas Funeral Service Commission to approve it at their first opportunity.

COMMISSION RESPONSE: While indicating that commenter intends to introduce legislation to strengthen the public's right of access to cemeteries, commenter's letter is supportive of new §205.2 as written.

COMMENT: Commenter is writing this letter regarding your proposal for cemeteries. Commenter believes that access to cemeteries is a right. Death and dying can be a traumatic event for families and friends. It can be complex. It may affect their minds, bodies, and spirits. Each person deals with death and dying differently. Some may move on immediately. Some may think they are over the event only to experience grief later. Others may take years to resolve their grief. Commenter is writing this letter of support for consumers.

1. Commenter feels individuals should be able to visit cemeteries daily from sunrise to sunset.

2. Commenter feels that access routes to cemeteries should be permanently designated and maintained consistently. It is important for inventory, researchers, historians, and caretakers of cemeteries. Renegotiating access can a negative affect on the deceased loved ones and delay future burials.

3. Commenter feels that Individual or families do not need to purchase an insurance policy to visit or keep the cemeteries clean.

4. Commenter feels local authorities should oversee the process to prevent delays and maintain timeliness for consumers. The state does not have a funds and staff to implement a timely course of action to resolve dilemmas. And finally,

5. Commenter feels access to cemeteries should not be a political issue. Policies and procedures should be consistent across the state.

COMMISSION RESPONSE: The commission does not necessarily disagree with comments. However, the process described above that would be set in place by the adoption of new §205.2 is designed to resolve on a case by case basis the issues raised by comments with the exception of comment number 4 where commenter suggests oversight by local officials. The Commission lacks authority to require oversight by local officials.

COMMENT: Commenter's father is buried in Boggy Cemetery in Flynn (Leon County), Texas. As a nurse, commenter knows personally that death and dying is a traumatic event and every person deals with it differently and goes through a process of grieving.

Commenter is writing this letter of support for consumers.

1. Commenter feels that commenter should be able to visit cemeteries daily from sunrise to sunset.

2. Commenter feels that policies and procedures should be written by the state and enforced consistent across the state.

3. Commenter feels that access routes to and from the cemeteries should be permanently designated and enforced.

4. Commenter feels local authorities should oversee the process to prevent delays and maintain time-lines for consumers with an empathic attitude.

COMMISSION RESPONSE: The commission does not necessarily disagree with the comments. However, the process described above that will be set in place by the adoption of new §205.2 is designed to resolve on a case by case basis the issues raised by comments with the exception of her comment number 4 where commenter suggests oversight by local officials. The Commission lacks authority to require oversight by local officials.

Comment letter dated November 25, 2008 (incorporating by reference letters dated June 16, 2008, July 7, 2008, and September 29, 2008):

LETTER DATED NOVEMBER 25, 2008: In accordance with comment procedure set forth in the proposed rule published on October 31, 2008, in the *Texas Register* under (33 TexReg 8874), [my client] believes there should be a withdrawal of the proposed rule, modification of the proposed rule and/or amendment of the proposed rule. As you are aware, [my client] is the owner of a tract or property located in Harrison County, Texas. an adjoining tract, with its boundaries not contiguous to the property owned by [my client] there is a place of internment which is locally known as the Love Cemetery. Commenter has provided various comments, both in person at your meeting in Marshall, Texas, as well as by mail. Commenter would incorporate in these comments those items of correspondence, which includes correspondence dated June 16, 2008, July 7, 2008, and September 29, 2008. Commenter would ask that the Texas Funeral Service Commission or the Attorney General for the State of Texas respond to each of the comments made herein. Commenter will break down comments into two (2) different sections. The first one will be comments concerning the legality and constitutionality of the proposed rule, and the second would be concerns over the provisions of the proposed rule. It concerns the commenter that you outline in the information contained within the *Texas Register* various issues that were raised at the local meetings, yet to my knowledge there were no major changes actually made to the rule to take into consideration anything that was provided to you in the way of comments at the meetings.

I. Legality and Constitutionality of the Proposed Rule.

1. The Commission seeks to enact a rule concerning the provision of §711.041(a) of the Texas Health and Safety Code. in researching the §711.041, the Beaumont Court of Appeals held the rule was unconstitutional as violating Texas Constitution Article I, Section 17. The case is Meek v. Smith and is published at 7 S.W.3d 297 (Court of Appeals- Beaumont 1999) That case is very similar to the case that is involved with [my client] in that there was an attempt to utilize the statute in order to obtain access across adjoining property to a cemetery that was located on property not owned by the landowners in question. The Court there found that the permanent appropriation of an easement for a right-of-way for travel across a tract of land constitutes a taking without compensation within the purview of Article I, Section 17 of the Constitution and therefore found the provision to be unconstitutional. Although there have been other cases that have ruled on the statute since the 1999 case of Meek, each of the other cases has found specifically that the statute becomes unconstitutional when it attempted to be applied to property which is not surrounding, contiguous or adjacent to the cemetery in question. Therefore, including §205.2(d) makes the rule unconstitutional in

that it attempts to make a rule as to facts which the Texas Court of Appeals has already concluded is unconstitutional.

2. As you are aware, there is already an existing access easement that has been signed by the Love Colored Burial Association as Grantee and "previous owner" as Grantor which covers art access way. Therefore, as you are also aware, this document requires the delivery of liability insurance for use of the access easement. Therefore, you have not indicated in the rule whether or not you are trying to terminate existing easements or whether or not your rule will affect those. If you are attempting to affect the existing easement, if any, then the rule will violate Texas Constitutional Article 1, Section 16, which provides that no law can be made impairing the obligations of contracts. Since you have not indicated in your rule whether existing documentation of agreements reached with cemeteries will be modified, it will continue to be [my client's] position that they are not subject to the rule since the rule only applies to instances in which there is no ingress or egress available. To the contrary, there may be the ability for ingress and egress to the Love Cemetery so long as the parties requesting access comply with the easement.

3. The Attorney General in 1998 also reviewed a proposed statute, §251.053 of the Texas Transportation Code, which authorized the establishment of a neighborhood road to obtain access to landlocked property. The Attorney General, after reviewing the statute, in a 1998 Attorney General's Opinion No. DM487, found that the County could not take private property for the purpose of establishing a road under the Neighborhoods Road Statute. This Attorney General's Opinion, which relies on the Supreme Court case of Estate of Wagner v. Oleghorn, 376S.W.2d (Tex. 1964) found that providing statute which takes private property is unconstitutional and void.

I would ask that you have the Attorney General provide a response to the above constitutionality and legality arguments since it appears that in the 1998 Attorney General's Opinion No. DM-487 would equally apply to the statute and proposed rule.

II. Comments concerning the Proposed Rule. Although as indicated above, commenter believes the statute and proposed rule as drafted will be unconstitutional and therefore illegal, nevertheless commenter is providing the following comments to the proposed rule in hopes that the Commission will make appropriate changes to make the rule less onerous to landowners. These comments would be as follows:

1. In the proposed rule you attempt to provide that the requirement of insurance or indemnification cannot be utilized to thwart the rule, yet there is no provision concerning how that provision is to be interpreted. As per commenter's previous comments, since you have made the imposition of the rule subject to mediation between the parties there does not seem to be any reason why the parties could not mediate the requirement of indemnification and liability insurance. The rule does not provide for any apportionment of risk or responsibility and therefore contrary to the assertion in the *Texas Register* under the Takings Impact Statement, I do believe that the taking that you are proposing will have a substantial impact on the private real property rights of the landowner.

2. You also have a reasonable hours provision under §205.2(c). As per commenter's previous discussions, commenter believes that the times of access should be part of the negotiations between the Landowner and the cemetery association since in most cases commenter does not think the cemetery association wants there to be open access to the cemetery and would want to control access to the cemetery.

3. In §205.2(n), you provide that the decision of the commission is not appealable. Commenter does not believe that the Commission can be the final determiner of the taking of a landowner's property for ingress and egress. It would appear that it would be appropriate to remove the provision concerning "may not be appealed" since the commenter does not believe that provision is constitutional.

As indicated above, commenter would ask that the Commission and/or the Attorney General respond to each of the comments in writing so that [my client] can understand the basis for the provisions as written. It would seem only appropriate for the Commission to review the rule, not only with the issues of access to the cemetery being taken into consideration, but also the comments and concerns of landowners whose land is going to be subject to the imposition of the rule. If commenter can provide any further information concerning any of the above comments, please contact.

LETTER DATED JUNE 16, 2008: Commenter represents [my client] I have previously written the Funeral Service Commission concerning the issue of Love Cemetery which is located on property adjoining [my client's] property in Harrison County, Texas. Commenter has received notice that there is to be a public hearing concerning access issues to cemeteries such as Love Cemetery and rather than being present at the hearing, [my client] asked that I provide you written comments concerning any proposed rules or regulations. These comments would be as follows:

1. As per commenter's previous correspondence, Love Cemetery Association has a written easement agreement, which although it is somewhat confusing as to the exact route to achieve access to the cemetery, would provide access to the cemetery but the Association has chosen not to proceed by the terms of the easement but instead wants an unfettered right to obtain access.

2. As indicated above, the Cemetery is not located on the property of [my client] although [my client] seems to continue to receive requests for access without compliance with the right-of-way agreement. The Cemetery is actually located on the property of [another person], a doctor from Shreveport, Louisiana, and therefore, any use of a statute which would allow access across property on which the Cemetery is located would impact [the other person's] property and not the property of [my client].

3. Any regulation or statute which would establish a right to cross property of a third party in order to obtain access to a cemetery would necessarily require some type of release of the property owner from any claims that might be made as a result of the use. In addition, it would have to require the users of the property to repair any damage they do to a third party's property. Also, the release of any claims would only handle one of two issues, the second being if there was damage to the property that they were crossing, for example, the activities resulted in a fire which destroyed the timber of the landowner that would cause there to be a potentially uncompensated damage to the Landowner. [My client] would be concerned that there is no method to restrict who obtains access such that if access is left open to the parties involved in the cemetery, there would be no ability to prevent access from third parties who have no intent to access the cemetery but simply want to obtain access to [my client's] property.

4. Any such regulation or statute would potentially cause there to be a taking of an easement without compensation which would be violative of the Texas Constitution. The legislature has attempted in the past to provide relief for other landlocked property and although they have attempted to grant a mechanism to obtain access to landlocked property, the grant of such mechanism was held to be unconstitutional.

[My client] is keenly aware of the issue to access to the Cemetery but the Funeral Service Commission should be aware that all [my client] has ever asked is that the Cemetery comply with their agreements under the easement that they obtained from "the previous owner" prior to the purchase by [my client], and the Cemetery Association is unwilling or unable to complete the purchase of insurance to protect [my client] in connection with its ownership of the property. If the Funeral Service Commission were to enact regulations dealing with this matter, the impact would be on the other person's property since it would be the property in which the cemetery was contained and not on [my client's] property.

All that being said, if the Funeral Service Commission is able to resolve the issue, not only of potential liability to the landowner for allowing access, but also a method to provide for recovery of any damage that is caused as a result of the use, then such regulation would potentially protect the landowner in connection with a forced easement onto their property but I anticipate that the Funeral Service Commission will not be able to provide for regulations which would result in the various issues with the landowner being resolved. The commenter would appreciate it if this letter would be made a part of the record of the Commission hearing in order to act as [my client's] formal response to the Notice of the Holding of the Hearing.

LETTER DATED JULY 7, 2008: After our conversation on Thursday June 19, 2008, commenter had an opportunity to visit with the media who were at the entrance of [my client's] property. Commenter provided them my account of the situation that arose on Thursday. Commenter thought it appropriate to write you and make you aware of my concern about how the whole matter was handled by the Funeral Service Commission. When you arrived at my office, unannounced, you and the vice chairman of the Commission were the only two (2) people that entered my office and led me to believe that you were the only two (2) people that would be escorted to the property. It has now come to my attention from my staff that at the time you entered my office you already had other individuals with you, who commenter anticipated you would also want to enter the property, and who would be at the site at the time the [my client's] representative appeared. If you had made it known to commenter that you were going to have media people involved and/or others involved in the meeting, commenter would not have agreed to allow "another representative" to meet you at the location, but instead would have had you postpone any meeting until commenter could be available. Therefore, commenter feels that whether you contacted the media or not, commenter was misled about the activities that were to take place at [my client's] property. In addition, you indicated to commenter that you needed to be escorted in order to see the cemetery. As commenter learned later, you were planning to visit the cemetery through [another person's] property and therefore, it did not appear that it would have been necessary for you to utilize [my client's] property in order to have access to the cemetery. If commenter had known that you already had access to the cemetery commenter would have again viewed the whole matter in a different light. This is not to say that [my client] is unwilling to allow the Funeral Service Commission to proceed on a fact finding mission, but as you have been informed on a number of occasions, this is not a landlocked cemetery except as to any position that [the other person] may take. Contrary to that position, the Cemetery Association entered into an Easement Agreement which contractually bound them to provide insurance in connection with the use of the easement and they simply have chosen not to. This particular cemetery issue is not consistent with some of the others that you are reviewing where the cemetery is surrounded by land and they have no right of entry but instead is a contractual matter in that the Cemetery Association has not complied with the contract and have not provided any alternatives to compliance with the contract. Based upon my review of the issues that arose in connection with your access to the property, it appears that either you or someone within the party wanted to make this a media event. Since you were aware that commenter was not going to be in attendance, it appears that someone within the group wanted to have a representative of [my client] who was not as familiar with the issues at hand to appear at the property of [my client] in order to utilize his potential unsophistication and his lack of knowledge to make it difficult for him to properly respond to whatever questions either you or the media may have had. "The other representative" would not have been able to answer the questions and the party that should have been available was me but, as indicated in the newspaper article, commenter was unavailable that afternoon. It is not the fact that the media was in attendance that was a problem, it was the fact that the appropriate person to respond to any questions was not going to be available to attend the meeting. Other arrangements would have been made if commenter had been aware that there were other parties that planned on attending the meeting. Based upon all of the information commenter has, it appears that the Funeral Service Commission, rather than being on a fact finding mission, intended instead to create a media event. It also appears that rather than attempting to fairly and accurately describe the issues that are at hand, either you and/or the Funeral Service Commission has already made up their mind that the Cemetery Association does not need to honor its contractual obligations but instead should be allowed an unfettered right to go across private property leaving the landowner without any potential recourse should an incident occur which results in either damage to the property or liability to the property owner. You indicated to the newspaper reporter that you planned on contacting the Attorney General of the State of Texas concerning this matter and I would request that you do so since I anticipate that you will find that what the Funeral Service Commission is proposing as legislation would have to be drafted very carefully not to violate constitutional prohibitions on taking of private property for private purposes. As indicated above, [my client] is keenly aware of the concerns of the parties but the status of the matter was not of [my client's] making and [my client] is simply requiring the parties to comply with the contractual easement agreement as it would of any other person or entity in connection with the use of its property. As I indicated to you, I will be happy to provide you another opportunity to go across [my client's] property to the fence that is on [the other person's] boundary if you will provide me dates on which you wish to obtain access. In addition, in the future if you will notify me that you plan to make it a media event for whatever reason, instead of a fact finding mission, commenter will make himself available so that commenter can answer any questions that the parties may have and make sure that the media, as well as the Funeral Service Commission, is aware of the true nature of the situation.

LETTER DATED SEPTEMBER 29, 2008: After the meeting in Marshall, commenter thought it would be appropriate to mention one other comment that commenter would have to the proposed rule. This comment would be, in addition to the other comments the commenter made at the meeting, and in particular this should not indicate that commenter feels that the rule that is going to be proposed is necessary or constitutional. An additional comment would be that commenter does not see the reason why the Commission would place certain specifics in the rule when it appears that the rule is intended to provide for a mechanism to mediate and determine the best method for the cemetery and landowner to agree to allow for access. In the rule, you have made two (2) specific determinations, those being that the reasonable hours for access are from 8:00 a.m. to 5:00 p.m., each day of the week and that there can be no requirement of liability insurance or indemnification. It would seem that the more appropriate approach would be to leave those two (2) items to the mediation process rather than predetermining those issues. Specifically, in speaking to the individuals in control of the Love Cemetery Association, they would not want there to be open access to the cemetery but would only want limited access since they have indicated that they would also be concerned about potential vandalism and theft if the access is not properly monitored. I would suggest that the Commission may wish to delete the definition of reasonable hours and any prohibition of requiring liability insurance and instead leave those as part of the mediation process in order to be fair to both parties to the process.

COMMISSION RESPONSE: The commenter divides the substantive comments in his letter dated November 25, 2008 into two categories. In a category denominated "Legality and Constitutionality of the Proposed Rule," commenter makes three primary points. First, he points out that one Court of Appeals case has held §711.041 unconstitutional when applied to a certain fact situation. He also notes that other courts have not found the statute constitutional when applied to other fact situations. However, new §205.2 provides a broad framework for the negotiation, mediation, and, ultimately, for an order of the Commission only if negotiation and mediation are not successful. The Commission will not intentionally adopt an order that is unconstitutional. Second, the commenter makes the point that there may be an existing easement providing access with respect to a particular cemetery in Harrison County, and that any enforced modification of that easement would violate a provision of the Texas Constitution providing that no law can be made impairing the obligations of contracts. The commenter also notes that it is his belief that new §205.2 would in and of itself violate the Private Real Property Rights Preservation Act. The Commission disagrees for the reasons stated under "Taking Impacts Statement" in the preface to the publication for comment of new §205.2. Once again, however, new §205.2 provides a broad framework for negotiation, mediation, and, only after negotiation and mediation are not successful would the Commission adopt an order with respect to a particular fact situation. The Commission would expect to consider all legal issues before acting. Third, the commenter cites an Attorney General's opinion that found that a county could not take private property for the purpose of establishing a road under a law referred to as the Neighborhood Road Statute. The Commission believes that this opinion may or may not be applicable to any particular fact situation that the Commission might address under new §205.2. The Commission does not believe that any modification of new §205.2 needs to be made to address the comments with respect to the legality and constitutionality of new §205.2.

In a category denominated "Comments concerning the Proposed Rule," the commenter makes three additional points. First, he expresses concern with a provision contained in subsection (g) of new §205.2 providing that an owner or owners of land surrounding a cemetery or private burial cannot render the right of ingress and egress impractical by the imposition of liability insurance or other indemnification requirements. He goes on to say that he does not see any reason why liability insurance and indemnification requirements cannot be negotiated and mediated between the parties. Indeed, it is assumed by the Commission that such negotiation and mediation will in fact occur. The point of the provision is to make it clear that if the negotiation and mediation process envisioned by new §205.2 does not result in a voluntary agreement, the Commission would be able to act to prevent exorbitant liability and insurance requirements from rendering §711.041, Texas Health and Safety Code meaningless, thus thwarting the purpose of the statute. Secondly, the commenter objects to the provision in subsection (e) of new §205.2 that establishes 8:00 a.m. to 5:00 p.m. on any day of the week as the nominal standard for reasonable hours of ingress and egress. However, subsection (e) goes on to state: "It is provided, however, that the hours during the day and the days of the week during which ingress and egress shall be allowed may be more particularly circumscribed by an agreement reached or an order entered pursuant to subsections (i) - (n)" of new §205.2. New §205.2 contemplates that the parties will negotiate or mediate or the Commission will order a set of hours and days that is appropriate to the particular fact situation surrounding a particular cemetery or private burial ground. The Commission does not believe that any changes to new §205.2 are necessary to accommodate these two comments. Finally, the commenter points out that subsection (n) of new §205.2 could be interpreted as an attempt to preclude access to the courts to challenge an order of the Commission. The Commission agrees that subsection (n) could be misconstrued and has changed the language of that subsection to avoid such an interpretation. The letters dated June 16, 2008 and July 7, 2008 that were incorporated by reference in the commenter's letter of November 28, 2008 precede the comment period and relate to the specific fact situation surrounding a particular cemetery in Harrison County that has not been addressed pursuant to the procedures contained in new §205.2. The letters do not offer any specific comments with regard to new §205.2 that are not covered by the points made in the commenter's letter of November 28, 2008. The letter of September 29, 2008 also precedes the comment period. However, it does suggest that new §205.2 should not mandate 8:00 a.m. to 5:00 p.m. as reasonable hours and should not mandate that there can be no requirement for liability insurance or indemnification. These comments also are made in the commenter's letter of November 28, 2008 and are discussed in the immediately preceding paragraph where it is pointed out that new §205.2 does not mandate either of these things.

The new rule is adopted under Texas Occupations Code §651.152 and §711.012(b), Texas Health and Safety Code.

§205.2. Ingress and Egress to Cemeteries and Private Burial Grounds Which Have No Public Ingress or Egress.

(a) Section 711.012(b), Texas Health and Safety Code, authorizes the Texas Funeral Service Commission (commission) to promulgate rules to effectuate §711.041, Texas Health and Safety Code.

(b) Section 711.041(a), Texas Health and Safety Code, provides that any person who wishes to visit a cemetery or private burial grounds for which no public ingress or egress is available shall have,

for the purposes usually associated with cemetery visits and during reasonable hours, the right to reasonable ingress and egress for the purpose of visiting the cemetery or private burial grounds.

(c) Section 711.041(b), Texas Health and Safety Code, provides that the owner or owners of lands surrounding a cemetery or private burial grounds may designate the route or routes of reasonable ingress and egress.

(d) The term "owner or owners of lands surrounding a cemetery or private burial grounds" as used in §711.041(b), Texas Health and Safety Code, means any person, persons, entity, or entities that own lands that lie between a public road and a cemetery or private burial grounds that has no public ingress or egress irrespective of whether such lands are contiguous to the cemetery or private burial grounds or to the public road.

(e) The term "reasonable hours" as used in §711.041(a), Texas Health and Safety Code, means 8:00 a.m. to 5:00 p.m. on any day of the week. It is provided, however, that the hours during the day and the days of the week during which ingress and egress shall be allowed may be more particularly circumscribed by an agreement reached or an order entered pursuant to subsections (i) - (n) of this section.

(f) The phrase "purposes usually associated with cemetery visits" as used in §711.041(a), Texas Health and Safety Code, means a visit by any person or group of persons for the purpose of interring a person or persons in a cemetery or private burial grounds or for the purpose of paying respect to a person or persons interred in a cemetery or private burial grounds.

(g) The use by the Texas Legislature of the word "reasonable" in the phrase "designate the routes of reasonable ingress and egress" as set out in §711.041(b), Texas Health and Safety Code, means:

(1) that an "owner or owners of land surrounding the cemetery or private burial grounds" may not designate a route or routes of ingress and egress that discourages visits to a cemetery or private burial grounds during "reasonable hours" for the "purposes usually associated with cemetery visits" as defined in subsections (d) and (e) of this section; and

(2) that an owner or owners of lands surrounding a cemetery or private burial grounds may not thwart the right of ingress and egress guaranteed by §711.041, Texas Health and Safety Code, by the imposition of liability insurance or other indemnification requirements that render impractical or impossible visits during "reasonable hours" for the "purposes usually associated with cemetery visits" as defined in subsections (d) and (e) of this section.

(h) Within the framework provided by subsections (d) - (g) of this section, persons or entities that are interested in establishing a visitation schedule and a route or routes of reasonable ingress and egress with respect to a particular cemetery or private burial grounds shall make contact with and negotiate with each owner or owners of lands that surround the cemetery or private burial grounds for the purpose of agreeing to and reducing to writing the visitation schedule and route or routes of reasonable ingress and egress to a cemetery or private burial grounds for which no public ingress and egress is available. The persons or entities making contact with the owner or owners of land that surround such a cemetery or public burial grounds shall inform the executive director of the commission that such contact is being initiated.

(i) If the parties reach agreement during the negotiations prescribed by subsection (h) of this section, the persons or entities making contact with the owner or owners of lands shall file a written agreement signed by all parties with the executive director of the commission.

(j) If the parties cannot reach agreement during the negotiations prescribed by subsection (h) of this section, any party to the negotiations may request of the executive director of the commission that the dispute be mediated pursuant to the commission's alternate dispute resolution policy and procedure as set out in §207.1 of this title (relating to Alternative Dispute Resolution Policy and Procedure).

(k) If the mediation is successful, the mediated agreement shall be reduced to writing and filed with the executive director of the commission.

(l) If the mediation is not successful, the executive director shall propose to the commission the adoption of an order setting out a reasonable visitation schedule and a route or routes of reasonable ingress to the cemetery or private burial grounds for which no public ingress or egress is available.

(m) Notice and a copy of the proposed order will be sent by certified mail to all interested parties no less than 30 days prior to the commission meeting at which the adoption of an order will be considered. At the meeting at which the adoption of an order will be considered, each affected party will be given an opportunity to offer testimony with respect to the proposed order. Subject to expansion by the commission on the day of the meeting, time limits on testimony shall be set by the executive director in the notice accompanying a copy of the proposed order.

(n) After consideration of the proposed order and any testimony taken, the commission may adopt the order as proposed, may adopt the order with changes, or may defer action to a future meeting. An order adopted by the commission under this section is final as of the date of the Commission's adoption of the order, as proposed or with changes, at a meeting. A copy of the Commission's final order will be sent to the parties by certified mail.

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

Filed with the Office of the Secretary of State on January 30, 2009.

TRD-200900370
O.C. Robbins
Executive Director
Texas Funeral Service Commission
Effective date: February 19, 2009
Proposal publication date: October 31, 2008
For further information, please call: (512) 936-2466

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 13. HEALTH PLANNING AND RESOURCE DEVELOPMENT

The Executive Commissioner of the Health and Human Services Commission (commission) on behalf of the Department of State Health Services (department) adopts the repeal of §§13.1 - 13.8, and new §§13.1 - 13.3, concerning the recruitment of physicians to underserved areas without changes to the proposed text as published in the September 5, 2008, issue of the *Texas Register*

(33 TexReg 7419) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

Federal law (Title 8, United States Code, §1182 and §1184) allows waiver of normal immigration requirements for foreign physicians who agree to provide certain specified types of medical services in this country. The Immigration and Naturalization Services provide these waivers based upon the recommendation of state health departments. This is called the "Conrad 30" program after the original name of the sponsor of the federal legislation and the number of exemptions provided to each state. Corresponding state law (Health and Safety Code, §12.0127) allows the department to implement the Texas Conrad 30 program in Texas. The purpose of the program is to recruit physicians to underserved areas of the state by making a recommendation for the waiver of the two-year home residence requirement for foreign physicians who trained in the United States on a J-1 Exchange Visitor visa. The waiver recommendation comes with a three-year service obligation for the physician to practice in an underserved area. The program is authorized by the federal government to make 30 waiver recommendations per year.

The repeals and new rules are necessary to avoid any possible conflict between the rules and 8 United States Code, §1184. Changes in federal law now allow state Conrad 30 programs to recommed waivers for physicians in areas that were previously ineligible. The new rules allow the program the flexibility to make priorities for waiver recommendations on an annual basis that will be congruous with current and possible future changes in the federal law and policy. The new rules will also allow the program to increase the public health service fee as the cost of administering the program increases.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 13.1 - 13.8 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed. However, the rules are repealed and adopted as new rules.

SECTION-BY-SECTION SUMMARY

The repeal of §§13.1 - 13.8 eliminates the definition of terms, various rules in regard to employers and employment contracts, and verification of program expectations. New §§13.1 - 13.3 provide flexibility for the department to set priorities for waiver recommendations on an annual basis; assess the public health service fee as the cost of administering the program increases; and set policy on an annual basis according to state need and potential change in federal law.

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.

SUBCHAPTER A. WAIVER OF VISA RECOMMENDATION FOR PHYSICIANS

25 TAC §§13.1 - 13.8

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §12.0127, which requires the department to charge fees for a favorable recommendation by the Conrad 30 program; 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. Review of the rules implements Government Code, §2001.039.

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

Filed with the Office of the Secretary of State on February 2, 2009.

TRD-200900380
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: February 22, 2009
Proposal publication date: September 5, 2008
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER A. RECRUITMENT OF PHYSICIANS TO UNDERSERVED AREAS

25 TAC §§13.1 - 13.3

STATUTORY AUTHORITY

The new rules are authorized by Health and Safety Code, §12.0127, which requires the department to charge fees for a favorable recommendation by the Conrad 30 program; 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. Review of the rules implements Government Code, §2001.039.

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

Filed with the Office of the Secretary of State on February 2, 2009.

TRD-200900381

Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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CHAPTER 289. RADIATION CONTROL
SUBCHAPTER D. GENERAL

25 TAC §289.201, §289.202

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 25 TAC §289.202(ggg)(2)(F) is not included in the print version of the Texas Register. The figure is available in the on-line version of the February 13, 2009, issue of the Texas Register.)

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts an amendment to §289.201 concerning general provisions for radioactive material without changes to the proposed text as published in the August 29, 2008, issue of the *Texas Register* (33 TexReg 7133) and, therefore, the section will not be republished. The amendment to §289.202 concerning standards for protection against radiation from radioactive materials is adopted with changes to the proposed text as published in the August 29, 2008, issue of the *Texas Register* (33 TexReg 7133).

BACKGROUND AND PURPOSE

The amendment to §289.201 corrects references, revises the definition of byproduct material, clarifies the definition of radiation safety officer, and adds definitions for discrete source and waste as required for compatibility with the U.S. Nuclear Regulatory Commission (NRC). Clarification is made in the rule for records of receipt, transfer, and disposal of sources of radiation, and a time frame is added for action to be taken for a radioactive sealed source that has been determined to be leaking. The address included for communications, reports, and applications has been updated.

The amendment to §289.202 is necessary for compatibility with the NRC. Texas, as an agreement state, must maintain rules that are compatible with NRC rules. These changes include clarification for the use of deep-dose equivalent and effective dose equivalent in determining occupational dose limits, and a requirement that portable gauge licensees use a minimum of two independent physical controls to secure gauges whenever they are not under the control and constant surveillance of the licensee. Clarification is added for waste disposal at approved facilities to be consistent with the new definition of byproduct material being proposed in §289.201 of this title. References to uranium rules are being deleted as a result of Senate Bill (SB) 1604, 80th Legislature, 2007, amending Health and Safety Code, §401.011, which transferred the regulatory authority for licensing and inspection of low-level waste processing and uranium recovery and disposal from the department to the Texas Commission on Environmental Quality (TCEQ). The elements, nitrogen and oxygen, are added to the list of elements and the table of values for annual intake for reasons of NRC compatibility. The date for submission to the NRC of the initial inventory for the National Source Tracking System is being changed based on compatibility with the NRC.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 289.201 and §289.202 have been reviewed and the department has determined that the reasons for adopting these sections continue to exist because rules on these subjects are needed.

SECTION-BY-SECTION SUMMARY

The reference to the table listed in §289.201(b)(9)(A) has been revised. The definition of byproduct material in §289.201(b)(15) has been revised in order to maintain compatibility with the NRC. The definition of discrete source in §289.201(b)(28) is added in order to maintain compatibility with the NRC. Section 289.201(b)(71) corrects the reference to the Texas Medical Board. Section 289.201(b)(80) has information added to the definition of radiation safety officer in order to clarify citations specific to training and responsibilities for radiation safety officers. A typographical correction is made in §289.201(b)(99). The definition of total effective dose equivalent in §289.201(b)(109) has been changed in order to maintain compatibility with the NRC. Rule reference corrections have been made in §289.201(b)(112). The definition of waste has been added in §289.201(b)(118) in order to maintain compatibility with the NRC. In §289.201(d)(1)(A)(iii) and (iv), references to "person" have been changed to "licensee" for clarification purposes. Section 289.201(g)(6) adds clarification that a leaking sealed source must be repaired or transferred within two years, and equipment associated with a leaking source must also be checked for contamination. Both clarifications are made in order to maintain compatibility with the NRC. Section 289.201(k)(1) corrects the agency address.

Section 289.202(f)(3) clarifies that the deep-dose equivalent must be used in place of the effective dose equivalent if external exposure is determined by measurement with an external personal monitoring device, in order to maintain compatibility with the NRC. Section 289.202(p)(2)(E) clarifies details associated with the determination of the accuracy of instruments and equipment used for quantitative radiation measurements. Section 289.202(y)(3) adds security requirements for portable gauges in order to maintain compatibility with the NRC.

References to rules regarding uranium and licensing of radioactive waste processing and storage facilities are removed in §§289.202(ff)(1)(A), 289.202(ccc)(2), 289.202(ddd)(1)(A), and 289.202(fff)(4) as a result of SB 1604, 80th Legislature, 2007, amending Health and Safety Code, §401.011, which transferred the regulatory authority for licensing and inspection of low-level waste processing and uranium recovery and disposal from the department to the TCEQ. Waste shipping requirements are added in §289.202(ff)(4), (5) and (6), in order to maintain compatibility with the NRC. References are corrected in §§289.202(j)(4), 289.202(ll)(4), 289.202(eee)(2)(A), and 289.202(fff)(9). The elements, nitrogen and oxygen, are added to §289.202(ggg)(2)(E) in order to maintain compatibility with the NRC. The table of soil contamination limits for selected radionuclides in current §289.202(ggg)(8) was deleted because the limits were not consistent with decommissioning criteria. A date correction is made in §289.202(hhh)(1)(H) in order to maintain compatibility with the NRC.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period, which the commission has reviewed and accepts. The department received one comment from an individual. The commenter was not against the rules in their entirety; however, the commenter suggested recommendations for change as discussed in the summary of comments.

Comment: Concerning §289.201(g)(6), the commenter observed that if the Texas Low Level Radioactive Waste disposal site is not licensed, opened and accepting waste, then it could be impossible to dispose of a leaking source within two years as required. In addition, the commenter stated that if waste were greater than Class C (GTCC) waste, such as many cesium-137 sources, then there would be no disposal options, unless the Department of Energy (DOE) takes title to the source for disposal. Due to personal experience, the commenter added that the process for DOE to take title, possession of and disposal of a GTCC source could take many years to accomplish. The commenter also expressed that simply repairing a leaking source may not be entirely possible, depending upon the amount of the radioactive material that leaked from a source and the condition of or damage to a source that is determined to be leaking.

Response: The commission disagrees because the requirements for leaking sealed sources are being amended to maintain rules that are compatible with the NRC and as an agreement state, Texas must adopt this change. The department has added the requirement that a leaking source be repaired or transferred for disposal within two years to prevent the spread of contamination. Although disposal options are limited, there are options for Class A waste and the option to request an exemption from the department is available. The most common types of Class B waste are americium and cesium sources. Historically, these types of sources have rarely been found to leak and in most cases, these sources would routinely be stored or repaired. If a facility does choose to dispose of these types of sources, the facility could coordinate with the DOE for disposal options. No change was made as a result of the comment.

Comment: Concerning §289.202(c), the commenter suggested that the term "portable" be defined.

Response: The commission disagrees with the comment and has determined that the term "portable gauge" as used in this section has the same meaning as defined in a standard dictionary. No change was made as a result of the comment.

Comment: Concerning §289.202(y)(3), the commenter stated that since no lower limit is mentioned, that even a 0.001 microcurie "portable gauge" would have to have "two independent physical controls..." In addition, the commenter expressed that this proposed regulation is inconsistent with §289.252(ii)(8) requirements for a "portable device." The commenter further questioned why the department doesn't make this requirement applicable to all portable devices.

Response: The commission disagrees because the requirement that each portable gauge licensee shall use a minimum of two independent physical controls to secure portable gauges is being added to maintain rules that are compatible with the NRC and as an agreement state, Texas must adopt this change. In addition, the department has determined that portable gauges have a long history of being lost and stolen; therefore, the new requirement will provide physical measures to ensure increased security and control of these radioactive sources. No change was made as a result of the comment.

Comment: Concerning §289.202(ff)(4), the commenter questioned if the term "Licensed material" should be "Byproduct material," as in the proposed §289.202(ff)(5) and (6).

Response: The commission agrees and has deleted "Licensed" before "material" and substituted "Byproduct," in the first sentence. In addition, the department deleted "licensed" before "byproduct material" in the second sentence for consistency.

Comment: Concerning §289.202(ff)(6), the commenter suggested the words "(the designated receiver of the shipment of low-level radioactive waste)" be added after "consignee."

Response: The commission disagrees with the comment. The term "consignee" is defined in §289.257 of this title (relating to Packaging and Transportation of Radioactive Material). No change was made as a result of the comment.

Comment: Concerning proposed deleted §289.202(ggg)(8), the commenter noted that the proposed preamble did not specify why the specific soil release limits were deleted.

Response: The commission agrees and has added the justification in the adoption preamble under the section-by-section summary to explain that the table of soil contamination limits for selected radionuclides was deleted because they were not consistent with decommissioning criteria.

The department staff on behalf of the commission provided comments and the commission has reviewed and agrees to the following changes that correct *Texas Register* formatting requirements, correct rule reference citations, and clarify several rule requirements.

Change: Concerning §289.202(p)(2)(E), the department deleted the new proposed language "... or inclusive of an appropriate efficiency associated with quantitative counting equipment" because it determined that this addition does not relate to this requirement.

Change: Concerning §289.202(ggg)(2)(F), the department deleted the proposed table and replaced with a modified table to correct numerical errors.

Change: Concerning §289.202(hhh)(1)(H), the department revised the first sentence to incorporate the information in the second sentence to eliminate duplicative language and make the information easier to read. The first sentence is revised to read "Each licensee that possesses Category 1 or Category 2 nationally tracked sources listed in paragraph (2) of this subsection shall report its initial inventory of Category 1 or Category 2 nationally tracked sources to the National Source Tracking System by January 31, 2009."

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, §401.051, which provides the Executive Commissioner of the Health and Human Services Commission with authority to adopt rules and guidelines relating to the control of radiation; 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 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 review of the rules implements Government Code, §2001.039.

§289.202. Standards for Protection Against Radiation from Radioactive Materials.

(a) Purpose.

(1) This section establishes standards for protection against ionizing radiation resulting from activities conducted in accordance with licenses issued by the agency.

(2) The requirements in this section are designed to control the receipt, possession, use, and transfer of sources of radiation by any licensee so the total dose to an individual, including doses resulting from all sources of radiation other than background radiation, does not exceed the standards for protection against radiation prescribed in this section. However, nothing in this section shall be construed as limiting actions that may be necessary to protect health and safety in an emergency.

(b) Scope.

(1) Except as specifically provided in other sections of this chapter, this section applies to persons who receive, possess, use, or transfer sources of radiation, unless otherwise exempted. No person may use, manufacture, produce, transport, transfer, receive, acquire, own, possess, process, or dispose of sources of radiation unless that person has a license or exemption from the agency. The dose limits in this section do not apply to doses due to background radiation, to exposure of patients to radiation for the purpose of medical diagnosis or therapy, to exposure from individuals administered radioactive material and released in accordance with this chapter, or to voluntary participation in medical research programs. However, no radiation may be deliberately applied to human beings except by or under the supervision of an individual authorized by and licensed in accordance with Texas' statutes to engage in the healing arts.

(2) Licensees who are also registered by the agency to receive, possess, use, and transfer radiation machines must also comply with the requirements of §289.231 of this title (relating to General Provisions and Standards for Protection Against Machine-Produced Radiation).

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

(1) Air-purifying respirator--A respirator with an air-purifying filter, cartridge, or canister that removes specific air contaminants by passing ambient air through the air-purifying element.

(2) Annual limit on intake (ALI)--The derived limit for the amount of radioactive material taken into the body of an adult worker by inhalation or ingestion in a year. ALI is the smaller value of intake of a given radionuclide in a year by Reference Man that would result in a committed effective dose equivalent of 5 rems (0.05 sievert (Sv)) or a committed dose equivalent of 50 rems (0.5 Sv) to any individual organ or tissue. ALI values for intake by ingestion and by inhalation of selected radionuclides are given in Columns 1 and 2 of Table I of subsection (ggg)(2) of this section.

(3) Assigned protection factor (APF)--The expected workplace level of respiratory protection that would be provided by a properly functioning respirator or a class of respirators to properly fitted and trained users. Operationally, the inhaled concentration can be estimated by dividing the ambient airborne concentration by the APF.

(4) Atmosphere-supplying respirator--A respirator that supplies the respirator user with breathing air from a source independent of the ambient atmosphere and includes supplied-air respirators (SARs) and self-contained breathing apparatus (SCBA) units.

(5) Class--A classification scheme for inhaled material according to its rate of clearance from the pulmonary region of the lung. Materials are classified as D, W, or Y, which apply to a range of clearance half-times: for Class D, Days, of less than 10 days; for Class W, Weeks, from 10 to 100 days, and for Class Y, Years, of greater than 100 days. For purposes of this section, lung class and inhalation class are equivalent terms.

(6) Debris--The remains of something destroyed, disintegrated, or decayed. Debris does not include soils, sludges, liquids, gases, naturally occurring radioactive material regulated in accordance with §289.259 of this title (relating to Licensing of Naturally Occurring Radioactive Material (NORM)), or low-level radioactive waste received from other persons.

(7) Declared pregnant woman--A woman who has voluntarily informed the licensee, in writing, of her pregnancy and the estimated date of conception. The declaration remains in effect until the declared pregnant woman voluntarily withdraws the declaration in writing or is no longer pregnant.

(8) Demand respirator--An atmosphere-supplying respirator that admits breathing air to the facepiece only when a negative pressure is created inside the facepiece by inhalation.

(9) Derived air concentration (DAC)--The concentration of a given radionuclide in air that, if breathed by Reference Man for a working year of 2,000 hours under conditions of light work, results in an intake of 1 ALI. For purposes of this section, the condition of light work is an inhalation rate of 1.2 cubic meters of air per hour for 2,000 hours in a year. DAC values are given in Column 3 of Table I of subsection (ggg)(2) of this section.

(10) Derived air concentration-hour (DAC-hour)--The product of the concentration of radioactive material in air, expressed as a fraction or multiple of the derived air concentration for each radionuclide, and the time of exposure to that radionuclide, in hours. A licensee may take 2,000 DAC-hours to represent ALI, equivalent to a committed effective dose equivalent of 5 rems (0.05 Sv).

(11) Disposable respirator--A respirator for which maintenance is not intended and that is designed to be discarded after excessive breathing resistance, sorbent exhaustion, physical damage, or end-of-service-life renders it unsuitable for use. Examples of this type of respirator are a disposable half-mask respirator or a disposable escape-only self-contained breathing apparatus.

(12) Dosimetry processor--A person that processes and evaluates personnel monitoring devices in order to determine the radiation dose delivered to the monitoring devices.

(13) Filtering facepiece (dust mask)--A negative pressure particulate respirator with a filter as an integral part of the facepiece or with the entire facepiece composed of the filtering medium, not equipped with elastomeric sealing surfaces and adjustable straps.

(14) Fit factor--A quantitative estimate of the fit of a particular respirator to a specific individual, and typically estimates the ratio of the concentration of a substance in ambient air to its concentration inside the respirator when worn.

(15) Fit test--The use of a protocol to qualitatively or quantitatively evaluate the fit of a respirator on an individual.

(16) Helmet--A rigid respiratory inlet covering that also provides head protection against impact and penetration.

(17) Hood--A respiratory inlet covering that completely covers the head and neck and may also cover portions of the shoulders and torso.

(18) Inhalation class (see definition for Class).

(19) Loose-fitting facepiece--A respiratory inlet covering that is designed to form a partial seal with the face.

(20) Lung class (see definition for Class).

(21) Nationally tracked source--A sealed source containing a quantity equal to or greater than Category 1 or Category 2 levels of any radioactive material listed in subsection (hhh)(2) of this section. In this context a sealed source is defined as radioactive material that is sealed in a capsule or closely bonded, in a solid form and which is not exempt from regulatory control. It does not mean material encapsulated solely for disposal, or nuclear material contained in any fuel assembly, subassembly, fuel rod, or fuel pellet. Category 1 nationally tracked sources are those containing radioactive material at a quantity equal to or greater than the Category 1 threshold. Category 2 nationally tracked sources are those containing radioactive material at a quantity equal to or greater than the Category 2 threshold but less than the Category 1 threshold.

(22) Negative pressure respirator (tight fitting)--A respirator in which the air pressure inside the facepiece is negative during inhalation with respect to the ambient air pressure outside the respirator.

(23) Nonstochastic effect--A health effect, the severity of which varies with the dose and for which a threshold is believed to exist. Radiation-induced cataract formation is an example of a nonstochastic effect. For purposes of this section, deterministic effect is an equivalent term.

(24) Planned special exposure--An infrequent exposure to radiation, separate from and in addition to the annual occupational dose limits.

(25) Positive pressure respirator--A respirator in which the pressure inside the respiratory inlet covering exceeds the ambient air pressure outside the respirator.

(26) Powered air-purifying respirator--An air-purifying respirator that uses a blower to force the ambient air through air-purifying elements to the inlet covering.

(27) Pressure demand respirator--A positive pressure atmosphere-supplying respirator that admits breathing air to the facepiece when the positive pressure is reduced inside the facepiece by inhalation.

(28) Qualitative fit test--A pass/fail fit test to assess the adequacy of respirator fit that relies on the individual's response to the test agent.

(29) Quantitative fit test--An assessment of the adequacy of respirator fit by numerically measuring the amount of leakage into the respirator.

(30) Quarter--A period of time equal to one-fourth of the year observed by the licensee, approximately 13 consecutive weeks, providing that the beginning of the first quarter in a year coincides with the starting date of the year and that no day is omitted or duplicated in consecutive quarters.

(31) Reference man--A hypothetical aggregation of human physical and physiological characteristics determined by international consensus. These characteristics may be used by researchers and public health employees to standardize results of experiments and to relate biological insult to a common base. A description of Reference Man is contained in the International Commission on Radiological Protection Report, ICRP Publication 23, "Report of the Task Group on Reference Man."

(32) Respiratory protective equipment--An apparatus, such as a respirator, used to reduce an individual's intake of airborne radioactive materials.

(33) Sanitary sewerage--A system of public sewers for carrying off waste water and refuse, but excluding sewage treatment facilities, septic tanks, and leach fields owned or operated by the licensee or registrant.

(34) Self-contained breathing apparatus--An atmosphere-supplying respirator for which the breathing air source is designed to be carried by the user.

(35) Stochastic effect--A health effect that occurs randomly and for which the probability of the effect occurring, rather than its severity, is assumed to be a linear function of dose without threshold. Hereditary effects and cancer incidence are examples of stochastic effects. For purposes of this section probabilistic effect is an equivalent term.

(36) Supplied-air respirator or airline respirator--An atmosphere-supplying respirator for which the source of breathing air is not designed to be carried by the user.

(37) Tight-fitting facepiece--A respiratory inlet covering that forms a complete seal with the face.

(38) User seal check (fit check)--An action conducted by the respirator user to determine if the respirator is properly seated to the face. Examples include negative pressure check, positive pressure check, irritant smoke check, or isoamyl acetate check.

(39) Weighting factor w_T for an organ or tissue (T)--The proportion of the risk of stochastic effects resulting from irradiation of that organ or tissue to the total risk of stochastic effects when the whole body is irradiated uniformly. For calculating the effective dose equivalent, the values of w_T are:
Figure: 25 TAC §289.202(c)(39) (No change.)

(d) Implementation.

(1) Any existing license condition that is more restrictive than this section remains in force until there is an amendment or renewal of the license that modifies or removes this condition.

(2) If a license condition exempts a licensee from a provision of this section in effect on or before January 1, 1994, it also exempts the licensee from the corresponding provision of this section.

(3) If a license condition cites provisions of this section in effect prior to January 1, 1994, that do not correspond to any provisions of this section, the license condition remains in force until there is an amendment or renewal of the license that modifies or removes this condition.

(e) Radiation protection programs.

(1) Each licensee shall develop, document, and implement a radiation protection program sufficient to ensure compliance with the provisions of this section. See subsection (mm) of this section for recordkeeping requirements relating to these programs. Documenta-

tion of the radiation protection program may be incorporated in the licensee's operating, safety, and emergency procedures.

(2) The licensee shall use, to the extent practicable, procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and public doses that are as low as is reasonably achievable (ALARA).

(3) The licensee shall, at intervals not to exceed 12 months, ensure the radiation protection program content and implementation is reviewed. The review shall include a reevaluation of the assessments made to determine monitoring is not required in accordance with subsection (q)(1) and (3) of this section in conjunction with the licensee's current operating conditions.

(4) To implement the ALARA requirement in paragraph (2) of this subsection and notwithstanding the requirements in subsection (n) of this section, a constraint on air emissions of radioactive material to the environment, excluding radon-222 and its daughters, shall be established by licensees such that the individual member of the public likely to receive the highest dose will not be expected to receive a total effective dose equivalent in excess of 10 millirems (mrem) (0.1 mSv) per year from these emissions. If a licensee subject to this requirement exceeds this dose constraint, the licensee shall report the exceedance as required in subsection (yy) of this section and promptly take appropriate corrective action.

(5) If monitoring is not required in accordance with subsection (q)(1) and (3) of this section, the licensee shall document assessments made to determine the requirements of subsection (q)(1) and (3) of this section are not applicable. The licensee shall maintain the documentation in accordance with subsection (rr)(5) of this section.

(f) Occupational dose limits for adults.

(1) The licensee shall control the occupational dose to individuals, except for planned special exposures in accordance with subsection (k) of this section, to the following dose limits.

(A) An annual limit shall be the more limiting of:

(i) the total effective dose equivalent being equal to 5 rems (0.05 Sv); or

(ii) the sum of the deep dose equivalent and the committed dose equivalent to any individual organ or tissue other than the lens of the eye being equal to 50 rems (0.5 Sv).

(B) The annual limits to the lens of the eye, to the skin of the whole body, and to the skin of the extremities shall be:

(i) a lens dose equivalent of 15 rems (0.15 Sv); and

(ii) a shallow dose equivalent of 50 rems (0.5 Sv) to the skin of the whole body or to the skin of any extremity.

(2) Doses received in excess of the annual limits, including doses received during accidents, emergencies, and planned special exposures, shall be subtracted from the limits for planned special exposures that the individual may receive during the current year and during the individual's lifetime. See subsection (k)(6)(A) and (B) of this section.

(3) When the external exposure is determined by measurement with an external personal monitoring device, the deep-dose equivalent shall be used in place of the effective dose equivalent, unless the effective dose equivalent is determined by a dosimetry method approved by the agency. The assigned deep dose equivalent shall be for the portion of the body receiving the highest exposure. The assigned shallow-dose equivalent shall be the dose averaged over the contiguous 10 square centimeters (cm^2) of skin receiving the highest exposure.

(4) The deep dose equivalent, lens dose equivalent and shallow dose equivalent may be assessed from surveys, or other radiation measurements for the purpose of demonstrating compliance with the occupational dose limits, if the individual monitoring device was not in the region of highest potential exposure, or the results of individual monitoring are unavailable.

(5) Derived air concentration (DAC) and annual limit on intake (ALI) values are specified in Table I of subsection (ggg)(2) of this section and may be used to determine the individual's dose and to demonstrate compliance with the occupational dose limits. See subsection (rr) of this section.

(6) Notwithstanding the annual dose limits, the licensee shall limit the soluble uranium intake by an individual to 10 milligrams (mg) in a week in consideration of chemical toxicity. See footnote 3 of subsection (ggg)(2) of this section.

(7) The licensee shall reduce the dose that an individual may be allowed to receive in the current year by the amount of occupational dose received while employed by any other person. See subsection (j)(4) of this section.

(g) Compliance with requirements for summation of external and internal doses.

(1) If the licensee is required to monitor in accordance with both subsection (q)(1) and (3) of this section, the licensee shall demonstrate compliance with the dose limits by summing external and internal doses. If the licensee is required to monitor only in accordance with subsection (q)(1) of this section or only in accordance with subsection (q)(3) of this section, then summation is not required to demonstrate compliance with the dose limits. The licensee may demonstrate compliance with the requirements for summation of external and internal doses in accordance with paragraphs (2) - (4) of this subsection. The dose equivalents for the lens of the eye, the skin, and the extremities are not included in the summation, but are subject to separate limits.

(2) If the only intake of radionuclides is by inhalation, the total effective dose equivalent limit is not exceeded if the sum of the deep dose equivalent divided by the total effective dose equivalent limit, and one of the following, does not exceed unity:

(A) the sum of the fractions of the inhalation ALI for each radionuclide; or

(B) the total number of derived air concentration-hours (DAC-hours) for all radionuclides divided by 2,000; or

(C) the sum of the calculated committed effective dose equivalents to all significantly irradiated organs or tissues (T) calculated from bioassay data using appropriate biological models and expressed as a fraction of the annual limit. For purposes of this requirement, an organ or tissue is deemed to be significantly irradiated if, for that organ or tissue, the product of the weighting factors, w_T, and the committed dose equivalent, $H_{T,50}$, per unit intake is greater than 10% of the maximum weighted value of $H_{T,50}$, that is, $w_T H_{T,50}$, per unit intake for any organ or tissue.

(3) If the occupationally exposed individual receives an intake of radionuclides by oral ingestion greater than 10% of the applicable oral ALI, the licensee shall account for this intake and include it in demonstrating compliance with the limits.

(4) The licensee shall evaluate and, to the extent practical, account for intakes through wounds or skin absorption. The intake through intact skin has been included in the calculation of DAC for hydrogen-3 and does not need to be evaluated or accounted for in accordance with this paragraph.

(h) Determination of external dose from airborne radioactive material.

(1) Licensees shall, when determining the dose from airborne radioactive material, include the contribution to the deep dose equivalent, eye dose equivalent, and shallow dose equivalent from external exposure to the radioactive cloud. See footnotes 1 and 2 of subsection (ggg)(2) of this section.

(2) Airborne radioactivity measurements and DAC values shall not be used as the primary means to assess the deep dose equivalent when the airborne radioactive material includes radionuclides other than noble gases or if the cloud of airborne radioactive material is not relatively uniform. The determination of the deep dose equivalent to an individual shall be based upon measurements using instruments or individual monitoring devices.

(i) Determination of internal exposure.

(1) For purposes of assessing dose used to determine compliance with occupational dose equivalent limits, the licensee shall, when required in accordance with subsection (q) of this section, take suitable and timely measurements of:

(A) concentrations of radioactive materials in air in work areas;

(B) quantities of radionuclides in the body;

(C) quantities of radionuclides excreted from the body; or

(D) combinations of these measurements.

(2) Unless respiratory protective equipment is used, as provided in subsection (x) of this section, or the assessment of intake is based on bioassays, the licensee shall assume that an individual inhales radioactive material at the airborne concentration in which the individual is present.

(3) When specific information on the physical and biochemical properties of the radionuclides taken into the body or the behavior of the material in an individual is known, the licensee may:

(A) use that information to calculate the committed effective dose equivalent, and, if used, the licensee shall document that information in the individual's record;

(B) upon prior approval of the agency, adjust the DAC or ALI values to reflect the actual physical and chemical characteristics of airborne radioactive material, for example, aerosol size distribution or density; and

(C) separately assess the contribution of fractional intakes of Class D, W, or Y compounds of a given radionuclide to the committed effective dose equivalent. See subsection (ggg)(2) of this section.

(4) If the licensee chooses to assess intakes of Class Y material using the measurements given in paragraph (1)(A) or (B) of this subsection, the licensee may delay the recording and reporting of the assessments for periods up to seven months, unless otherwise required by subsections (xx) or (yy) of this section. This delay permits the licensee to make additional measurements basic to the assessments.

(5) If the identity and concentration of each radionuclide in a mixture are known, the fraction of the DAC applicable to the mixture for use in calculating DAC-hours shall be either:

(A) the sum of the ratios of the concentration to the appropriate DAC value, that is, D, W, or Y, from subsection (ggg)(2) of this section for each radionuclide in the mixture; or

(B) the ratio of the total concentration for all radionuclides in the mixture to the most restrictive DAC value for any radionuclide in the mixture.

(6) If the identity of each radionuclide in a mixture is known, but the concentration of one or more of the radionuclides in the mixture is not known, the DAC for the mixture shall be the most restrictive DAC of any radionuclide in the mixture.

(7) When a mixture of radionuclides in air exists, a licensee may disregard certain radionuclides in the mixture if:

(A) the licensee uses the total activity of the mixture in demonstrating compliance with the dose limits in subsection (f) of this section and in complying with the monitoring requirements in subsection (q)(3) of this section;

(B) the concentration of any radionuclide disregarded is less than 10% of its DAC; and

(C) the sum of these percentages for all of the radionuclides disregarded in the mixture does not exceed 30%.

(8) When determining the committed effective dose equivalent, the following information may be considered.

(A) In order to calculate the committed effective dose equivalent, the licensee may assume that the inhalation of 1 ALI, or an exposure of 2,000 DAC-hours, results in a committed effective dose equivalent of 5 rems (0.05 Sv) for radionuclides that have their ALIs or DACs based on the committed effective dose equivalent.

(B) For an ALI and the associated DAC determined by the nonstochastic organ dose limit of 50 rems (0.5 Sv), the intake of radionuclides that would result in a committed effective dose equivalent of 5 rems (0.05 Sv), that is, the stochastic ALI, is listed in parentheses in Table I of subsection (ggg)(2) of this section. The licensee may, as a simplifying assumption, use the stochastic ALI to determine committed effective dose equivalent. However, if the licensee uses the stochastic ALI, the licensee shall also demonstrate that the limit in subsection (f)(1)(A)(ii) of this section is met.

(j) Determination of occupational dose for the current year.

(1) For each individual who is likely to receive, in a year, an occupational dose requiring monitoring in accordance with subsection (q) of this section, the licensee shall determine the occupational radiation dose received during the current year.

(2) In complying with the requirements of paragraph (1) of this subsection, a licensee may:

(A) accept, as a record of the occupational dose that the individual received during the current year, BRC Form 202-2 from prior or other current employers, or other clear and legible record, of all information required on that form and indicating any periods of time for which data are not available; or

(B) accept, as a record of the occupational dose that the individual received during the current year, a written signed statement from the individual, or from the individual's prior or other current employer(s) for work involving radiation exposure, that discloses the nature and the amount of any occupational dose that the individual received during the current year; or

(C) obtain reports of the individual's dose equivalent from prior or other current employer(s) for work involving radiation exposure, or the individual's current employer, if the individual is not employed by the licensee, by telephone, telegram, facsimile, or letter. The licensee shall request a written verification of the dose data if the authenticity of the transmitted report cannot be established.

(3) The licensee shall record the exposure data for the current year, as required by paragraph (1) of this subsection, on BRC Form 202-3, or other clear and legible record, of all the information required on that form.

(4) If the licensee is unable to obtain a complete record of an individual's current occupational dose while employed by any other licensee, the licensee shall assume in establishing administrative controls in accordance with subsection (f)(7) of this section for the current year, that the allowable dose limit for the individual is reduced by 1.25 rems (12.5 millisieverts (mSv)) for each quarter; or 416 mrem (4.16 mSv) for each month for which records were unavailable and the individual was engaged in activities that could have resulted in occupational radiation exposure.

(5) If an individual has incomplete (e.g., a lost or damaged personnel monitoring device) current occupational dose data for the current year and that individual is employed solely by the licensee during the current year, the licensee shall:

(A) assume that the allowable dose limit for the individual is reduced by 1.25 rems (12.5 mSv) for each quarter;

(B) assume that the allowable dose limit for the individual is reduced by 416 mrem (4.16 mSv) for each month; or

(C) assess an occupational dose for the individual during the period of missing data using surveys, radiation measurements, or other comparable data for the purpose of demonstrating compliance with the occupational dose limits.

(6) Administrative controls established in accordance with paragraph (4) of this subsection shall be documented and maintained for inspection by the agency. Occupational dose assessments made in accordance with paragraph (5) of this subsection and records of data used to make the assessment shall be maintained for inspection by the agency. The licensee shall retain the records in accordance with subsection (rr) of this section.

(k) Planned special exposures. A licensee may authorize an adult worker to receive doses in addition to and accounted for separately from the doses received under the limits specified in subsection (f) of this section provided that each of the following conditions is satisfied.

(1) The licensee authorizes a planned special exposure only in an exceptional situation when alternatives that might avoid the doses estimated to result from the planned special exposure are unavailable or impractical.

(2) The licensee and employer, if the employer is not the licensee, specifically authorizes the planned special exposure, in writing, before the exposure occurs.

(3) Before a planned special exposure, the licensee ensures that each individual involved is:

(A) informed of the purpose of the planned operation;

(B) informed of the estimated doses and associated potential risks and specific radiation levels or other conditions that might be involved in performing the task; and

(C) instructed in the measures to be taken to keep the dose ALARA considering other risks that may be present.

(4) Prior to permitting an individual to participate in a planned special exposure, the licensee shall determine:

(A) the internal and external doses from all previous planned special exposures;

(B) all doses in excess of the limits, including doses received during accidents and emergencies, received during the lifetime of the individual; and

(C) all lifetime cumulative occupational radiation doses.

(5) In complying with the requirements of paragraph (4)(C) of this subsection, a licensee may:

(A) accept, as the record of lifetime cumulative radiation dose, an up-to-date BRC Form 202-2 or equivalent, signed by the individual and countersigned by an appropriate official of the most recent employer for work involving radiation exposure, or the individual's current employer, if the individual is not employed by the licensee; and

(B) obtain reports of the individual's dose equivalent from prior employer(s) for work involving radiation exposure, or the individual's current employer, if the individual is not employed by the licensee, by telephone, telegram, facsimile, or letter. The licensee shall request a written verification of the dose data if the authenticity of the transmitted report cannot be established.

(6) Subject to subsection (f)(2) of this section, the licensee shall not authorize a planned special exposure that would cause an individual to receive a dose from all planned special exposures and all doses in excess of the limits to exceed:

(A) the numerical values of any of the dose limits in subsection (f)(1) of this section in any year; and

(B) five times the annual dose limits in subsection (f)(1) of this section during the individual's lifetime.

(7) The licensee maintains records of the conduct of a planned special exposure in accordance with subsection (qq) of this section and submits a written report to the agency in accordance with subsection (zz) of this section.

(8) The licensee records the best estimate of the dose resulting from the planned special exposure in the individual's record and informs the individual, in writing, of the dose within 30 days from the date of the planned special exposure. The dose from planned special exposures shall not be considered in controlling future occupational dose of the individual in accordance with subsection (f)(1) of this section but shall be included in evaluations required by paragraphs (4) and (6) of this subsection.

(9) The licensee shall record the exposure history, as required by paragraph (4) of this subsection, on BRC Form 202-2, or other clear and legible record, of all the information required on that form. The form or record shall show each period in which the individual received occupational exposure to radiation or radioactive material and shall be signed by the individual who received the exposure. For each period for which the licensee obtains reports, the licensee shall use the dose shown in the report in preparing BRC Form 202-2 or equivalent.

(l) Occupational dose limits for minors. The annual occupational dose limits for minors are 10% of the annual occupational dose limits specified for adult workers in subsection (f) of this section.

(m) Dose equivalent to an embryo/fetus.

(1) If a woman declares her pregnancy, the licensee shall ensure that the dose equivalent to an embryo/fetus during the entire pregnancy, due to occupational exposure of a declared pregnant woman, does not exceed 0.5 rem (5 mSv). If a woman chooses not to declare pregnancy, the occupational dose limits specified in subsection

(f)(1) of this section are applicable to the woman. See subsection (rr) of this section for recordkeeping requirements.

(2) The licensee shall make efforts to avoid substantial variation above a uniform monthly exposure rate to a declared pregnant woman so as to satisfy the limit in paragraph (1) of this subsection. The National Council on Radiation Protection and Measurements recommended in NCRP Report No. 91 "Recommendations on Limits for Exposure to Ionizing Radiation" (June 1, 1987) that no more than 0.05 rem (0.5 mSv) to the embryo/fetus be received in any one month.

(3) The dose equivalent to an embryo/fetus shall be taken as:

(A) the dose equivalent to the embryo/fetus from radionuclides in the embryo/fetus and radionuclides in the declared pregnant woman; and

(B) the dose equivalent that is most representative of the dose equivalent to the embryo/fetus from external radiation, that is, in the mother's lower torso region.

(i) If multiple measurements have not been made, assignment of the highest deep dose equivalent for the declared pregnant woman shall be the dose equivalent to the embryo/fetus.

(ii) If multiple measurements have been made, assignment of the deep dose equivalent for the declared pregnant woman from the individual monitoring device that is most representative of the dose equivalent to the embryo/fetus shall be the dose equivalent to the embryo/fetus. Assignment of the highest deep dose equivalent for the declared pregnant woman to the embryo/fetus is not required unless that dose equivalent is also the most representative deep dose equivalent for the region of the embryo/fetus.

(4) If by the time the woman declares pregnancy to the licensee, the dose equivalent to the embryo/fetus has exceeded 0.45 rem (4.5 mSv), the licensee shall be deemed to be in compliance with paragraph (1) of this subsection, if the additional dose equivalent to the embryo/fetus does not exceed 0.05 rem (0.5 mSv) during the remainder of the pregnancy.

(n) Dose limits for individual members of the public.

(1) Each licensee shall conduct operations so that:

(A) The total effective dose equivalent to individual members of the public from the licensed and/or registered operation does not exceed 0.1 rem (1 mSv) in a year, exclusive of the dose contribution from background radiation, from any medical administration the individual has received, from exposure to individuals administered radioactive material and released in accordance with §289.256 of this title (relating to Medical and Veterinary Use of Radioactive Material), from voluntary participation in medical research programs, and from the licensee's disposal of radioactive material into sanitary sewerage in accordance with subsection (gg) of this section; and

(B) the dose in any unrestricted area from licensed and/or registered external sources, exclusive of the dose contributions from patients administered radioactive material and released in accordance with §289.256 of this title, does not exceed 0.002 rem (0.02 mSv) in any one hour.

(2) If the licensee permits members of the public to have access to restricted areas, the limits for members of the public continue to apply to those individuals.

(3) A licensee or an applicant for a license may apply for prior agency authorization to operate up to an annual dose limit for an individual member of the public of 0.5 rem (5 mSv). This application shall include the following information:

(A) demonstration of the need for and the expected duration of operations in excess of the limit in paragraph (1) of this subsection;

(B) the licensee's program to assess and control dose within the 0.5 rem (5 mSv) annual limit; and

(C) the procedures to be followed to maintain the dose ALARA.

(4) In addition to the requirements of this section, a licensee subject to the provisions of the United States Environmental Protection Agency's (EPA) generally applicable environmental radiation standards in 40 Code of Federal Regulations (CFR), §190 shall comply with those requirements.

(5) The agency may impose additional restrictions on radiation levels in unrestricted areas and on the total quantity of radionuclides that a licensee may release in effluents in order to restrict the collective dose.

(6) Notwithstanding paragraph (1)(A) of this subsection, a licensee may permit visitors to an individual who cannot be released, in accordance with §289.256 of this title, to receive a radiation dose greater than 0.1 rem (1 mSv) if:

(A) the radiation dose received does not exceed 0.5 rem (5 mSv); and

(B) the authorized user, as defined in §289.256 of this title, has determined before the visit that it is appropriate.

(o) Compliance with dose limits for individual members of the public.

(1) The licensee shall make or cause to be made surveys of radiation levels in unrestricted areas and radioactive materials in effluents released to unrestricted areas to demonstrate compliance with the dose limits for individual members of the public as required in subsection (n) of this section.

(2) A licensee shall show compliance with the annual dose limit in subsection (n) of this section by:

(A) demonstrating by measurement or calculation that the total effective dose equivalent to the individual likely to receive the highest dose from the licensed or registered operation does not exceed the annual dose limit; or

(B) demonstrating that:

(i) the annual average concentrations of radioactive material released in gaseous and liquid effluents at the boundary of the unrestricted area do not exceed the values specified in Table II of subsection (ggg)(2) of this section; and

(ii) if an individual were continuously present in an unrestricted area, the dose from external sources of radiation would not exceed 0.002 rem (0.02 mSv) in an hour and 0.05 rem (0.5 mSv) in a year.

(3) Upon approval from the agency, the licensee may adjust the effluent concentration values in Table II, of subsection (ggg)(2) of this section, for members of the public, to take into account the actual physical and chemical characteristics of the effluents, such as, aerosol size distribution, solubility, density, radioactive decay equilibrium, and chemical form.

(p) General surveys and monitoring.

(1) Each licensee shall make, or cause to be made, surveys that:

(A) are necessary for the licensee to comply with this section; and

(B) are necessary under the circumstances to evaluate:

(i) the magnitude and extent of radiation levels;

(ii) concentrations or quantities of radioactive material; and

(iii) the potential radiological hazards.

(2) The licensee shall ensure that instruments and equipment used for quantitative radiation measurements, for example, dose rate and effluent monitoring, are operable and calibrated:

(A) by a person licensed or registered by the agency, another agreement state, a licensing state, or the United States Nuclear Regulatory Commission (NRC) to perform such service;

(B) at intervals not to exceed 12 months unless a different time interval is specified in another section of this chapter;

(C) after each instrument or equipment repair;

(D) for the types of radiation used and at energies appropriate for use; and

(E) at an accuracy within 20% of the true radiation level.

(3) All individual monitoring devices, except for direct and indirect reading pocket dosimeters, electronic personal dosimeters, and those individual monitoring devices used to measure the dose to any extremity, that require processing to determine the radiation dose and that are used by licensees to comply with subsection (f) of this section, with other applicable provisions of this chapter, or with conditions specified in a license, shall be processed and evaluated by a dosimetry processor:

(A) holding current personnel dosimetry accreditation from the National Voluntary Laboratory Accreditation Program (NVLAP) of the National Institute of Standards and Technology;

(B) approved in this accreditation process for the type of radiation or radiations included in the NVLAP program that most closely approximates the type of radiation or radiations for which the individual wearing the dosimeter is monitored.

(4) All individual monitoring devices shall be appropriate for the environment in which they are used.

(q) Conditions requiring individual monitoring of external and internal occupational dose. Each licensee shall monitor exposures from sources of radiation at levels sufficient to demonstrate compliance with the occupational dose limits of this section. As a minimum:

(1) each licensee shall monitor occupational exposure to radiation and shall supply and require the use of individual monitoring devices by:

(A) adults likely to receive, in one year from sources external to the body, a dose in excess of 10% of the limits in subsection (f)(1) of this section;

(B) minors likely to receive, in one year from sources of radiation external to the body, a deep dose equivalent in excess of 0.1 rem (1 mSv), a lens dose equivalent in excess of 0.15 rem (1.5 mSv), or a shallow dose equivalent to the skin or to the extremities in excess of 0.5 rem (5 mSv);

(C) declared pregnant women likely to receive during the entire pregnancy, from sources of radiation external to the body, a deep dose equivalent in excess of 0.1 rem (1 mSv); and

(D) individuals entering a high or very high radiation area;

(2) notwithstanding paragraph (1)(C) of this subsection, a licensee is exempt from supplying individual monitoring devices to healthcare personnel who may enter a high radiation area while providing patient care if:

(A) the personnel are not likely to receive, in one year from sources external to the body, a dose in excess of 10% of the limits in subsection (f)(1) of this section; and

(B) the licensee complies with the requirements of subsection (e)(2) of this section; and

(3) each licensee shall monitor, to determine compliance with subsection (i) of this section, the occupational intake of radioactive material by and assess the committed effective dose equivalent to:

(A) adults likely to receive, in one year, an intake in excess of 10% of the applicable ALI in Columns 1 and 2 of Table I of subsection (ggg)(2) of this section;

(B) minors likely to receive, in one year, a committed effective dose equivalent in excess of 0.1 rem (1 mSv); and

(C) declared pregnant women likely to receive, during the entire pregnancy, a committed effective dose equivalent in excess of 0.1 rem (1 mSv).

(r) Location and use of individual monitoring devices.

(1) Each licensee shall ensure that individuals who are required to monitor occupational doses in accordance with subsection (q)(l) of this section wear and use individual monitoring devices as follows.

(A) An individual monitoring device used for monitoring the dose to the whole body shall be worn at the unshielded location of the whole body likely to receive the highest exposure. When a protective apron is worn, the location of the individual monitoring device is typically at the neck (collar).

(B) If an additional individual monitoring device is used for monitoring the dose to an embryo/fetus of a declared pregnant woman, in accordance with subsection (m)(1) of this section, it shall be located at the waist under any protective apron being worn by the woman.

(C) An individual monitoring device used for monitoring the lens dose equivalent, to demonstrate compliance with subsection (f)(1)(B)(i) of this section, shall be located at the neck (collar) or at a location closer to the eye, outside any protective apron being worn by the monitored individual.

(D) An individual monitoring device used for monitoring the dose to the skin of the extremities, to demonstrate compliance with subsection (f)(1)(B)(ii) of this section, shall be worn on the skin of the extremity likely to receive the highest exposure. Each individual monitoring device, to the extent practicable, shall be oriented to measure the highest dose to the skin of the extremity being monitored.

(E) An individual monitoring device shall be assigned to and worn by only one individual.

(F) An individual monitoring device shall be worn for the period of time authorized by the dosimetry processor's certificate of registration or for no longer than three months, whichever is more restrictive.

(2) Each licensee shall ensure that individual monitoring devices are returned to the dosimetry processor for proper processing.

(3) Each licensee shall ensure that adequate precautions are taken to prevent a deceptive exposure of an individual monitoring device.

(s) Control of access to high radiation areas.

(1) The licensee shall ensure that each entrance or access point to a high radiation area has one or more of the following features:

(A) a control device that, upon entry into the area, causes the level of radiation to be reduced below that level at which an individual might receive a deep dose equivalent of 0.1 rem (1 mSv) in one hour at 30 centimeters (cm) from the source of radiation from any surface that the radiation penetrates;

(B) a control device that energizes a conspicuous visible or audible alarm signal so that the individual entering the high radiation area and the supervisor of the activity are made aware of the entry; or

(C) entryways that are locked, except during periods when access to the areas is required, with positive control over each individual entry.

(2) In place of the controls required by paragraph (1) of this subsection for a high radiation area, the licensee may substitute continuous direct or electronic surveillance that is capable of preventing unauthorized entry.

(3) The licensee may apply to the agency for approval of alternative methods for controlling access to high radiation areas.

(4) The licensee shall establish the controls required by paragraphs (1) and (3) of this subsection in a way that does not prevent individuals from leaving a high radiation area.

(5) The licensee is not required to control each entrance or access point to a room or other area that is a high radiation area solely because of the presence of radioactive materials prepared for transport and packaged and labeled in accordance with the regulations of the United States Department of Transportation (DOT) provided that:

(A) the packages do not remain in the area longer than three days; and

(B) the dose rate at 1 meter from the external surface of any package does not exceed 0.01 rem (0.1 millisievert) per hour.

(6) The licensee is not required to control entrance or access to rooms or other areas in hospitals solely because of the presence of patients containing radioactive material, provided that there are personnel in attendance who are taking the necessary precautions to prevent the exposure of individuals to sources of radiation in excess of the established limits in this section and to operate within the ALARA provisions of the licensee's radiation protection program.

(t) Control of access to very high radiation areas. In addition to the requirements in subsection (s) of this section, the licensee shall institute measures to ensure that an individual is not able to gain unauthorized or inadvertent access to areas in which radiation levels could be encountered at 500 rads (5 grays) or more in one hour at 1 m from a source of radiation or any surface through which the radiation penetrates at this level.

(u) Control of access to very high radiation areas for irradiators.

(1) This subsection applies to licensees with sources of radiation in non-self-shielded irradiators. This subsection does not apply to sources of radiation that are used in teletherapy, in industrial radiography, or in completely self-shielded irradiators in which the source of radiation is both stored and operated within the same shielding radiation barrier and, in the designed configuration of the irradiator, is always physically inaccessible to any individual and cannot create high levels of radiation in an area that is accessible to any individual.

(2) Each area in which there may exist radiation levels in excess of 500 rads (5 grays) in one hour at 1 m from a source of radiation that is used to irradiate materials shall meet the following requirements.

(A) Each entrance or access point shall be equipped with entry control devices that:

(i) function automatically to prevent any individual from inadvertently entering a very high radiation area;

(ii) permit deliberate entry into the area only after a control device is actuated that causes the radiation level within the area, from the source of radiation, to be reduced below that at which it would be possible for an individual to receive a deep dose equivalent in excess of 0.1 rem (1 mSv) in one hour; and

(iii) prevent operation of the source of radiation if it would produce radiation levels in the area that could result in a deep dose equivalent to an individual in excess of 0.1 rem (1 mSv) in one hour.

(B) Additional control devices shall be provided so that, upon failure of the entry control devices to function as required by subparagraph (A) of this paragraph:

(i) the radiation level within the area, from the source of radiation, is reduced below that at which it would be possible for an individual to receive a deep dose equivalent in excess of 0.1 rem (1 mSv) in one hour; and

(ii) conspicuous visible and audible alarm signals are generated to make an individual attempting to enter the area aware of the hazard and at least one other authorized individual, who is physically present, familiar with the activity, and prepared to render or summon assistance, aware of the failure of the entry control devices.

(C) The licensee shall provide control devices so that, upon failure or removal of physical radiation barriers other than the sealed source's shielded storage container:

(i) the radiation level from the source of radiation is reduced below that at which it would be possible for an individual to receive a deep dose equivalent in excess of 0.1 rem (1 mSv) in one hour; and

(ii) conspicuous visible and audible alarm signals are generated to make potentially affected individuals aware of the hazard and the licensee or at least one other individual, who is familiar with the activity and prepared to render or summon assistance, aware of the failure or removal of the physical barrier.

(D) When the shield for stored sealed sources is a liquid, the licensee shall provide means to monitor the integrity of the shield and to signal, automatically, loss of adequate shielding.

(E) Physical radiation barriers that comprise permanent structural components, such as walls, that have no credible probability of failure or removal in ordinary circumstances, need not meet the requirements of subparagraphs (C) and (D) of this paragraph.

(F) Each area shall be equipped with devices that will automatically generate conspicuous visible and audible alarm signals to alert personnel in the area before the source of radiation can be put into operation and in time for any individual in the area to operate a clearly identified control device, which must be installed in the area and which can prevent the source of radiation from being put into operation.

(G) Each area shall be controlled by use of such administrative procedures and such devices as are necessary to ensure that the area is cleared of personnel prior to each use of the source of radiation.

(H) Each area shall be checked by a radiation measurement to ensure that, prior to the first individual's entry into the area after any use of the source of radiation, the radiation level from the source of radiation in the area is below that at which it would be possible for an individual to receive a deep dose equivalent in excess of 0.1 rem (1 mSv) in one hour.

(I) The entry control devices required in subparagraph (A) of this paragraph shall be tested for proper functioning. See subsection (uu) of this section for recordkeeping requirements.

(i) Testing shall be conducted prior to initial operation with the source of radiation on any day, unless operations were continued uninterrupted from the previous day.

(ii) Testing shall be conducted prior to resumption of operation of the source of radiation after any unintentional interruption.

(iii) The licensee shall submit and adhere to a schedule for periodic tests of the entry control and warning systems.

(J) The licensee shall not conduct operations, other than those necessary to place the source of radiation in safe condition or to effect repairs on controls, unless control devices are functioning properly.

(K) Entry and exit portals that are used in transporting materials to and from the irradiation area, and that are not intended for use by individuals, shall be controlled by such devices and administrative procedures as are necessary to physically protect and warn against inadvertent entry by any individual through these portals. Exit portals for irradiated materials shall be equipped to detect and signal the presence of any loose radioactive material that is carried toward such an exit and automatically to prevent loose radioactive material from being carried out of the area.

(3) Licensees or applicants for licenses for sources of radiation within the purview of paragraph (2) of this subsection that will be used in a variety of positions or in locations, such as open fields or forests, which make it impracticable to comply with certain requirements of paragraph (2) of this subsection, such as those for the automatic control of radiation levels, may apply to the Agency for approval of alternative safety measures. Alternative safety measures shall provide personnel protection at least equivalent to those specified in paragraph (2) of this subsection. At least one of the alternative measures shall include an entry-preventing interlock control based on a measurement of the radiation that ensures the absence of high radiation levels before an individual can gain access to the area where such sources of radiation are used.

(4) The entry control devices required by paragraphs (2) and (3) of this subsection shall be established in such a way that no individual will be prevented from leaving the area.

(v) Use of process or other engineering controls. The licensee shall use, to the extent practicable, process or other engineering controls, such as containment, decontamination, or ventilation, to control the concentrations of radioactive material in air.

(w) Use of other controls.

(1) When it is not practicable to apply process or other engineering controls to control the concentrations of radioactive material in air to values below those that define an airborne radioactivity area, the licensee shall, consistent with maintaining the total effective dose equivalent ALARA, increase monitoring and limit intakes by one or more of the following means:

(A) control of access;

(B) limitation of exposure times;

(C) use of respiratory protection equipment; or

(D) other controls.

(2) If the licensee performs an ALARA analysis to determine whether respirators should be used, the licensee may consider safety factors other than radiological factors. The licensee shall also consider the impact of respirator use on workers' industrial health and safety.

(x) Use of individual respiratory protection equipment.

(1) If the licensee uses respiratory protection equipment to limit intakes of radioactive material in accordance with subsection (w) of this section, the licensee shall do the following.

(A) Except as provided in subparagraph (B) of this paragraph, the licensee shall use only respiratory protection equipment that is tested and certified by the National Institute for Occupational Safety and Health (NIOSH).

(B) If the licensee wishes to use equipment that has not been tested or certified by the NIOSH, or for which there is no schedule for testing or certification, the licensee shall submit an application to the agency for authorized use of that equipment, including a demonstration by testing, or a demonstration on the basis of test information, that the material and performance characteristics of the equipment are capable of providing the proposed degree of protection under anticipated conditions of use.

(C) The licensee shall implement and maintain a respiratory protection program that includes:

(i) air sampling sufficient to identify the potential hazard, permit proper equipment selection, and estimate doses;

(ii) surveys and bioassays, as appropriate, to evaluate actual intakes;

(iii) testing of respirators for operability (user seal check for face sealing devices and functional check for others) immediately prior to each use;

(iv) written procedures regarding the following:

(I) monitoring, including air sampling and bioassays;

(II) supervision and training of respirator users;

(III) fit testing;

(IV) respirator selection;

(V) breathing air quality;

(VI) inventory and control;

(VII) storage, issuance, maintenance, repair, testing, and quality assurance of respiratory protection equipment;

(VIII) recordkeeping; and

(IX) limitations on periods of respirator use and relief from respirator use;

(v) determination by a physician prior to initial fitting of a face sealing respirator and the first field use of non-face sealing respirators, and either every 12 months thereafter or periodically at

a frequency determined by a physician, that the individual user is medically fit to use the respiratory protection equipment; and

(vi) fit testing, with fit factor > 10 times the APF for negative pressure devices, and a fit factor > 500 for any positive pressure, continuous flow, and pressure-demand devices, before the first field use of tight fitting, face-sealing respirators and periodically thereafter at a frequency not to exceed 1 year. Fit testing shall be performed with the facepiece operating in the negative pressure mode.

(D) The licensee shall advise each respirator user that the user may leave the area at any time for relief from respirator use in the event of equipment malfunction, physical or psychological distress, procedural or communication failure, significant deterioration of operating conditions, or any other conditions that might require such relief.

(E) The licensee shall use respiratory protection equipment within the equipment manufacturer's expressed limitations for type and mode of use and shall provide for vision correction, adequate communication, low-temperature work environment, and the concurrent use of other safety or radiological protection equipment. The licensee shall use equipment in such a way as not to interfere with the proper operation of the respirator.

(F) Standby rescue persons are required whenever one-piece atmosphere-supplying suits, or any combination of supplied air respiratory protection device and personnel protective equipment are used from which an unaided individual may have difficulty extricating himself or herself. The standby persons shall be equipped with respiratory protection devices or other apparatus appropriate for the potential hazards. The standby rescue persons shall observe or otherwise maintain continuous communication with the workers (visual, voice, signal line, telephone, radio, or other suitable means), and be immediately available to assist them in case of a failure of the air supply or for any other reason that requires relief from distress. A sufficient number of standby rescue persons must be immediately available to assist all users of this type of equipment and to provide effective emergency rescue if needed.

(G) Atmosphere-supplying respirators shall be supplied with respirable air of grade D quality or better as defined by the Compressed Gas Association in publication G-7.1, "Commodity Specification for Air," 1997 and included in the regulations of the Occupational Safety and Health Administration (Title 29, CFR, §1910.134(i)(1)(ii)(A) through (E). Grade D quality air criteria include:

(i) oxygen content (volume/volume) of 19.5-23.5%;

(ii) hydrocarbon (condensed) content of 5 milligrams per cubic meter of air or less;

(iii) carbon monoxide (CO) content of 10 parts per million (ppm) or less;

(iv) carbon dioxide content of 1,000 ppm or less; and

(v) lack of noticeable odor.

(H) the licensee shall ensure that no objects, materials or substances, such as facial hair, or any conditions that interfere with the face-facepiece seal or valve function, and that are under the control of the respirator wearer, are present between the skin of the wearer's face and the sealing surface of a tight-fitting respirator facepiece.

(I) In estimating the dose to individuals from intake of airborne radioactive materials, the concentration of radioactive material in the air that is inhaled when respirators are worn is initially assumed to be the ambient concentration in air without respiratory protection, divided by the assigned protection factor. If the dose is later found to be greater than the estimated dose, the corrected value must be used. If the dose is later found to be less than the estimated dose, the corrected value may be used.

(2) The agency may impose restrictions in addition to those in paragraph (1) of this subsection, subsection (w) of this section, and subsection (ggg)(1) of this section, in order to:

(A) ensure that the respiratory protection program of the licensee is adequate to limit doses to individuals from intakes of airborne radioactive materials consistent with maintaining total effective dose equivalent ALARA; and

(B) limit the extent to which a licensee may use respiratory protection equipment instead of process or other engineering controls.

(3) The licensee shall obtain authorization from the agency before assigning respiratory protection factors in excess of those specified in subsection (ggg)(1) of this section. The agency may authorize a licensee to use higher protection factors on receipt of an application that:

(A) describes the situation for which a need exists for higher protection factors; and

(B) demonstrates that the respiratory protection equipment provides these higher protection factors under the proposed conditions of use.

(y) Security and control of licensed sources of radiation.

(1) The licensee shall secure radioactive material from unauthorized removal or access.

(2) The licensee shall maintain constant surveillance, using devices and/or administrative procedures to prevent unauthorized access to use of radioactive material that is in an unrestricted area and that is not in storage.

(3) Each portable gauge licensee shall use a minimum of two independent physical controls that form tangible barriers to secure portable gauges from unauthorized removal, whenever portable gauges are not under the control and constant surveillance of the licensee.

(z) Caution signs.

(1) Unless otherwise authorized by the agency, the standard radiation symbol prescribed shall use the colors magenta, or purple, or black on yellow background. The standard radiation symbol prescribed is the three-bladed design as follows:
Figure: 25 TAC §289.202(z)(1) (No change.)

(A) the cross-hatched area of the symbol is to be magenta, or purple, or black; and

(B) the background of the symbol is to be yellow.

(2) Notwithstanding the requirements of paragraph (1) of this subsection, licensees are authorized to label sources, source holders, or device components containing sources of radiation that are subjected to high temperatures, with conspicuously etched or stamped radiation caution symbols and without a color requirement.

(aa) Posting requirements.

(1) The licensee shall post each radiation area with a conspicuous sign or signs bearing the radiation symbol and the words "CAUTION, RADIATION AREA."

(2) The licensee shall post each high radiation area with a conspicuous sign or signs bearing the radiation symbol and the words

"CAUTION, HIGH RADIATION AREA" or "DANGER, HIGH RADIATION AREA."

(3) The licensee shall post each very high radiation area with a conspicuous sign or signs bearing the radiation symbol and words "GRAVE DANGER, VERY HIGH RADIATION AREA." If the very high radiation area involves medical treatment of patients, the licensee may omit the word "GRAVE" from the sign or signs.

(4) The licensee shall post each airborne radioactivity area with a conspicuous sign or signs bearing the radiation symbol and the words "CAUTION, AIRBORNE RADIOACTIVITY AREA" or "DANGER, AIRBORNE RADIOACTIVITY AREA."

(5) The licensee shall post each area or room in which there is used or stored an amount of licensed material exceeding 10 times the quantity of such material specified in subsection (ggg)(3) of this section with a conspicuous sign or signs bearing the radiation symbol and the words "CAUTION, RADIOACTIVE MATERIAL(S)" or "DANGER, RADIOACTIVE MATERIAL(S)."

(bb) Exceptions to posting requirements.

(1) A licensee is not required to post caution signs in areas or rooms containing sources of radiation for periods of less than 8 hours, if each of the following conditions is met:

(A) the sources of radiation are constantly attended during these periods by an individual who takes the precautions necessary to prevent the exposure of individuals to sources of radiation in excess of the limits established in this section; and

(B) the area or room is subject to the licensee's control.

(2) Rooms or other areas in hospitals that are occupied by patients are not required to be posted with caution signs in accordance with subsection (aa) of this section provided that the patient could be released from licensee control in accordance with this chapter.

(3) A room or area is not required to be posted with a caution sign because of the presence of a sealed source(s) provided the radiation level at 30 centimeters from the surface of the sealed source container(s) or housing(s) does not exceed 0.005 rem (0.05 mSv) per hour.

(4) Rooms in medical facilities that are used for teletherapy are exempt from the requirement to post caution signs in accordance with subsection (aa) of this section provided the following conditions are met.

(A) Access to the room is controlled in accordance with this chapter; and

(B) Personnel in attendance take necessary precautions to prevent the inadvertent exposure of workers, other patients, and members of the public to radiation in excess of the limits established in this section.

(cc) Labeling containers.

(1) The licensee shall ensure that each container of licensed material bears a durable, clearly visible label bearing the radiation symbol and the words "CAUTION, RADIOACTIVE MATERIAL" or "DANGER, RADIOACTIVE MATERIAL." The label shall also provide information, such as the radionuclides present, an estimate of the quantity of radioactivity, the date for which the activity is estimated, radiation levels, kinds of materials, and mass enrichment, to permit individuals handling or using the containers, or working in the vicinity of the containers, to take precautions to avoid or minimize exposures.

(2) Each licensee shall, prior to removal or disposal of empty uncontaminated containers to unrestricted areas, remove or deface the radioactive material label or otherwise clearly indicate that the container no longer contains radioactive materials.

(dd) Exemptions to labeling requirements. A licensee is not required to label:

(1) containers holding licensed material in quantities less than the quantities listed in subsection (ggg)(3) of this section;

(2) containers holding licensed material in concentrations less than those specified in Table III of subsection (ggg)(2) of this section;

(3) containers attended by an individual who takes the precautions necessary to prevent the exposure of individuals in excess of the limits established by this section;

(4) containers when they are in transport and packaged and labeled in accordance with the rules of the DOT (labeling of packages containing radioactive materials is required by the DOT if the amount and type of radioactive material exceeds the limits for an excepted quantity or article as defined and limited by DOT regulations 49 CFR §§173.403(m) and (w) and 173.424);

(5) containers that are accessible only to individuals authorized to handle or use them, or to work in the vicinity of the containers, if the contents are identified to these individuals by a readily available written record. Examples of containers of this type are containers in locations such as water-filled canals, storage vaults, or hot cells. The record shall be retained as long as the containers are in use for the purpose indicated on the record; or

(6) installed manufacturing or process equipment, such as piping and tanks.

(ee) Procedures for receiving and opening packages.

(1) Each licensee who expects to receive a package containing quantities of radioactive material in excess of a Type A quantity, as defined in §289.201(b) of this title and specified in §289.257(s)(1) of this title (relating to Packaging and Transportation of Radioactive Material), shall make arrangements to receive:

(A) the package when the carrier offers it for delivery; or

(B) the notification of the arrival of the package at the carrier's terminal and to take possession of the package expeditiously.

(2) Each licensee shall:

(A) monitor the external surfaces of a labeled package, labeled with a Radioactive White I, Yellow II, or Yellow III label as specified in DOT regulations Title 49, CFR, §§172.403 and 172.436-440, for radioactive contamination unless the package contains only radioactive material in the form of gas or in special form as defined in §289.201(b) of this title;

(B) monitor the external surfaces of a labeled package, labeled with a Radioactive White I, Yellow II, or Yellow III label as specified in DOT regulations 49 CFR §§172.403 and §§172.436-440, for radiation levels unless the package contains quantities of radioactive material that are less than or equal to the Type A quantity, as defined in §289.201(b) of this title and specified in §289.257(s)(1) of this title; and

(C) monitor all packages known to contain radioactive material for radioactive contamination and radiation levels if there is evidence of degradation of package integrity, such as packages that are crushed, wet, or damaged.

(3) The licensee shall perform the monitoring required by paragraph (2) of this subsection as soon as practicable after receipt of the package, but not later than three hours after the package is received at the licensee's facility if it is received during the licensee's normal working hours. If a package is received after working hours, the package shall be monitored no later than three hours from the beginning of the next working day. If the licensee discovers there is evidence of degradation of package integrity, such as a package that is crushed, wet, or damaged, the package shall be surveyed immediately.

(4) The licensee shall immediately notify the final delivery carrier and, by telephone and telegram, mailgram, or facsimile, the agency when removable radioactive surface contamination or external radiation levels exceed the limits established in subparagraphs (A) and (B) of this paragraph.

(A) Limits for removable radioactive surface contamination levels.

(i) The level of removable radioactive contamination on the external surfaces of each package offered for shipment shall be ALARA. The level of removable radioactive contamination may be determined by wiping an area of 300 square centimeters (cm2) of the surface concerned with an absorbent material, using moderate pressure, and measuring the activity on the wiping material. Sufficient measurements must be taken in the most appropriate locations to yield a representative assessment of the removable contamination levels. Except as provided in clause (iii) of this subparagraph, the amount of radioactivity measured on any single wiping material, when averaged over the surface wiped, must not exceed the limits given in clause (ii) of this subparagraph at any time during transport. If other methods are used, the detection efficiency of the method used must be taken into account and in no case may the removable contamination on the external surfaces of the package exceed 10 times the limits listed in clause (ii) of this subparagraph.

(ii) Removable external radioactive contamination wipe limits are as follows.
Figure: 25 TAC §289.202(ee)(4)(A)(ii) (No change.)

(iii) In the case of packages transported as exclusive use shipments by rail or highway only, the removable radioactive contamination at any time during transport must not exceed 10 times the levels prescribed in clause (ii) of this subparagraph. The levels at the beginning of transport must not exceed the levels in clause (ii) of this subparagraph.

(B) Limits for external radiation levels.

(i) External radiation levels around the package and around the vehicle, if applicable, will not exceed 200 millirems per hour (mrem/hr) (2 millisieverts per hour (mSv/hr)) at any point on the external surface of the package at any time during transportation. The transport index shall not exceed 10.

(ii) For a package transported in exclusive use by rail, highway or water, radiation levels external to the package may exceed the limits specified in clause (i) of this subparagraph but shall not exceed any of the following:

(I) 200 mrem/hr (2 mSv/hr) on the accessible external surface of the package unless the following conditions are met, in which case the limit is 1,000 mrem/hr (10 mSv/hr):

(-a-) the shipment is made in a closed transport vehicle;

(-b-) provisions are made to secure the package so that its position within the vehicle remains fixed during transportation; and

(-c-) there are no loading or unloading operations between the beginning and end of the transportation;

(II) 200 mrem/hr (2 mSv/hr) at any point on the outer surface of the vehicle, including the upper and lower surfaces, or, in the case of a flat-bed style vehicle, with a personnel barrier, at any point on the vertical planes projected from the outer edges of the vehicle, on the upper surface of the load (or enclosure, if used), and on the lower external surface of the vehicle (a flat-bed style vehicle with a personnel barrier shall have radiation levels determined at vertical planes. If no personnel barrier, the package cannot exceed 200 mrem/hr (2 mSv/hr) at the surface.);

(III) 10 mrem/hr (0.1 mSv/hr) at any point 2 m from the vertical planes represented by the outer lateral surfaces of the vehicle, or, in the case of a flat-bed style vehicle, at any point 2 m from the vertical planes projected from the outer edges of the vehicle; and

(IV) 2 mrem/hr (0.02 mSv/hr) in any normally occupied positions of the vehicle, except that this provision does not apply to private motor carriers when persons occupying these positions are provided with special health supervision, personnel radiation exposure monitoring devices, and training in accordance with §289.203(c) of this title (relating to Notices, Instructions, and Reports to Workers; Inspections).

(5) Each licensee shall:

(A) establish, maintain, and retain written procedures for safely opening packages in which radioactive material is received; and

(B) ensure that the procedures are followed and that due consideration is given to special instructions for the type of package being opened.

(6) Licensees transferring special form sources in vehicles owned or operated by the licensee to and from a work site are exempt from the contamination monitoring requirements of paragraph (2) of this subsection, but are not exempt from the monitoring requirement in paragraph (2) of this subsection for measuring radiation levels that ensures that the source is still properly lodged in its shield.

(ff) General requirements for waste management.

(1) Unless otherwise exempted, a licensee shall discharge, treat, or decay licensed material or transfer waste for disposal only:

(A) by transfer to an authorized recipient as provided in subsection (jj) of this section, §289.252 of this title (relating to Licensing of Radioactive Material), §289.257 of this title, §289.259 of this title, or to the United States Department of Energy (DOE);

(B) by decay in storage with prior approval from the agency, except as authorized in §289.256(x) of this title (relating to Medical and Veterinary Use of Radioactive Material);

(C) by release in effluents within the limits in subsection (n) of this section; or

(D) as authorized in accordance with paragraph (2) of this subsection, and subsections (gg), (hh), and (fff) of this section.

(2) Upon agency approval, emission control dust and other material from electric arc furnaces or foundries contaminated as a result of inadvertent melting of cesium-137 or americium-241 sources may be transferred for disposal to a hazardous waste disposal facility authorized by the Texas Commission on Environmental Quality (Commission) or its successor, another state's regulatory agency with jurisdiction to regulate hazardous waste as classified under Subtitle C of the Resource Conservation and Recovery Act (RCRA), or the EPA. The

material may be transferred for disposal without regard to its radioactivity if the following conditions are met.

(A) Contaminated material described in paragraph (2) of this subsection, whether packaged or unpackaged (i.e., bulk), must be treated through stabilization to comply with all waste treatment requirements of the appropriate state or federal regulatory agency as listed in this paragraph. The treatment operations must be undertaken by either of the following:

(i) the owner/operator of the electric arc furnace or foundry licensed to possess, treat or transfer cesium-137 or americium-241 contaminated incident-related material; or

(ii) a service contractor licensed by the agency, NRC, or an agreement state to possess, treat, or transfer cesium-137 or americium-241 contaminated incident-related material.

(B) The emission control dust and other incident-related materials have been stored (if applicable) and transferred in accordance with operating and emergency procedures approved by the agency.

(C) The total cesium-137 or americium-241 activity contained in emission control dust and other incident-related materials to be transferred to a hazardous waste disposal facility has been specifically approved by NRC or the appropriate agreement state(s) and does not exceed the total activity associated with the inadvertent melting incident.

(D) The hazardous waste disposal facility operator has been notified in writing of the impending transfer of the incident-related materials and has agreed in writing to receive and dispose of the packaged or unpackaged materials. Copies of the notification and agreement shall be submitted to the agency.

(E) The licensee, as listed in subparagraph (A)(i) or (ii) of this paragraph, notifies the NRC or agreement state(s) in which the transferor and transferee are located, in writing, of the impending transfer, at least 30 days before the transfer.

(F) The packaged stabilized material has been packaged for transportation and disposal in non-bulk steel packaging as defined in DOT regulations at 49 CFR §173.213.

(G) The emission control dust and other incident-related materials that have been stabilized and packaged as described in subparagraph (F) of this paragraph shall contain pretreatment average concentrations of cesium-137 that do not exceed 130 pCi/g of material, above background, or pretreatment average concentrations of americium-241 that do not exceed 3 pCi/g of material, above background.

(H) The dose rate at 3.28 feet (1 m) from the surface of any package containing stabilized waste shall not exceed 20 μrem per hour or 0.20 μSv per hour, above background.

(I) The unpackaged stabilized material shall contain pretreatment average concentrations of cesium-137 that do not exceed 100 pCi/g of material, above background, or pretreatment average concentrations of americium-241 that do not exceed 3 pCi/g of material, above background.

(J) The licensee transferring the cesium-137 or americium -241 contaminated incident-related material must consult with the agency, the Commission or its successor, another state's regulatory agency with jurisdiction to regulate hazardous waste as classified under RCRA, or the EPA and other authorized parties, including state and local governments, and obtain all necessary approvals, in addition to those of NRC and/or appropriate agreement states, for the transfers described in paragraph (2) of this subsection.

(K) Nothing in this subsection shall be or is intended to be construed as a waiver of any RCRA permit condition or term, of any state or local statute or regulation, or of any federal RCRA regulation.

(L) The total incident-related cesium-137 activity described in paragraph (2) of this subsection received by a facility over its operating life shall not exceed 1 Ci (37 GBq). The total incident-related americium-241 activity described in paragraph (2) of this subsection received by a facility over its operating life shall not exceed 30 mCi (1.11MBq). The agency will maintain a record of the total incident-related cesium-137 or americium-241 activity shipped by a person licensed by the agency. Upon consultation with the Commission, the agency will determine if the total incident-related activity received by a hazardous waste disposal facility over its operating life has reached 1 Ci (37 GBq) of cesium-137 or 30 mCi (1.11MBq) of americium-241. The agency will not approve shipments of cesium-137 or americium-241 contaminated incident-related material that will cause this limit to be exceeded.

(3) A person shall be specifically licensed to receive waste containing licensed material from other persons for:

(A) treatment prior to disposal;

(B) treatment by incineration;

(C) decay in storage;

(D) disposal at an authorized land disposal facility; or

(E) storage until transferred to a storage or disposal facility authorized to receive the waste.

(4) Byproduct material as defined in §289.201(b)(15)(C) - (E) of this title may be disposed of in accordance with Title 10, CFR, Part 61, even though it is not defined as low level radioactive waste. Therefore, any byproduct material being disposed of at a facility, or transferred for ultimate disposal at a facility licensed under Title 10, CFR, Part 61, shall meet the requirements of this chapter.

(5) A licensee may dispose of byproduct material, as defined in §289.201(b)(15)(C) - (E) of this title, at a disposal facility authorized to dispose of such material in accordance with any Federal or State solid or hazardous waste law.

(6) Any licensee shipping byproduct material as defined in §289.201(b)(15)(C) - (E) of this title intended for ultimate disposal at a land disposal facility licensed under Title 10, CFR, Part 61, shall document the information required on the NRC's Uniform Low-Level Radioactive Waste Manifest and transfer this recorded manifest information to the intended consignee in accordance with §289.257(gg) of this title.

(gg) Discharge by release into sanitary sewerage.

(1) A licensee may discharge licensed material into sanitary sewerage if each of the following conditions is satisfied:

(A) the material is readily soluble, or is readily dispersible biological material, in water;

(B) the quantity of licensed radioactive material that the licensee releases into the sewer in one month divided by the average monthly volume of water released into the sewer by the licensee does not exceed the concentration listed in Table III of subsection (ggg)(2) of this section; and

(C) if more than one radionuclide is released, the following additional conditions must also be satisfied:

(i) the fraction of the limit in Table III of subsection (ggg)(2) of this section represented by discharges into sanitary sewer-

age determined by dividing the actual monthly average concentration of each radionuclide released by the licensee into the sewer by the concentration of that radionuclide listed in Table III of subsection (ggg)(2) of this section; and

(ii) the sum of the fractions for each radionuclide required by clause (i) of this subparagraph does not exceed unity; and

(D) the total quantity of licensed radioactive material that the licensee releases into the sanitary sewerage in a year does not exceed 5 curies (Ci) (185 gigabecquerels (GBq)) of hydrogen-3, 1 Ci (37 GBq) of carbon-14, and 1 Ci (37 GBq) of all other radioactive materials combined.

(2) Excreta from individuals undergoing medical diagnosis or therapy with radioactive material are not subject to the limitations contained in paragraph (1) of this subsection.

(hh) Treatment by incineration. A licensee may treat licensed material by incineration only in the form and concentration specified in subsection (fff)(1) of this section or as authorized by the agency.

(ii) Discharge by release into septic tanks. No licensee shall discharge radioactive material into a septic tank system except as specifically approved by the agency.

(jj) Transfer for disposal and manifests.

(1) The control of transfers of LLRW intended for disposal at a licensed low-level radioactive waste disposal facility, the establishment of a manifest tracking system, and additional requirements concerning transfers and recordkeeping for those wastes are found in §289.257(s)(5) of this title.

(2) Each person involved in the transfer of waste for disposal including the waste generator, waste collector, and waste processor, shall comply with the requirements specified in §289.257(s)(5) of this title.

(kk) Compliance with environmental and health protection regulations. Nothing in subsections (ff), (gg), (hh), or (jj) of this section relieves the licensee from complying with other applicable federal, state, and local regulations governing any other toxic or hazardous properties of materials that may be disposed of in accordance with subsections (ff), (gg), (hh), or (jj) of this section.

(ll) General provisions for records.

(1) Each licensee shall use the International System of Units (SI) units becquerel, gray, sievert, and coulomb per kilogram, or the special units curie, rad, rem, and roentgen, including multiples and subdivisions, and shall clearly indicate the units of all quantities on records required by this section. Disintegrations per minute may be indicated on records of surveys performed to determine compliance with subsections (ee)(4) and (ggg)(6) of this section. To ensure compatibility with international transportation standards, all limits in this section are given in terms of dual units: The SI units followed or preceded by United States (U.S.) standard or customary units. The U.S. customary units are not exact equivalents, but are rounded to a convenient value, providing a functionally equivalent unit. For the purpose of this section, either unit may be used.

(2) Notwithstanding the requirements of paragraph (1) of this subsection, when recording information on shipment manifests, as required in §289.257 of this title, information must be recorded in SI units or in SI and units as specified in paragraph (1) of this subsection.

(3) The licensee shall make a clear distinction among the quantities entered on the records required by this section, such as, total effective dose equivalent, total organ dose equivalent, shallow dose equivalent, lens dose equivalent, deep dose equivalent, or committed effective dose equivalent.

(4) Records required in accordance with §289.201(d) of this title, and subsections (mm) - (oo) and (ss) - (uu) of this section shall include the date and the identification of individual(s) making the record, and, as applicable, a unique identification of survey instrument(s) used, and an exact description of the location of the survey. Records of receipt, transfer, and disposal of sources of radiation shall uniquely identify the source of radiation.

(5) Copies of records required in accordance with §289.201(d) of this title, and subsections (mm) - (uu) of this section, and by license condition that are relevant to operations at an additional authorized use/storage site shall be maintained at that site in addition to the main site specified on a license.

(mm) Records of radiation protection programs.

(1) Each licensee shall maintain records of the radiation protection program, including:

(A) the provisions of the program; and

(B) audits and other reviews of program content and implementation.

(2) The licensee shall retain the records required by paragraph (1)(A) of this subsection until the agency terminates each pertinent license requiring the record. The licensee shall retain the records required by paragraph (1)(B) of this subsection for three years after the record is made.

(nn) Records of surveys.

(1) Each licensee shall maintain records showing the results of surveys and calibrations required by subsections (p) and (ee)(2) of this section. The licensee shall retain these records for three years after the record is made.

(2) The licensee shall retain each of the following records until the agency terminates each pertinent license requiring the record:

(A) the results of surveys to determine the dose from external sources of radiation used, in the absence of or in combination with individual monitoring data, in the assessment of individual dose equivalents; and

(B) results of measurements and calculations used to determine individual intakes of radioactive material and used in the assessment of internal dose; and

(C) results of air sampling, surveys, and bioassays required in accordance with subsection (x)(1)(C)(i) and (ii) of this section; and

(D) results of measurements and calculations used to evaluate the release of radioactive effluents to the environment.

(oo) Records of tests for leakage or contamination of sealed sources. Records of tests for leakage or contamination of sealed sources required by §289.201(g) of this title shall be kept in units of becquerel or microcurie and retained for inspection by the agency for five years after the records are made.

(pp) Records of lifetime cumulative occupational radiation dose. The licensee shall retain the records of lifetime cumulative occupational radiation dose as specified in subsection (k) of this section on BRC Form 202-2 or equivalent until the agency terminates each pertinent license requiring this record. The licensee shall retain records used in preparing BRC Form 202-2 or equivalent for three years after the record is made.

(qq) Records of planned special exposures.

(1) For each use of the provisions of subsection (k) of this section for planned special exposures, the licensee shall maintain records that describe:

(A) the exceptional circumstances requiring the use of a planned special exposure;

(B) the name of the management official who authorized the planned special exposure and a copy of the signed authorization;

(C) what actions were necessary;

(D) why the actions were necessary;

(E) what precautions were taken to assure that doses were maintained ALARA;

(F) what individual and collective doses were expected to result; and

(G) the doses actually received in the planned special exposure.

(2) The licensee shall retain the records until the agency terminates each pertinent license requiring these records.

(rr) Records of individual monitoring results.

(1) Each licensee shall maintain records of doses received by all individuals for whom monitoring was required in accordance with subsection (q) of this section, and records of doses received during planned special exposures, accidents, and emergency conditions. Assessments of dose equivalent and records made using units in effect before January 1, 1994, need not be changed. These records shall include, when applicable:

(A) the deep dose equivalent to the whole body, lens dose equivalent, shallow dose equivalent to the skin, and shallow dose equivalent to the extremities;

(B) the estimated intake of radionuclides, see subsection (g) of this section;

(C) the committed effective dose equivalent assigned to the intake of radionuclides;

(D) the specific information used to calculate the committed effective dose equivalent in accordance with subsection (i)(1) and (3) of this section and when required by subsection (q)(1) of this section;

(E) the total effective dose equivalent when required by subsection (g) of this section;

(F) the total of the deep dose equivalent and the committed dose to the organ receiving the highest total dose; and

(G) the data used to make occupational dose assessments in accordance with subsection (j)(5) of this section.

(2) The licensee shall make entries of the records specified in paragraph (1) of this subsection at intervals not to exceed 1 year and by April 30 of the following year.

(3) The licensee shall maintain the records specified in paragraph (1) of this subsection on BRC Form 202-3, in accordance with the instructions for BRC Form 202-3, or in clear and legible records containing all the information required by BRC Form 202-3.

(4) The licensee shall maintain the records of dose to an embryo/fetus with the records of dose to the declared pregnant woman. The declaration of pregnancy, including the estimated date of conception, shall also be kept on file, but may be maintained separately from the dose records.

(5) The licensee shall retain each required form or record until the agency terminates each pertinent license requiring the record. The licensee shall retain records used in preparing BRC Form 202-3 or equivalent for three years after the record is made.

(ss) Records of dose to individual members of the public.

(1) Each licensee shall maintain records sufficient to demonstrate compliance with the dose limit for individual members of the public. See subsection (n) of this section.

(2) The licensee shall retain the records required by paragraph (1) of this subsection until the agency terminates each pertinent license requiring the record.

(tt) Records of discharge, treatment, or transfer for disposal.

(1) Each licensee shall maintain records of the discharge or treatment of licensed materials made in accordance with subsection (gg) and (hh) of this section and of transfers for disposal made in accordance with subsection (jj) of this section and §289.257 of this title.

(2) The licensee shall retain the records required by paragraph (1) of this subsection until the agency terminates each pertinent license requiring the record.

(uu) Records of testing entry control devices for very high radiation areas.

(1) Each licensee shall maintain records of tests made in accordance with subsection (u)(2)(I) of this section on entry control devices for very high radiation areas. These records must include the date, time, and results of each such test of function.

(2) The licensee shall retain the records required by paragraph (1) of this subsection for three years after the record is made.

(vv) Form of records. Each record required by this chapter shall be legible throughout the specified retention period. The record shall be the original or a reproduced copy or a microform, provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period or the record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records, such as letters, drawings, and specifications, shall include all pertinent information, such as stamps, initials, and signatures. The licensee shall maintain adequate safeguards against tampering with and loss of records.

(ww) Reports of stolen, lost, or missing licensed sources of radiation.

(1) Each licensee shall report to the agency by telephone as follows:

(A) immediately after its occurrence becomes known to the licensee, stolen, lost, or missing licensed radioactive material in an aggregate quantity equal to or greater than 1,000 times the quantity specified in subsection (ggg)(3) of this section, under such circumstances that it appears to the licensee that an exposure could result to individuals in unrestricted areas; or

(B) within 30 days after its occurrence becomes known to the licensee, lost, stolen, or missing licensed radioactive material in an aggregate quantity greater than 10 times the quantity specified in subsection (ggg)(3) of this section that is still missing.

(2) Each licensee required to make a report in accordance with paragraph (1) of this subsection shall, within 30 days after making

the telephone report, make a written report to the agency setting forth the following information:

(A) a description of the licensed source of radiation involved, including, for radioactive material, the kind, quantity, and chemical and physical form;

(B) a description of the circumstances under which the loss or theft occurred;

(C) a statement of disposition, or probable disposition, of the licensed source of radiation involved;

(D) exposures of individuals to radiation, circumstances under which the exposures occurred, and the possible total effective dose equivalent to persons in unrestricted areas;

(E) actions that have been taken, or will be taken, to recover the source of radiation; and

(F) procedures or measures that have been, or will be, adopted to ensure against a recurrence of the loss or theft of licensed sources of radiation.

(3) Subsequent to filing the written report, the licensee shall also report additional substantive information on the loss or theft within 30 days after the licensee learns of such information.

(4) The licensee shall prepare any report filed with the agency in accordance with this subsection so that names of individuals who may have received exposure to radiation are stated in a separate and detachable portion of the report.

(xx) Notification of incidents.

(1) Notwithstanding other requirements for notification, each licensee shall immediately report each event involving a source of radiation possessed by the licensee that may have caused or threatens to cause:

(A) an individual to receive:

(i) a total effective dose equivalent of 25 rems (0.25 Sv) or more;

(ii) a lens dose equivalent of 75 rems (0.75 Sv) or more; or

(iii) a shallow dose equivalent to the skin or extremities or a total organ dose equivalent of 250 rads (2.5 grays) or more; or

(B) the release of radioactive material, inside or outside of a restricted area, so that, had an individual been present for 24 hours, the individual could have received an intake five times the occupational ALI. This provision does not apply to locations where personnel are not normally stationed during routine operations, such as hot-cells or process enclosures.

(2) Each licensee shall, within 24 hours of discovery of the event, report to the agency each event involving loss of control of a licensed source of radiation possessed by the licensee that may have caused, or threatens to cause:

(A) an individual to receive, in a period of 24 hours:

(i) a total effective dose equivalent exceeding 5 rems (0.05 Sv);

(ii) a lens dose equivalent exceeding 15 rems (0.15 Sv); or

(iii) a shallow dose equivalent to the skin or extremities or a total organ dose equivalent exceeding 50 rems (0.5 Sv); or

(B) the release of radioactive material, inside or outside of a restricted area, so that, had an individual been present for 24 hours, the individual could have received an intake in excess of one occupational ALI. This provision does not apply to locations where personnel are not normally stationed during routine operations, such as hot-cells or process enclosures.

(3) Licensees shall make the initial notification reports required by paragraphs (1) and (2) of this subsection by telephone to the agency and shall confirm the initial notification report within 24 hours by telegram, mailgram, or facsimile to the agency.

(4) The licensee shall prepare each report filed with the agency in accordance with this section so that names of individuals who have received exposure to sources of radiation are stated in a separate and detachable portion of the report.

(5) The provisions of this section do not apply to doses that result from planned special exposures, provided such doses are within the limits for planned special exposures and are reported in accordance with subsection (zz) of this section.

(6) Each licensee shall notify the agency as soon as possible but not later than four hours after the discovery of an event that prevents immediate protective actions necessary to avoid exposures to radioactive materials that could exceed regulatory limits or releases of radioactive materials that could exceed regulatory limits (events may include fires, explosions, toxic gas releases, etc.).

(7) Each licensee shall notify the agency within 24 hours after the discovery of any of the following events involving radioactive material:

(A) an unplanned contamination event that:

(i) requires access to the contaminated area, by workers or the public, to be restricted for more than 24 hours by imposing additional radiological controls or by prohibiting entry into the area;

(ii) involves a quantity of material greater than five times the lowest annual limit on intake specified in subsection (ggg)(2) of this section for the material; and

(iii) has access to the area restricted for a reason other than to allow isotopes with a half-life of less than 24 hours to decay prior to decontamination.

(B) an event in which equipment is disabled or fails to function as designed when:

(i) the equipment is required by rule or license condition to prevent releases exceeding regulatory limits, to prevent exposures to radioactive materials exceeding regulatory limits, or to mitigate the consequences of an accident;

(ii) the equipment is required to be available and operable when it is disabled or fails to function; and

(iii) no redundant equipment is available and operable to perform the required safety function;

(C) an event that requires unplanned medical treatment at a medical facility of an individual with spreadable radioactive contamination on the individual's clothing or body; or

(D) an unplanned fire or explosion damaging any radioactive material or any device, container, or equipment containing radioactive material when:

(i) the quantity of material involved is greater than five times the lowest annual limit on intake specified in subsection (ggg)(2) of this section for the material; and

(ii) the damage affects the integrity of the radioactive material or its container.

(8) Preparation and submission of reports. Reports made by licensees in response to the requirements of paragraphs (6) and (7) of this subsection shall be made as follows.

(A) Licensees shall make reports required by paragraphs (6) and (7) of this subsection by telephone to the agency. To the extent that the information is available at the time of notification, the information provided in these reports shall include:

(i) the caller's name and call back telephone number;

(ii) a description of the event, including date and time;

(iii) the exact location of the event;

(iv) the isotopes, quantities, and chemical and physical form of the radioactive material involved; and

(v) any personnel radiation exposure data available.

(B) Each licensee who makes a report required by paragraphs (6) and (7) of this subsection shall submit to the agency a written follow-up report within 30 days of the initial report. Written reports prepared in accordance with other requirements of this chapter may be submitted to fulfill this requirement if the reports contain all of the necessary information and the appropriate distribution is made. The reports must include the following:

(i) a description of the event, including the probable cause and the manufacturer and model number (if applicable) of any equipment that failed or malfunctioned;

(ii) the exact location of the event;

(iii) the isotopes, quantities, and chemical and physical form of the radioactive material involved;

(iv) date and time of the event;

(v) corrective actions taken or planned and the results of any evaluations or assessments; and

(vi) the extent of exposure of individuals to radioactive materials without identification of individuals by name.

(yy) Reports of exposures, radiation levels, and concentrations of radioactive material exceeding the limits.

(1) In addition to the notification required by subsection (xx) of this section, each licensee shall submit a written report within 30 days after learning of any of the following occurrences:

(A) incidents for which notification is required by subsection (xx) of this section;

(B) doses in excess of any of the following:

(i) the occupational dose limits for adults in subsection (f) of this section;

(ii) the occupational dose limits for a minor in subsection (l) of this section;

(iii) the limits for an embryo/fetus of a declared pregnant woman in subsection (m) of this section;

(iv) the limits for an individual member of the public in subsection (n) of this section;

(v) any applicable limit in the license; or

(vi) the ALARA constraints for air emissions as required by subsection (e)(4) of this section;

(C) levels of radiation or concentrations of radioactive material in:

(i) a restricted area in excess of applicable limits in the license; or

(ii) an unrestricted area in excess of 10 times the applicable limit set forth in this section or in the license, whether or not involving exposure of any individual in excess of the limits in subsection (n) of this section; or

(D) for licensees subject to the provisions of the EPA's generally applicable environmental radiation standards in 40 CFR §190, levels of radiation or releases of radioactive material in excess of those standards, or of license conditions related to those requirements.

(2) Each report required by paragraph (1) of this subsection shall describe the extent of exposure of individuals to radiation and radioactive material, including, as appropriate:

(A) estimates of each individual's dose;

(B) the levels of radiation and concentrations of radioactive material involved;

(C) the cause of the elevated exposures, dose rates, or concentrations; and

(D) corrective steps taken or planned to ensure against a recurrence, including the schedule for achieving conformance with applicable limits, ALARA constraints, generally applicable environmental standards, and associated license conditions.

(3) Each report filed in accordance with paragraph (1) of this subsection shall include for each individual exposed: the name, identification number, and date of birth. With respect to the limit for the embryo/fetus in subsection (m) of this section, the identifiers should be those of the declared pregnant woman. The report shall be prepared so that this information is stated in a separate and detachable portion of the report.

(4) All licensees who make reports in accordance with paragraph (1) of this subsection shall submit the report in writing to the agency.

(zz) Reports of planned special exposures. The licensee shall submit a written report to the agency within 30 days following any planned special exposure conducted in accordance with subsection (k) of this section, informing the agency that a planned special exposure was conducted and indicating the date the planned special exposure occurred and the information required by subsection (qq) of this section.

(aaa) Notifications and reports to individuals.

(1) Requirements for notification and reports to individuals of exposure to sources of radiation are specified in §289.203 of this title.

(2) When a licensee is required in accordance with subsection (yy) or (zz) of this section to report to the agency any exposure of an identified occupationally exposed individual, or an identified member of the public, to sources of radiation, the licensee shall also notify the individual and provide a copy of the report submitted to the agency, to the individual. Such notice shall be transmitted at a time not later than the transmittal to the agency, and shall comply with the provisions of §289.203(d)(1) of this title.

(bbb) Reports of leaking or contaminated sealed sources. The licensee shall immediately notify the agency if the test for leakage or contamination required in accordance with §289.201(g) of this title indicates a sealed source is leaking or contaminated. A written report of a leaking or contaminated source shall be submitted to the agency within five days. The report shall include the equipment involved, the test results and the corrective action taken.

(ccc) Vacating premises.

(1) Each licensee or person possessing non-exempt sources of radiation shall, no less than 30 days before vacating and relinquishing possession or control of premises, notify the agency, in writing, of the intent to vacate.

(2) The licensee or person possessing non-exempt radioactive material shall decommission the premises to a degree consistent with subsequent use as an unrestricted area and in accordance with the requirements of subsection (ddd) of this section.

(ddd) Radiological requirements for license termination.

(1) General provisions and scope.

(A) The requirements in this section apply to the decommissioning of facilities licensed in accordance with §289.252 of this title, §289.255 of this title, and §289.258 of this title (relating to Licensing and Radiation Safety Requirements for Irradiators).

(B) The requirements in this section do not apply to the following:

(i) sites that have been decommissioned prior to October 1, 2000, in accordance with requirements identified in this section and in §289.252 of this title; or

(ii) sites that have previously submitted and received approval on a decommissioning plan by October 1, 2000.

(C) After a site has been decommissioned and the license terminated in accordance with the requirements in the subsection, the agency will require additional cleanup if it determines that the requirements of the subsection were not met and residual radioactivity remaining at the site could result in significant threat to public health and safety.

(D) When calculating TEDE to the average member of the critical group, the licensee shall determine the peak annual TEDE dose expected within the first 1,000 years after decommissioning.

(2) Radiological requirements for unrestricted use. A site will be considered acceptable for unrestricted use if the residual radioactivity that is distinguishable from background radiation results in a TEDE to an average member of the critical group that does not exceed 25 mrem (0.25 mSv) per year, including that from groundwater sources of drinking water, and the residual radioactivity has been reduced to levels that are ALARA. Determination of the levels that are ALARA must take into account consideration of any detriments, such as deaths from transportation accidents, expected to potentially result from decontamination and waste disposal.

(3) Alternate requirements for license termination.

(A) The agency may terminate a license using alternate requirements greater than the dose requirements specified in paragraph (2) of this subsection if the licensee does the following:

(i) provides assurance that public health and safety would continue to be protected, and that it is unlikely that the dose from all man-made sources combined, other than medical, would be more than the 1 mSv per year (100 mrem per year) limit specified in subsection (o) of this section, by submitting an analysis of possible sources of exposure;

(ii) reduces doses to ALARA levels, taking into consideration any detriments such as traffic accidents expected to potentially result from decontamination and waste disposal; and

(iii) has submitted a decommissioning plan to the agency indicating the licensee's intent to decommission in accordance with the requirements in §289.252(l)(7) of this title, and specifying that the licensee proposes to decommission by use of alternate requirements. The licensee shall document in the decommissioning plan how the advice of individuals and institutions in the community who may be affected by the decommissioning has been sought and addressed, as appropriate, following analysis of that advice. In seeking such advice, the licensee shall provide for the following:

(I) participation by representatives of a broad cross section of community interests who may be affected by the decommissioning;

(II) an opportunity for a comprehensive, collective discussion on the issues by the participants represented; and

(III) a publicly available summary of the results of all such discussions, including a description of the individual viewpoints of the participants on the issues and the extent of agreement and disagreement among the participants on the issues.

(B) The use of alternate requirements to terminate a license requires the approval of the agency after consideration of the agency's recommendations that will address any comments provided by the EPA and any public comments submitted in accordance with paragraph (4) of this subsection.

(4) Public notification and public participation. Upon receipt of a decommissioning plan from the licensee, or a proposal from the licensee for release of a site in accordance with paragraph (3) of this subsection, or whenever the agency deems such notice to be in the public interest, the agency will do the following:

(A) notify and solicit comments from the following:

(i) local and state governments in the vicinity of the site and any Indian Nation or other indigenous people that have treaty or statutory rights that could be affected by the decommissioning; and

(ii) the EPA for cases where the licensee proposes to release a site in accordance with paragraph (3) of this subsection; and

(B) publish a notice in the *Texas Register* and a forum, such as local newspapers, letters to state of local organizations, or other appropriate forum, that is readily accessible to individuals in the vicinity of the site, and solicit comments from affected parties.

(5) Minimization of contamination. Applicants for licenses, other than renewals, after October 1, 2000, shall describe in the application how facility design and procedures for operation will minimize, to the extent practical, contamination of the facility and the environment, facilitate eventual decommissioning, and minimize, to the extent practical, the generation of LLRW.

(eee) Limits for contamination of soil, surfaces of facilities and equipment, and vegetation.

(1) No licensee shall possess, receive, use, or transfer radioactive material in such a manner as to cause contamination of surfaces of facilities or equipment in unrestricted areas to the extent that the contamination exceeds the limits specified in subsection (ggg)(6) of this section.

(2) No licensee shall possess, receive, use, or transfer radioactive material in such a manner as to cause contamination of soil in unrestricted areas, to the extent that the contamination exceeds, on a dry weight basis, the concentration limits specified in:

(A) subsection (ddd) of this section; or

(B) the effluent concentrations in Table II, Column 2 of subsection (ggg)(2)(F) of this section, with the units changed from microcuries per milliliter to microcuries per gram, for radionuclides not specified in paragraph (4) of this subsection.

(3) Where combinations of radionuclides are involved, the sum of the ratios between the concentrations present and the limits specified in paragraph (2) of this subsection shall not exceed one.

(4) Notwithstanding the limits specified in paragraph (2) of this subsection, no licensee shall cause the concentration of radium-226 or radium-228 in soil in unrestricted areas, averaged over any 100 square meters (m2), to exceed the background level by more than:

(A) 5 picocuries per gram (pCi/g) (0.185 becquerel per gram (Bq/g)), averaged over the first 15 cm of soil below the surface; and

(B) 15 pCi/g (0.555 Bq/g), averaged over 15 cm thick layers of soil more than 15 cm below the surface.

(5) No licensee shall possess, receive, use, or transfer radioactive material in such a manner as to cause contamination of vegetation in unrestricted areas to exceed 5 pCi/g (0.185 Bq/g), based on dry weight, for radium-226 or radium-228.

(6) Notwithstanding the limits specified in paragraph (2) of this subsection, no licensee shall cause the concentration of natural uranium with no daughters present, based on dry weight and averaged over any 100 m2 of area, to exceed the following limits:

(A) 30 pCi/g (1.11 Bq/g), averaged over the top 15 cm of soil below the surface; and

(B) 150 pCi/g (5.55 Bq/g), average concentration at depths greater than 15 centimeters below the surface so that no individual member of the public will receive an effective dose equivalent in excess of 100 mrem (1 mSv) per year.

(fff) Exemption of specific wastes.

(1) A licensee may discard the following licensed material without regard to its radioactivity:

(A) 0.05 microcurie (μCi) (1.85 kilobecquerels (kBq)), or less, of hydrogen-3, carbon-14, or iodine-125 per gram of medium used for liquid scintillation counting or in vitro clinical or in vitro laboratory testing; and

(B) 0.05 μCi (1.85 kBq), or less, of hydrogen-3, carbon-14, or iodine-125, per gram of animal tissue, averaged over the weight of the entire animal.

(2) A licensee shall not discard tissue in accordance with paragraph (1)(B) of this subsection in a manner that would permit its use either as food for humans or as animal feed.

(3) The licensee shall maintain records in accordance with subsection (tt) of this section.

(4) Any licensee may, upon agency approval of procedures required in paragraph (6) of this subsection, discard licensed material included in subsection (ggg)(7) of this section, provided that it does not exceed the concentration and total curie limits contained therein, in a Type I municipal solid waste site as defined in the Municipal Solid Waste Regulations of the authorized regulatory agency (30 Texas Administrative Code Chapter 330), unless such licensed material also contains hazardous waste, as defined in §3(15) of the Solid Waste Disposal Act, Health and Safety Code, Chapter 361. Any licensed material included in subsection (ggg)(7) of this section and which is a hazardous waste as defined in the Solid Waste Disposal Act may be discarded at a facility authorized to manage hazardous waste by the authorized regulatory agency.

(5) Each licensee who discards material described in paragraphs (1) or (4) of this subsection shall:

(A) make surveys adequate to assure that the limits of paragraphs (1) or (4) of this subsection are not exceeded; and

(B) remove or otherwise obliterate or obscure all labels, tags, or other markings that would indicate that the material or its contents is radioactive.

(6) Prior to authorizations in accordance with paragraph (4) of this subsection, a licensee shall submit procedures to the agency for:

(A) the physical delivery of the material to the disposal site;

(B) surveys to be performed for compliance with paragraph (5)(A) of this subsection;

(C) maintaining secure packaging during transportation to the site; and

(D) maintaining records of any discards made under paragraph (4) of this subsection.

(7) Nothing in this section relieves the licensee of maintaining records showing the receipt, transfer, and discard of such radioactive material as specified in §289.201(d) of this title.

(8) Nothing in this section relieves the licensee from complying with other applicable federal, state, and local regulations governing any other toxic or hazardous property of these materials.

(9) Licensed material discarded under this section is exempt from the requirements of §289.252(ff) of this title.

(ggg) Appendices.

(1) Assigned protection factors for respirators. The following table contains assigned protection factors for respirators[a]:
Figure: 25 TAC §289.202(ggg)(1) (No change.)

(2) Annual limits on intake (ALI) and derived air concentrations (DAC) of radionuclides for occupational exposure; effluent concentrations; concentrations for release to sanitary sewerage.

(A) Introduction.

(i) For each radionuclide, Table I of subparagraph (F) of this paragraph indicates the chemical form that is to be used for selecting the appropriate ALI or DAC value. The ALIs and DACs for inhalation are given for an aerosol with an activity median aerodynamic diameter (AMAD) of 1 micron, and for three classes (D, W, Y) of radioactive material, which refer to their retention (approximately days, weeks, or years) in the pulmonary region of the lung. This classification applies to a range of clearance half-times for D if less than 10 days, for W from 10 to 100 days, and for Y greater than 100 days. Table II of subparagraph (F) of this paragraph provides concentration limits for airborne and liquid effluents released to the general environment. Table III of subparagraph (F) of this paragraph provides concentration limits for discharges to sanitary sewerage.

(ii) The values in Tables I, II, and III of subparagraph (F) of this paragraph are presented in the computer "E" notation.

In this notation a value of 6E-02 represents a value of 6 x 10^{-2} or 0.06, 6E+2 represents 6 x 10^{2} or 600, and 6E+0 represents 6 x 10^{0} or 6.

(B) Occupational values.

(i) Note that the columns in Table I of subparagraph (F) of this paragraph captioned "Oral Ingestion ALI," "Inhalation ALI," and "DAC," are applicable to occupational exposure to radioactive material.

(ii) The ALIs in subparagraph (F) of this paragraph are the annual intakes of given radionuclide by "Reference Man" that would result in either a committed effective dose equivalent of 5 rems (0.05 Sv), stochastic ALI, or a committed dose equivalent of 50 rems (0.5 Sv) to an organ or tissue, non-stochastic ALI. The stochastic ALIs were derived to result in a risk, due to irradiation of organs and tissues, comparable to the risk associated with deep dose equivalent to the whole body of 5 rems (0.05 Sv). The derivation includes multiplying the committed dose equivalent to an organ or tissue by a weighting factor, w_T. This weighting factor is the proportion of the risk of stochastic effects resulting from irradiation of the organ or tissue, T, to the total risk of stochastic effects when the whole body is irradiated uniformly. The values of w_T are listed under the definition of "weighting factor" in subsection (c) of this section. The non-stochastic ALIs were derived to avoid non-stochastic effects, such as prompt damage to tissue or reduction in organ function.

(iii) A value of $w_T = 0.06$ is applicable to each of the five organs or tissues in the "remainder" category receiving the highest dose equivalents, and the dose equivalents of all other remaining tissues may be disregarded. The following portions of the GI tract; stomach, small intestine, upper large intestine, and lower large intestine, are to be treated as four separate organs.

(iv) The dose equivalents for an extremity, skin, and lens of the eye are not considered in computing the committed effective dose equivalent, but are subject to limits that must be met separately.

(v) When an ALI is defined by the stochastic dose limit, this value alone is given. When an ALI is determined by the non-stochastic dose limit to an organ, the organ or tissue to which the limit applies is shown, and the ALI for the stochastic limit is shown in parentheses. Abbreviated organ or tissue designations are used as follows:

(I) LLI wall = lower large intestine wall;

(II) St. wall = stomach wall;

(III) Blad wall = bladder wall; and

(IV) Bone surf = bone surface.

(vi) Figure: 25 TAC §289.202(ggg)(2)(B)(vi) (No change.)

(vii) The dose equivalents for an extremity, skin, and lens of the eye are not considered in computing the committed effective dose equivalent, but are subject to limits that must be met separately.

(viii) The DAC values are derived limits intended to control chronic occupational exposures. The relationship between the DAC and the ALI is given by:
Figure: 25 TAC §289.202(ggg)(2)(B)(viii) (No change.)

(ix) The DAC values relate to one of two modes of exposure: either external submersion or the internal committed dose equivalents resulting from inhalation of radioactive materials. DACs based upon submersion are for immersion in a semi-infinite cloud of uniform concentration and apply to each radionuclide separately.

(x) The ALI and DAC values include contributions to exposure by the single radionuclide named and any in-growth of daughter radionuclides produced in the body by decay of the parent. However, intakes that include both the parent and daughter radionuclides should be treated by the general method appropriate for mixtures.

(xi) The values of ALI and DAC do not apply directly when the individual both ingests and inhales a radionuclide, when the individual is exposed to a mixture of radionuclides by either inhalation or ingestion or both, or when the individual is exposed to both internal and external irradiation. See subsection (g) of this section. When an individual is exposed to radioactive materials which fall under several of the translocation classifications of the same radionuclide, such as, Class D, Class W, or Class Y, the exposure may be evaluated as if it were a mixture of different radionuclides.

(xii) It should be noted that the classification of a compound as Class D, W, or Y is based on the chemical form of the compound and does not take into account the radiological half-life of different radionuclides. For this reason, values are given for Class D, W, and Y compounds, even for very short-lived radionuclides.

(C) Effluent concentrations.

(i) The columns in Table II of subparagraph (F) of this paragraph captioned "Effluents," "Air," and "Water" are applicable to the assessment and control of dose to the public, particularly in the implementation of the provisions of subsection (o) of this section. The concentration values given in Columns 1 and 2 of Table II of subparagraph (F) of this paragraph are equivalent to the radionuclide concentrations which, if inhaled or ingested continuously over the course of a year, would produce a total effective dose equivalent of 0.05 rem (0.5 mSv).

(ii) Consideration of non-stochastic limits has not been included in deriving the air and water effluent concentration limits because non-stochastic effects are presumed not to occur at or below the dose levels established for individual members of the public. For radionuclides, where the non-stochastic limit was governing in deriving the occupational DAC, the stochastic ALI was used in deriving the corresponding airborne effluent limit in Table II of subparagraph (F) of this paragraph. For this reason, the DAC and airborne effluent limits are not always proportional as they were in the previous radiation protection standards.

(iii) The air concentration values listed in Column I of Table II of subparagraph (F) of this paragraph were derived by one of two methods. For those radionuclides for which the stochastic limit is governing, the occupational stochastic inhalation ALI was divided by 2.4 x 10^{9}, relating the inhalation ALI to the DAC, as explained in subparagraph (B)(viii) of this paragraph, and then divided by a factor of 300. The factor of 300 includes the following components:

(I) a factor of 50 to relate the 5 rems (0.05 Sv) annual occupational dose limit to the 0.1 rem limit for members of the public;

(II) a factor of 3 to adjust for the difference in exposure time and the inhalation rate for a worker and that for members of the public; and

(III) a factor of 2 to adjust the occupational values, derived for adults, so that they are applicable to other age groups.

(iv) For those radionuclides for which submersion, that is external dose, is limiting, the occupational DAC in Column 3 of Table I of subparagraph (F) of this paragraph was divided by 219. The factor of 219 is composed of a factor of 50, as described in clause (iii) of this subparagraph, and a factor of 4.38 relating occupational

exposure for 2,000 hours per year to full-time exposure (8,760 hours per year). Note that an additional factor of 2 for age considerations is not warranted in the submersion case.

(v) The water concentrations were derived by taking the most restrictive occupational stochastic oral ingestion ALI and dividing by 7.3×10^7. The factor of 7.3×10^7 milliliters (ml) includes the following components:

(I) the factors of 50 and 2 described in clause (iii) of this subparagraph; and

(II) a factor of 7.3×10^5 (ml) which is the annual water intake of "Reference Man."

(vi) Note 2 of subparagraph (F) of this paragraph provides groupings of radionuclides that are applicable to unknown mixtures of radionuclides. These groupings, including occupational inhalation ALIs and DACs, air and water effluent concentrations, and releases to sewer, require demonstrating that the most limiting radionuclides in successive classes are absent. The limit for the unknown mixture is defined when the presence of one of the listed radionuclides cannot be definitely excluded as being present either from knowledge of the radionuclide composition of the source or from actual measurements.

(D) Releases to sewers. The monthly average concentrations for release to sanitary sewerage are applicable to the provisions in subsection (gg) of this section. The concentration values were derived by taking the most restrictive occupational stochastic oral ingestion ALI and dividing by 7.3×10^6 (ml). The factor of 7.3×10^6 (ml) is composed of a factor of 7.3×10^5 (ml), the annual water intake by "Reference Man," and a factor of 10, such that the concentrations, if the sewage released by the licensee were the only source of water ingested by a "Reference Man" during a year, would result in a committed effective dose equivalent of 0.5 rem.

(E) List of elements.
Figure: 25 TAC §289.202(ggg)(2)(E)

(F) Tables--Values for annual limits. The following tables contain values for annual limits on intake (ALI) and derived air concentrations (DAC) of radionuclides for occupational exposure; effluent concentrations; concentrations for release to sanitary sewerage:
Figure: 25 TAC §289.202(ggg)(2)(F)

(3) Quantities of licensed material requiring labeling. The following tables contain quantities of licensed material requiring labeling:
Figure: 25 TAC §289.202(ggg)(3) (No change.)

(4) Classification and characteristics of low-level radioactive waste (LLRW).

(A) Classification of radioactive waste for land disposal.

(i) Considerations. Determination of the classification of LLRW involves two considerations. First, consideration must be given to the concentration of long-lived radionuclides (and their shorter-lived precursors) whose potential hazard will persist long after such precautions as institutional controls, improved waste form, and deeper disposal have ceased to be effective. These precautions delay the time when long-lived radionuclides could cause exposures. In addition, the magnitude of the potential dose is limited by the concentration and availability of the radionuclide at the time of exposure. Second, consideration must be given to the concentration of shorter-lived radionuclides for which requirements on institutional controls, waste form, and disposal methods are effective.

(ii) Classes of waste.

(I) Class A waste is waste that is usually segregated from other waste classes at the disposal site. The physical form and characteristics of Class A waste must meet the minimum requirements set forth in subparagraph (B)(i) of this paragraph. If Class A waste also meets the stability requirements set forth in subparagraph (B)(ii) of this paragraph, it is not necessary to segregate the waste for disposal.

(II) Class B waste is waste that must meet more rigorous requirements on waste form to ensure stability after disposal. The physical form and characteristics of Class B waste must meet both the minimum and stability requirements set forth in subparagraph (B) of this paragraph.

(III) Class C waste is waste that not only must meet more rigorous requirements on waste form to ensure stability but also requires additional measures at the disposal facility to protect against inadvertent intrusion. The physical form and characteristics of Class C waste must meet both the minimum and stability requirements set forth in subparagraph (B) of this paragraph.

(iii) Classification determined by long-lived radionuclides. If the radioactive waste contains only radionuclides listed in subclause (V) of this clause, classification shall be determined as follows.

(I) If the concentration does not exceed 0.1 times the value in subclause (V) of this clause, the waste is Class A.

(II) If the concentration exceeds 0.1 times the value in Table I, but does not exceed the value in subclause (V) of this clause, the waste is Class C.

(III) If the concentration exceeds the value in subclause (V) of this clause, the waste is not generally acceptable for land disposal.

(IV) For wastes containing mixtures of radionuclides listed in subclause (V) of this clause, the total concentration shall be determined by the sum of fractions rule described in clause (vii) of this subparagraph.

(V) Classification table for long-lived radionuclides.
Figure: 25 TAC §289.202(ggg)(4)(A)(iii)(V) (No change.)

(iv) Classification determined by short-lived radionuclides. If the waste does not contain any of the radionuclides listed in clause (iii)(V) of this subparagraph, classification shall be determined based on the concentrations shown in subclause (VI) of this clause. However, as specified in clause (vi) of this subparagraph, if radioactive waste does not contain any nuclides listed in either clause (iii)(V) of this subparagraph or subclause (VI) of this clause, it is Class A.

(I) If the concentration does not exceed the value in Column 1 of subclause (VI) of this clause, the waste is Class A.

(II) If the concentration exceeds the value in Column 1 of subclause (VI) of this clause but does not exceed the value in Column 2 of subclause (VI) of this clause, the waste is Class B.

(III) If the concentration exceeds the value in Column 2 of subclause (VI) of this clause but does not exceed the value in Column 3 of subclause (VI) of this clause, the waste is Class C.

(IV) If the concentration exceeds the value in Column 3 of subclause (VI) of this clause, the waste is not generally acceptable for near-surface disposal.

(V) For wastes containing mixtures of the radionuclides listed in subclause (VI) of this clause, the total concentration shall be determined by the sum of fractions rule described in clause (vii) of this subparagraph.

(VI) Classification table for short-lived radionuclides.

Figure: 25 TAC §289.202(ggg)(4)(A)(iv)(VI) (No change.)

(v) Classification determined by both long- and short-lived radionuclides. If the radioactive waste contains a mixture of radionuclides, some of which are listed in clause (iii)(V) of this subparagraph and some of which are listed in clause (iv)(VI) of this subparagraph, classification shall be determined as follows:

(I) If the concentration of a radionuclide listed in clause (iii)(V) of this subparagraph is less than 0.1 times the value listed in clause (iii)(V) of this subparagraph, the class shall be that determined by the concentration of radionuclides listed in clause (iv)(VI) of this subparagraph.

(II) If the concentration of a radionuclide listed in clause (iii)(V) of this subparagraph exceeds 0.1 times the value listed in clause (iii)(V) of this subparagraph, but does not exceed the value listed in clause (iii)(V) of this subparagraph, the waste shall be Class C, provided the concentration of radionuclides listed in clause (iv)(VI) of this subparagraph does not exceed the value shown in Column 3 of clause (iv)(VI) of this subparagraph.

(vi) Classification of wastes with radionuclides other than those listed in clauses (iii)(V) and (iv)(VI) of this subparagraph. If the waste does not contain any radionuclides listed in either clauses (iii)(V) and (iv)(VI) of this subparagraph, it is Class A.

(vii) The sum of the fractions rule for mixtures of radionuclides. For determining classification for waste that contains a mixture of radionuclides, it is necessary to determine the sum of fractions by dividing each radionuclide's concentration by the appropriate limit and adding the resulting values. The appropriate limits must all be taken from the same column of the same table. The sum of the fractions for the column must be less than 1.0 if the waste class is to be determined by that column. Example: A waste contains Sr-90 in a concentration of 50 curies per cubic meter (Ci/m^3 (1.85 terabecquerels per cubic meter (TBq/m^3)) and Cs-137 in a concentration of 22 Ci/m^3 (814 gigabecquerels per cubic meter (GBq/m^3)). Since the concentrations both exceed the values in Column 1 of clause (iv)(VI) of this subparagraph, they must be compared to Column 2 values. For Sr-90 fraction, 50/150 = 0.33, for Cs-137 fraction, 22/44 = 0.5; the sum of the fractions = 0.83. Since the sum is less than 1.0, the waste is Class B.

(viii) Determination of concentrations in wastes. The concentration of a radionuclide may be determined by indirect methods such as use of scaling factors, which relate the inferred concentration of one radionuclide to another that is measured, or radionuclide material accountability, if there is reasonable assurance that the indirect methods can be correlated with actual measurements. The concentration of a radionuclide may be averaged over the volume of the waste, or weight of the waste if the units are expressed as nanocurie (becquerel) per gram.

(B) Radioactive waste characteristics.

(i) The following are minimum requirements for all classes of waste and are intended to facilitate handling and provide protection of health and safety of personnel at the disposal site.

(I) Wastes shall be packaged in conformance with the conditions of the license issued to the site operator to which the waste will be shipped. Where the conditions of the site license are more restrictive than the provisions of this section, the site license conditions shall govern.

(II) Wastes shall not be packaged for disposal in cardboard or fiberboard boxes.

(III) Liquid waste shall be packaged in sufficient absorbent material to absorb twice the volume of the liquid.

(IV) Solid waste containing liquid shall contain as little free-standing and non-corrosive liquid as is reasonably achievable, but in no case shall the liquid exceed 1.0% of the volume.

(V) Waste shall not be readily capable of detonation or of explosive decomposition or reaction at normal pressures and temperatures, or of explosive reaction with water.

(VI) Waste shall not contain, or be capable of generating, quantities of toxic gases, vapors, or fumes harmful to persons transporting, handling, or disposing of the waste. This does not apply to radioactive gaseous waste packaged in accordance with subclause (VIII) of this clause.

(VII) Waste must not be pyrophoric. Pyrophoric materials contained in wastes shall be treated, prepared, and packaged to be nonflammable.

(VIII) Wastes in a gaseous form shall be packaged at an absolute pressure that does not exceed 1.5 atmospheres at 20 degrees Celsius. Total activity shall not exceed 100 Ci (3.7 terabecquerels (TBq)) per container.

(IX) Wastes containing hazardous, biological, pathogenic, or infectious material shall be treated to reduce to the maximum extent practicable the potential hazard from the non-radiological materials.

(ii) The following requirements are intended to provide stability of the waste. Stability is intended to ensure that the waste does not degrade and affect overall stability of the site through slumping, collapse, or other failure of the disposal unit and thereby lead to water infiltration. Stability is also a factor in limiting exposure to an inadvertent intruder, since it provides a recognizable and nondispersible waste.

(I) Waste shall have structural stability. A structurally stable waste form will generally maintain its physical dimensions and its form, under the expected disposal conditions such as weight of overburden and compaction equipment, the presence of moisture, and microbial activity, and internal factors such as radiation effects and chemical changes. Structural stability can be provided by the waste form itself, processing the waste to a stable form, or placing the waste in a disposal container or structure that provides stability after disposal.

(II) Notwithstanding the provisions in clause (i)(III) and (IV) of this subparagraph, liquid wastes, or wastes containing liquid, shall be converted into a form that contains as little free-standing and non-corrosive liquid as is reasonably achievable, but in no case shall the liquid exceed 1.0% of the volume of the waste when the waste is in a disposal container designed to ensure stability, or 0.5% of the volume of the waste for waste processed to a stable form.

(III) Void spaces within the waste and between the waste and its package shall be reduced to the extent practicable.

(C) Labeling. Each package of waste shall be clearly labeled to identify whether it is Class A, Class B, or Class C waste, in accordance with subparagraph (A) of this paragraph.

(5) Time requirements for record keeping.
Figure: 25 TAC §289.202(ggg)(5) (No change.)

(6) Acceptable surface contamination levels.
Figure: 25 TAC §289.202(ggg)(6) (No change.)

(7) Concentration and activity limits of nuclides for disposal in a Type I municipal solid waste site or a hazardous waste facility (for use in subsection (fff) of this section). The following table contains concentration and activity limits of nuclides for disposal in a Type I municipal solid waste site or a hazardous waste facility.
Figure: 25 TAC §289.202(ggg)(7) (No change.)

(8) Cumulative occupational exposure form. The following, BRC Form 202-2, is to be used to document cumulative occupational exposure history: (Please find BRC Form 202-2 at the end of this section.)
Figure: 25 TAC §289.202(ggg)(8)

(9) Occupational exposure form. The following, BRC Form 202-3, is to be used to document occupational exposure record for a monitoring period: (Please find BRC Form 202-3 at the end of this section.)
Figure: 25 TAC §289.202(ggg)(9)

(hhh) Requirements for nationally tracked sources.

(1) Reports of transactions involving nationally tracked sources. Each licensee who manufactures, transfers, receives, disassembles, or disposes of a nationally tracked source shall complete and submit to NRC a National Source Tracking Transaction Report as specified in the following subparagraphs for each type of transaction.

(A) Each licensee who manufactures a nationally tracked source shall complete and submit to NRC a National Source Tracking Transaction Report. The report shall include the following information:

(i) the name, address, and license number of the reporting licensee;

(ii) the name of the individual preparing the report;

(iii) the manufacturer, model, and serial number of the source;

(iv) the radioactive material in the source;

(v) the initial source strength in becquerels (curies) at the time of manufacture; and

(vi) the manufacture date of the source.

(B) Each licensee that transfers a nationally tracked source to another person shall complete and submit to NRC a National Source Tracking Transaction Report. A source transfer transaction does not include transfers to a temporary domestic job site. Domestic transactions in which the nationally tracked source remains in the possession of the licensee do not require a report to the National Source Tracking System. The report shall include the following information:

(i) the name, address, and license number of the reporting licensee;

(ii) the name of the individual preparing the report;

(iii) the name and license number of the recipient facility and the shipping address;

(iv) the manufacturer, model, and serial number of the source or, if not available, other information to uniquely identify the source;

(v) the radioactive material in the source;

(vi) the initial or current source strength in becquerels (curies);

(vii) the date for which the source strength is reported;

(viii) the shipping date;

(ix) the estimated arrival date; and

(x) for nationally tracked sources transferred as waste under a Uniform Low-Level Radioactive Waste Manifest, the waste manifest number and the container identification of the container with the nationally tracked source.

(C) Each licensee that receives a nationally tracked source shall complete and submit to NRC a National Source Tracking Transaction Report. The report shall include the following information:

(i) the name, address, and license number of the reporting licensee;

(ii) the name of the individual preparing the report;

(iii) the name, address, and license number of the person that provided the source;

(iv) the manufacturer, model, and serial number of the source or, if not available, other information to uniquely identify the source;

(v) the radioactive material in the source;

(vi) the initial or current source strength in becquerels (curies);

(vii) the date for which the source strength is reported;

(viii) the date of receipt; and

(ix) for material received under a Uniform Low-Level Radioactive Waste Manifest, the waste manifest number and the container identification with the nationally tracked source.

(D) Each licensee that disassembles a nationally tracked source shall complete and submit to NRC a National Source Tracking Transaction Report. The report shall include the following information:

(i) the name, address, and license number of the reporting licensee;

(ii) the name of the individual preparing the report;

(iii) the manufacturer, model, and serial number of the source or, if not available, other information to uniquely identify the source;

(iv) the radioactive material in the source;

(v) the initial or current source strength in becquerels (curies);

(vi) the date for which the source strength is reported; and

(vii) the disassemble date of the source.

(E) Each licensee who disposes of a nationally tracked source shall complete and submit to NRC a National Source Tracking Transaction Report. The report shall include the following information:

(i) the name, address, and license number of the reporting licensee;

(ii) the name of the individual preparing the report;

(iii) the waste manifest number;

(iv) the container identification with the nationally tracked source.

(v) the date of disposal; and

(vi) the method of disposal.

(F) The reports discussed in subparagraphs (A) through (E) of this paragraph shall be submitted to NRC by the close of the next business day after the transaction. A single report may be submitted for multiple sources and transactions. The reports shall be submitted to the National Source Tracking System by using the following:

(i) the on-line National Source Tracking System;

(ii) electronically using a computer-readable format;

(iii) by facsimile;

(iv) by mail to the address on the National Source Tracking Transaction Report Form (NRC Form 748); or

(v) by telephone with follow-up by facsimile or mail.

(G) Each licensee shall correct any error in previously filed reports or file a new report for any missed transaction within 5 business days of the discovery of the error or missed transaction. Such errors may be detected by a variety of methods such as administrative reviews or by physical inventories required by regulation. In addition, each licensee shall reconcile the inventory of nationally tracked sources possessed by the licensee against that licensee's data in the National Source Tracking System. The reconciliation shall be conducted during the month of January in each year. The reconciliation process shall include resolving any discrepancies between the National Source Tracking System and the actual inventory by filing the reports identified by subparagraphs (A) through (E) of this paragraph. By January 31 of each year, each licensee shall submit to the National Source Tracking System confirmation that the data in the National Source Tracking System is correct.

(H) Each licensee that possesses Category 1 or Category 2 nationally tracked sources listed in paragraph (2) of this subsection shall report its initial inventory of Category 1 or Category 2 nationally tracked sources to the National Source Tracking System by January 31, 2009. The information may be submitted to NRC by using any of the methods identified by subparagraph (F)(i) through (iv) of this paragraph. The initial inventory report shall include the following information:

(i) the name, address, and license number of the reporting licensee;

(ii) the name of the individual preparing the report;

(iii) the manufacturer, model, and serial number of each nationally tracked source or, if not available, other information to uniquely identify the source;

(iv) the radioactive material in the sealed source;

(v) the initial or current source strength in becquerels (curies); and

(vi) the date for which the source strength is reported.

(2) Nationally tracked source thresholds. The Terabecquerel (TBq) values are the regulatory standards. The curie (Ci) values specified are obtained by converting from the TBq value. The curie values are provided for practical usefulness only and are rounded after conversion.

Figure: 25 TAC §289.202(hhh)(2) (No change.)

(3) Serialization of nationally tracked sources. Each licensee who manufactures a nationally tracked source after February 6, 2007, shall assign a unique serial number to each nationally tracked source. Serial numbers shall be composed only of alpha-numeric characters.

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

Filed with the Office of the Secretary of State on February 2, 2009.

TRD-200900398
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: February 22, 2009
Proposal publication date: August 29, 2008
For further information, please call: (512) 458-7111 x6972

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 291. UTILITY REGULATIONS

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §291.3 and §291.144; and adopts new §291.147.

Sections 291.144 and 291.147 are adopted *with changes* to the text and will be republished. Section 291.3 is adopted *without changes* to the proposed text as published in the August 22, 2008, issue of the *Texas Register* (33 TexReg 6736) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In 2007, the 80th Legislature passed House Bill (HB) 149, relating to water utilities. HB 149 amended Texas Water Code (TWC), Chapter 13, Subchapter C, by adding §13.046, which requires the commission by rule to provide a streamlined process to allow the retail public utility that takes over the nonfunctioning retail water or sewer utility to apply for a ruling on the reasonableness of the newly implemented rates. The bill further requires the commission to establish, in consultation with the utility, a reasonable amount of time for the retail public utility to bring the water or wastewater system into compliance, and prohibits the commission from imposing a penalty during this period for

any violation that existed at the time the nonfunctioning system was taken over.

On January 16, 2008, the commission approved for proposal a set of rules (Rule Project 2007-048-291-PR) that contained amendments to implement HB 149. This rule proposal was published in the February 1, 2008 issue of the *Texas Register* (33 TexReg 871). During the comment period for the proposed rule, the commission received comments that caused it to reconsider the way it was implementing HB 149 and the commission withdrew the sections of the proposed rule related to HB 149 from that rulemaking.

The rules adopted in the *Texas Register* today are the commission's implementation of HB 149.

SECTION BY SECTION DISCUSSION

Subchapter A: General Provisions

§291.3, Definitions of Terms

The commission adopts a definition for "nonfunctioning system" in §291.3(28). The commission adopts the following definition: 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 §291.142 of this title (relating to Operation of Utility That Discontinues Operation or Is Referred for Appointment of a Receiver) and §291.143 of this title (relating to Operation of a Utility by a Temporary Manager). This adopted definition increases the number of systems that qualify as nonfunctioning. By being classified as a nonfunctioning system, a system can qualify to have a temporary manager or receiver appointed. The individual appointed will have the necessary expertise to help the nonfunctioning system move toward compliance. The commission adopts this change to provide guidance in implementing TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007. The subsequent definitions were relettered to accommodate this new definition.

Subchapter J: Enforcement, Supervision, and Receivership

§291.144, Fines and Penalties

The commission adopts §291.144(b) which would mandate that the commission not impose a penalty on the retail public utility taking over the nonfunctioning system for a period to be determined in cooperation with the retail public utility, which includes municipalities, districts, river authorities, and other local governments to ensure that the commission did not impose a penalty on an entity taking over a nonfunctioning utility. The commission adopts this change to implement TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007. With the addition of adopted subsection (b), the implied subsection (a) becomes subsection (a). The commission also deletes the catchline in the implied subsection (a). The commission also correctly references "Water Code" as "Texas Water Code."

§291.147, Temporary Rates for Services Provided for a Nonfunctioning System

The commission adopts new §291.147 which would establish a procedure for a retail public utility other than a municipally owned utility or a water or sewer utility subject to the original rate jurisdiction of a municipality that acquires a nonfunctioning system to charge 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. The commission adopts this new section to implement TWC, §13.046, as added by HB 149, 80th Legislative Session, 2007.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedure Act. 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 adopted rules is to implement provisions enacted in HB 149 of the 80th Legislature. Generally, these rules are intended to impact only the economic regulation of water and sewer providers. More specifically, the provisions provide a streamlined process to allow a retail public utility other than a municipally owned utility or a water or sewer utility subject to the original rate jurisdiction of a municipality that takes over a nonfunctioning retail water or sewer system to implement temporary rates and to apply for a ruling on the reasonableness of the newly implemented rates. It also allows the commission to establish a reasonable amount of time for the retail public utility that takes over a nonfunctioning system to bring the water or wastewater system into compliance. Furthermore, it prohibits the commission from imposing a penalty during this period for any violation that existed at the time the nonfunctioning system was taken over. The adopted rules are not intended to have any impact on environmental regulations. Furthermore, this rulemaking does not qualify as a major environmental rule because it will not have an adverse economic effect. Based on the foregoing, the adopted rulemaking does not constitute a major environmental rule, and thus is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a).

This rulemaking does not meet the definition of a major environmental rule because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, only applies 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. This rulemaking does not meet any of these four applicability requirements because the adopted rules: (1) are specifically required by state law, namely the TWC, and do not exceed a standard set by federal law; (2) do not exceed the express requirements of the TWC; (3) do not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) the adopted rules will not be adopted solely under the general powers of the commission.

Based on the foregoing, the adopted rulemaking does not constitute a major environmental rule, and thus is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted amendments to Chapter 291 and performed an analysis of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The intent of the adopted rules is to implement amendments enacted in HB 149 of the 80th Legislature.

The adopted rules would substantially advance the intent of the rulemaking by creating a streamlined process to allow a retail public utility other than a municipally owned utility or a water or sewer utility subject to the original rate jurisdiction of a municipality that takes over a nonfunctioning water or sewer system to implement temporary rates and to apply for a ruling on the reasonableness of the newly implemented rates. It also allows the commission to establish a reasonable amount of time for the retail public utility that takes over a nonfunctioning system to bring the water or wastewater system into compliance, during which the commission will not impose a penalty for any violation that existed at the time the nonfunctioning system was taken over.

Promulgation and enforcement of these adopted rules will constitute neither a statutory nor a constitutional taking of private real property. The adopted regulations do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because this rulemaking does not burden nor restrict or limit the owner's right to property. More specifically, these rules implement retail water and sewer utility rate regulations, and other related regulations of retail water and sewer service providers, none of which imposes any burdens or restrictions on private real property. Therefore, the adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the coastal management program.

PUBLIC COMMENT

The proposal was published in the August 22, 2008 *Texas Register* (33 TexReg 6736). The commission held a public hearing for this rule on September 18, 2008, in Austin, Texas. Due to potential impacts from Hurricane Ike, the public comment period for this rulemaking was extended by two weeks and closed on October 6, 2008.

The commission received written comments from Thompson & Knight, LLP, on behalf of American States Utility Services, Inc. (American States) and Bickerstaff Heath Delgado Acosta, LLP, on behalf of the City of Houston (Houston).

American States supported the rule. Houston suggested changes to the proposed rule as described in the RESPONSE TO COMMENTS section of the preamble.

RESPONSE TO COMMENTS

American States commented that they are in support of proposed §291.144(b) and §291.147.

The commission appreciates these comments in support of the proposed rules.

Houston commented that the proposed rule allows implementation of a temporary rate upon notice to the Executive Director. Houston recommends that the proposed rule be changed to require notice of the temporary rate to be sent to a municipality with original jurisdiction over the nonfunctioning system at the same time the notice is sent to the executive director. Pursuant to TWC, §13.042, a municipality has original jurisdiction over the rates and services of a utility operating within its corporate limits unless the municipality surrenders original jurisdiction to the TCEQ.

The commission agrees that TWC, §13.042, gives municipalities original jurisdiction over rates and services of a utility operating within its corporate limits unless the municipality surrenders original jurisdiction to the TCEQ. With original jurisdiction, municipalities can set their own requirements for utilities that operate within their boundaries. In this adopted rule, the commission only requires a retail public utility other than a municipally owned utility or a water or sewer utility subject to the original rate jurisdiction of a municipality to provide notice to the executive director that the retail public utility has begun charging a temporary rate. Therefore, the commission made no change with regard to this comment.

Houston commented that as the rule is currently proposed, there is no time limit under which a retail public utility may charge the "temporary rate." Houston asserts that without a time limit, the retail public utility taking over a nonfunctioning system could evade the rate review process of a municipality because there is no limit on how long the "temporary rate" may be charged. Houston recommends that the temporary rate approved by the TCEQ come under the authority of a municipality's original jurisdiction and lose the "temporary" status after the rate is established by the municipality. Houston asks that the TCEQ require inside municipal limit retail public utilities that have set a temporary rate to file a rate application with the municipality having original jurisdiction within 180 days after the TCEQ sets the temporary rate. Houston stated that the temporary rate would then be subject to the municipality's original rate jurisdiction under TWC, §13.042.

The commission responds that under the commission's revisions to the rule, temporary rates will not apply to a water or sewer utility under the original rate jurisdiction of a municipality. For all other retail public utilities, §291.147(c) requires the executive director to issue an order regarding the reasonableness of the temporary rate. The commission expects that the executive director will include a time limit or benchmarks for the suspension of the temporary rates in the order. Additionally, the commission responds that an across-the-board 180-day deadline for the suspension of the temporary rate and a requirement of a rate application at the end of that deadline are both unnecessary. The

commission anticipates that in some cases 180 days will be a reasonable time period for a temporary rate while in other instances it may be too long. Requiring a specific deadline will undermine the purpose of this rulemaking, which is to provide the commission flexibility in allowing a retail public utility to charge temporary rates when taking over a nonfunctioning utility. This allows the retail public utility to focus its efforts on complying with regulations relating to public health and safety and avoid unnecessary costs of time and money involved in formal rate proceedings. The commission has made no change in response to this comment.

Houston commented and asked the TCEQ to clarify that, when a municipality takes over a nonfunctioning system inside the municipality's corporate limits, the municipality is not required to go through the TCEQ to set rates for the system. Houston recommends that since the TCEQ has appellate jurisdiction under TWC, §13.043(b) for the municipality, a municipality sets the rates for retail public utilities inside its corporate limits, that municipality would be exempt from this requirement.

The commission acknowledges that municipalities have original rate jurisdiction over water and sewer utilities within their corporate limits under TWC, §13.042. Thus, the commission has revised §291.147(a) by adding language to specifically define that only a retail public utility other than a municipally owned utility or a water or sewer utility subject to the original rate jurisdiction of a municipality need to submit notice to the executive director for a determination regarding the reasonableness of their rates.

Houston commented and asked the TCEQ to change the word "utility," in §291.144(b) to "retail public utility." The word "utility" is mentioned twice in the section. The term "utility" is a defined term, and does not have the same meaning as "retail public utility."

The commission agrees that the terms "utility" and "retail public utility" have different meanings and that "retail public utility" should be the term used in §291.144(b). The commission changed the term "utility" to "retail public utility" in §291.144(b) in response to this comment.

Houston commented that the TCEQ should clarify the term "takes over" in §291.147(a). Houston claims that it is unclear what actions by a retail public utility would be considered a "take over." Houston asks, "Has a retail public utility taken over a nonfunctioning utility if it simply takes over the operations of the system, but does not acquire the system?" Houston recommends that this term be defined, or that the TCEQ clarify that "take over" includes operating a system without acquiring it.

The commission responds that it is implicit in the term "takes over" that this will include any situation in which a retail public utility assumes the operational responsibilities for a nonfunctioning system whether the retail public utility has acquired the system or not. The commission made no change in response to this comment.

Houston commented that the TCEQ change the term "nonfunctioning retail public water and sewer utility service provider" in §291.147(a) to "nonfunctioning system." Houston recommends this change to avoid any confusion and to ensure consistency throughout the rules.

The commission responds that, as much as possible, it attempts to track the language of the statute. The legislature used both the terms "nonfunctioning retail water or sewer service provider" and "nonfunctioning system" in HB 149, §13.046(a). In this section of the bill, the legislature was referring to the provider of service to the nonfunctioning system and the nonfunctioning system separately and did not intend to create a separate definition for each term. The commission made no change in response to this comment.

Houston commented that the TCEQ define reasonable costs and outline what could be included in determining the "reasonable costs" incurred to interconnect a system, to make service available, or to bring the system into compliance. Houston also recommends that the TCEQ require the retail public utility to submit documentation to justify the reasonableness of the costs incurred at the time it provides written notice to the executive director, and as proposed above, to the municipality.

The commission acknowledges that creating the streamlined process envisioned by the legislature may require the executive director to make a subjective determination of what is a "reasonable cost." Certainly, costs associated with interconnecting a system, bringing a system into compliance, and making service available could all be "reasonable costs." However, the commission does not want to limit potential other costs which may be reasonable in some situations; therefore, the commission has not included a definition for "reasonable costs." Additionally, the commission does not feel it is necessary to change the rule to require the retail public utility to submit documentation because §291.47(c) already states that the executive director will consider information submitted by the retail public utility taking over the nonfunctioning system and the customers of the nonfunctioning system in deciding whether the temporary rates are reasonable. The commission will issue an order within 90 days of receiving notice of the temporary rate increase; therefore, if the retail public utility fails to provide any information within that 90-day period, the executive director would deem the temporary rates to be unreasonable. The commission made no change in response to this comment.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §291.3

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.102, which provides the commission the general powers to carry out duties under the TWC and TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated in TWC, Chapter 13 or implied in TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 also states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission. Finally, TWC, §13.046 requires the commission to adopt rules that allow a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility service provider to charge a reasonable rate for the services provided to the customers of the nonfunctioning system and TWC, §13.046 also requires the commission to provide a reasonable period for a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility system to bring the nonfunctioning system into compliance with the commission rules during which the commission shall not impose a penalty for any deficiency in

the system that is present at the time the utility takes over the nonfunctioning system.

The adopted amendment implements TWC, §13.046.

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

Filed with the Office of the Secretary of State on January 30, 2009.

TRD-200900376
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: February 19, 2009
Proposal publication date: August 22, 2008
For further information, please call: (512) 239-2548

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SUBCHAPTER J. ENFORCEMENT, SUPERVISION, AND RECEIVERSHIP

30 TAC §291.144, §291.147

STATUTORY AUTHORITY

The amendment and new section are adopted under TWC, §5.102, which provides the commission the general powers to carry out duties under the TWC and TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated in TWC, Chapter 13 or implied in TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 also states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission. Finally, TWC, §13.046 requires the commission to adopt rules that allow a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility service provider to charge a reasonable rate for the services provided to the customers of the nonfunctioning system and TWC, §13.046 also requires the commission to provide a reasonable period for a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility system to bring the nonfunctioning system into compliance with the commission rules during which the commission shall not impose a penalty for any deficiency in the system that is present at the time the utility takes over the nonfunctioning system.

The adopted amendment and new section implement TWC, §13.046.

§291.144. Fines and Penalties.

(a) Fines and penalties collected under Texas Water Code, 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.

§291.147. Temporary Rates for Services Provided for a Nonfunctioning System.

(a) Notwithstanding other provisions of this chapter, upon sending written notice to the executive director, 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 executive director will issue an order regarding the reasonableness of the temporary rates. In making the determination, the executive director 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.

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

Filed with the Office of the Secretary of State on January 30, 2009.

TRD-200900377
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: February 19, 2009
Proposal publication date: August 22, 2008
For further information, please call: (512) 239-2548

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 141. GENERAL PROVISIONS SUBCHAPTER C. SUBMISSION AND PRESENTATION OF INFORMATION AND REPRESENTATION OF OFFENDERS

37 TAC §141.60

The Texas Board of Pardons and Paroles adopts an amendment to 37 TAC §141.60 concerning the submission and presentation of information to the parole panel. The amendment is adopted

without change to the proposed text as published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6552). The text of the rule will not be republished.

The amended rule is adopted to clarify the review period for offenders who are eligible for parole review.

No public comment was received regarding adoption of the amendment.

The amended rule is adopted under §508.082 and §508.083, Government Code. Section 508.082 requires the board to adopt rules relating to the submission and presentation of information and arguments to the board, a parole panel, and the department for and in behalf of an inmate. Section 508.083 relates to representation of an inmate in a matter before the board or a parole panel.

No other statutes, articles, or codes are affected by this amendment.

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

Filed with the Office of the Secretary of State on January 29, 2009.

TRD-200900348
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Effective date: February 18, 2009
Proposal publication date: August 15, 2008
For further information, please call: (512) 406-5388

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CHAPTER 143. EXECUTIVE CLEMENCY
SUBCHAPTER A. FULL PARDON AND RESTORATION OF RIGHTS OF CITIZENSHIP

37 TAC §§143.4, 143.11, 143.12

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC §§143.4, 143.11, and 143.12 concerning full pardon and restoration of rights of citizenship. The amendments are adopted without change to the proposed text as published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6553). The text of the rules will not be republished.

The amended rules in §143.4 and §143.11 are adopted to update the statutory references contained within the rules. Amended §143.12 is adopted to revise the contact for proof of application.

No public comments were received regarding adoption of these amendments.

The amended rules are adopted under Article IV, Section 11 of the Texas Constitution and Article 48.01, Code of Criminal Procedure, that vests the Board of Pardons and Paroles with the power to recommend clemency, including pardons, commutations of sentence, and reprieves; and under §508.036(b), Government Code, that provides the Board with authority to adopt rules relating to the decision-making processes used by the Board of Pardons and Paroles.

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

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

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Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
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Proposal publication date: August 15, 2008
For further information, please call: (512) 406-5388

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SUBCHAPTER B. CONDITIONAL PARDON

37 TAC §§143.21, 143.23, 143.24

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC §§143.21, 143.23, and 143.24 concerning conditional pardons. The amendments are adopted without change to the proposed text as published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6553). The text of the rules will not be republished.

Amended §143.21 is adopted to revise the board rule reference contained within the rule. Amended §143.23 is adopted to remove the board rule reference contained within the rule. Amended §143.24 is adopted to update the statutory reference contained within the rule.

No public comments were received regarding adoption of these amendments.

The amended rules are adopted under Article IV, Section 11 of the Texas Constitution and Article 48.01, Code of Criminal Procedure, that invest the Board of Pardons and Paroles with the power to recommend clemency, including pardons, commutations of sentence, and reprieves; and under §508.036(b), Government Code, that provides the Board with authority to adopt rules relating to the decision-making processes used by the Board of Pardons and Paroles.

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

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

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SUBCHAPTER E. COMMUTATION OF SENTENCE

37 TAC §143.52, §143.58

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC §143.52 and §143.58 concerning commutation of sentences. The amendments are adopted without change to the proposed text as published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6554). The text of the rules will not be republished.

The amended rules are adopted to update the statutory references contained within the rules.

No public comments were received regarding adoption of these amendments.

The amended rules are adopted under Article IV, Section 11 of the Texas Constitution and Article 48.01, Code of Criminal Procedure, that invest the Board of Pardons and Paroles with the power to recommend clemency, including pardons, commutations of sentence, and reprieves; and under §508.036(b), Government Code, that provides the Board with authority to adopt rules relating to the decision-making processes used by the Board of Pardons and Paroles.

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

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

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SUBCHAPTER F. REMISSION OF FINES AND FORFEITURES

37 TAC §143.74

The Texas Board of Pardons and Paroles adopts an amendment to 37 TAC §143.74 concerning remission of fines and forfeitures. The amendment is adopted without change to the proposed text as published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6555). The text of the rule will not be republished.

The amended rule is adopted to update the statutory reference contained within the rule.

No public comment was received regarding adoption of the amendment.

The amended rule is adopted under Article IV, Section 11 of the Texas Constitution and Article 48.01, Code of Criminal Procedure, that invest the Board of Pardons and Paroles with the power to recommend clemency, including pardons, commutations of sentence, and reprieves; and under §508.036(b), Government Code, that provides the Board with authority to adopt rules relating to the decision-making processes used by the Board of Pardons and Paroles.

No other statutes, articles, or codes are affected by this amendment.

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

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CHAPTER 145. PAROLE

SUBCHAPTER A. PAROLE PROCESS

37 TAC §145.12, §145.17

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC §145.12 and §145.17 concerning the parole process. The amendments are adopted without change to the proposed text as published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6555). The text of the rules will not be republished.

The amendment to §145.12 is adopted to add the statutory reference to the rule. Section 145.17 is adopted to clarify the procedures regarding subsequent reviews of parole panel votes to deny release to parole or mandatory supervision

No public comments were received regarding adoption of these amendments.

The amended rules are adopted under §§508.036, 508.0441, and 508.141, Government Code. Section 508.036 provides the board with the authority to adopt rules relating to the decision-making process used by the board and parole panels. Section 508.0441 provides the board with the authority to adopt reasonable rules as proper or necessary relating to the eligibility of an inmate for release on parole or release to mandatory supervision. Section 508.141 provides the board authority to adopt policy establishing the date on which the board may reconsider for release an inmate who has previously been denied release.

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

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

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SUBCHAPTER B. TERMS AND CONDITIONS OF PAROLE

37 TAC §145.23, §145.24

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC §145.23 and §145.24 concerning terms and conditions of parole. The amendments are adopted without change to the proposed text as published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6556). The text of the rules will not be republished.

The amended rules are adopted to update the statutory references contained within the rules.

No public comments were received regarding adoption of these amendments.

The amended rules are adopted under §508.036 and §508.044, Government Code. Section 508.036 authorizes the board to promulgate rules relating to the board's decision-making processes, and §508.044, Government Code, provides the board with the authority to adopt rules relating to the eligibility of an inmate for release on parole or mandatory supervision.

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

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

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CHAPTER 146. REVOCATION OF PAROLE OR MANDATORY SUPERVISION

37 TAC §146.6, §146.8

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC §146.6 and §146.8 concerning revocation of parole or mandatory supervision. The amendments are adopted without change to the proposed text as published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6557). The text of the rules will not be republished.

The amended rules are adopted to update the statutory references contained within the rules.

No public comments were received regarding adoption of these amendments.

The amended rules are adopted under §§508.0441, 508.045, 508.281, and 508.283, Government Code. Section 508.0441 vests the Board with the authority to determine the continuation, modification, and revocation of parole or mandatory supervision. Section 508.045 provides parole panels with the authority to grant, deny, revoke parole, or revoke mandatory supervision. Sections 508.281 and 508.283 relate to hearings to determine violations of the releasee's parole or mandatory supervision.

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

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

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CHAPTER 149. MANDATORY SUPERVISION SUBCHAPTER A. RULES AND CONDITIONS OF MANDATORY SUPERVISION

37 TAC §149.3

The Texas Board of Pardons and Paroles adopts an amendment to 37 TAC §149.3 concerning rules and conditions of mandatory supervision. The amendment is adopted without change to the proposed text as published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6557). The text of the rule will not be republished.

The amended rule is adopted to update the statutory reference contained within the rule.

No public comment was received regarding adoption of the amendment.

The amended rule is adopted under §508.036 and §508.044, Government Code. Section 508.036 authorizes the board to promulgate rules relating to the board's decision-making processes, and §508.044, Government Code, provides the board with the authority to adopt rules relating to the eligibility of an inmate for release on parole or mandatory supervision.

No other statutes, articles, or codes are affected by this amendment.

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

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT
SUBCHAPTER C. OTHER ENTITIES' INTERNAL ETHICS AND COMPLIANCE PROCEDURES

43 TAC §1.8, §1.9

The Texas Department of Transportation (department) adopts new §1.8 and §1.9, concerning internal ethics and compliance programs. New §1.8 and §1.9 are adopted without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9952) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTIONS

The department has a long standing reputation for integrity and ethical behavior. To maintain and build on the department's commitment to integrity and ethical behavior, the Texas Transportation Commission (commission) in November 2007 ordered the department to develop an internal compliance program (ICP) designed to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law and departmental policies. The commission strengthened the requirement in May 2008 by ordering the department to develop and implement for the commission and commission staff, the department's executive director, deputy executive director, and assistant executive directors a training program that is to include training on ethics law and policies and the department's ICP.

The next step is for the commission to take action to discourage fraudulent and illegal activity by persons who receive financial assistance from or contract with the department. A purpose of the rule changes is to require that an entity that receives financial assistance from the department have and enforce an ethics and compliance program that is recognized by the department. The rule changes also provide that a contractor's adoption and enforcement of an ethics and compliance program is a potential mitigating factor for the imposition of sanctions on the contractor.

New §1.8, Internal Ethics and Compliance Program, establishes a framework for the internal ethics and compliance program of an entity that receives financial assistance from the department and that is required under another rule of the commission to establish such a program. The section establishes the minimum requirements of the internal ethics and compliance program and requires the entity to certify that it has adopted and enforces compliance with the program.

New §1.9, Effect of Contractor's Internal Ethics and Compliance Program, provides that a contractor's adoption and enforcement of compliance with an internal ethics and compliance program that meets the requirements of §1.8 may be considered in determining a sanction that may be imposed on the contractor as the result of a violation of federal or state law, including regulations.

COMMENTS

No comments on the proposed new sections were received.

STATUTORY AUTHORITY

The new sections 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.

CROSS REFERENCE TO STATUTE

None.

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

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Bob Jackson
General Counsel
Texas Department of Transportation
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CHAPTER 2. ENVIRONMENTAL POLICY
SUBCHAPTER A. ENVIRONMENTAL REVIEW AND PUBLIC INVOLVEMENT FOR TRANSPORTATION PROJECTS

43 TAC §2.1

The Texas Department of Transportation (department) adopts amendments to §2.1, concerning the applicability of the department's environmental review and public involvement requirements to transportation projects that are not on the state highway system. The amendments to §2.1 are adopted without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9954) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, §228.012 requires the department to create a separate account in the state highway fund to hold payments received by the department under a comprehensive development agreement (CDA), the surplus revenue of a toll project or system, and payments received under Transportation Code, §228.0111(g)(2) and (i)(2). The department is required to create subaccounts in the account for each project, system, or region, and to hold money in a subaccount in trust for the benefit of the region in which a project or system is located. The department may assign the responsibility for allocating money in a subaccount to a metropolitan planning organization (MPO) in which the region is located.

Money in a subaccount must be allocated to projects authorized by Transportation Code, §228.0055 or §228.006 or, for money deposited into a subaccount in connection with a project

for which a county acting under Transportation Code, Chapter 284 has the first option, to transportation projects located in the county and the counties contiguous to that county. The projects for which money in a subaccount may be allocated include transportation projects that are not on the state highway system.

The department has created subaccounts in the state highway fund to hold the payments received from the North Texas Tollway Authority (NTTA) for the right to develop, finance, design, construct, operate, and maintain the SH 121 toll project from Business SH 121 in Denton County to US 75 in Collin County (SH 121 subaccounts). Responsibility for allocating money in the SH 121 subaccounts has been assigned to the Regional Transportation Council (RTC), the transportation policy council of the North Central Texas Council of Governments (NCTCOG), under an agreement which provides that the selection of projects to be financed using those funds shall be made by the RTC, subject to Texas Transportation Commission (commission) concurrence.

The commission has authorized the executive director of the department to enter into an agreement with the NCTCOG under which the department will transfer funds from the SH 121 subaccounts to pay for the costs of projects that are not on the state highway system. The department may create additional subaccounts and may enter into agreements under which funds in those subaccounts are used to pay the costs of projects.

For some projects to be funded with money in the SH 121 subaccounts, the local governmental entities implementing those projects have been complying with environmental review, permitting, and other approval and public notice requirements applicable to those entities. The environmental review and public involvement for those projects may need to recommence if those projects are subject to the requirements of 43 TAC Chapter 2, Subchapter A. Other projects to be funded with money in the SH 121 subaccounts are anticipated to require a more limited environmental review focused on permitting and other approvals. All of the approved projects were selected by the RTC using a competitive evaluation process, resulting in the selection of projects that need to be built quickly. The RTC has determined that the approved projects will mitigate or prevent air pollution caused by the construction, maintenance, or use of other proposed or existing public roads in the area.

Amendments to §2.1, General; Emergency Action Procedures, provide that the environmental review and public involvement requirements of 43 TAC Chapter 2, Subchapter A do not apply to a project that is not on the state highway system the department funds solely with money held in a project subaccount created under Transportation Code, §228.012. The amendments require a project agreement entered into by the department ensure that the entity responsible for implementing such a project complies with all environmental review and public involvement requirements applicable to that entity under state and federal law in connection with the project.

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, §201.604, which requires the commission by rule to provide for the commission's environmental review of the department's transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §§4321 et seq.).

CROSS REFERENCE TO STATUTE

Transportation Code, §201.604 and Transportation Code, §228.012.

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

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Bob Jackson
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CHAPTER 5. FINANCE
SUBCHAPTER B. COLLECTION OF DEBTS

43 TAC §5.10

The Texas Department of Transportation (department) adopts amendments to §5.10, concerning Collection of Debts. The amendments to §5.10 are adopted without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9955) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Government Code, §2107.002, requires a state agency that collects delinquent obligations owed to it to establish by rule procedures for collecting the obligations and further requires that the rules establishing those procedures conform to the guidelines established by the Office of Attorney General. Title 1, Texas Administrative Code (TAC), §59.2, sets out those guidelines.

The department's rules relating to the collection of debts are set out in 43 TAC §5.10, Collection of Debts, which was adopted in October 1995 and has not been changed since its adoption. The department has identified some changes to §5.10 that need to be made to conform the department's debt collection procedures to the Office of Attorney General guidelines. The amendments make those changes and make some additional technical corrections.

The amendments make several changes to §5.10(a). In the definition of "debtor," the words "or entity" are deleted from the phrase "person or entity" as unnecessary, because the definition of "person" includes "entity." In the definition of "delinquent," "payment" is substituted for the phrase "when a payment" so that the definition coincides with the definition of that term in the Office of Attorney General guidelines. The definition of "demand letter" is deleted because the definition has been integrated into the substance of new §5.10(c)(4), and the subsequent paragraphs have been renumbered accordingly. Amendments to the definition of "division" clarify that the term includes "office" which is also an organizational unit at Austin headquarters.

The amendments delete §5.10(b) because the substance of the subsection is repeated in current subsection (d).

The amendments re-letter current §5.10(c) as new §5.10(b) and clarify that the department will subtract the amount of contractor's obligation to the department from payments due to a contractor if such an action is practical.

The amendments re-letter current §5.10(d) as new §5.10(c) and amend paragraph (1) to provide that the division or district that determines that an obligation is owed to the department will send the debtor a written notice of the obligation. The notice must state the amount owed and due date. Amendments to paragraph (2) provide that if the department does not receive a satisfactory response, the obligation becomes delinquent on the 31st day after the date that notice is sent and that a first demand letter will be sent not later than 30 days after the date on which the obligation becomes delinquent. This amendment is necessary to establish a definite date that an obligation becomes delinquent, which also clarifies the date on which formal demand letters for payment are to be sent, if necessary. Amendments to paragraph (3) provide that if the department does not receive a satisfactory response to the first demand letter, the division or district will send a final demand letter not later than 60 days after the date on which the first demand letter was sent. New paragraph (4) clarifies the content of, and procedure for sending, the demand letters.

Amendments re-letter current §5.10(e) as new §5.10(d) and clarify the information that the department will retain in the records of a delinquent obligation. The amendments make no substantive change to the current rules.

Amendments re-letter current §5.10(f) as new §5.10(e) and provide that before referring a delinquent obligation to the Office of Attorney General, the department will send two demand letters to the person obligated on the debt. The amendments also make technical, non-substantive changes to the section. The amendments are necessary to clarify the procedural steps that will be taken before making a referral to the Office of Attorney General.

Amendments re-letter current §5.10(g) as new §5.10(f) with no other changes.

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, Government Code, §2107.002(b), requiring state agencies to adopt rules that establish procedures for collecting a delinquent obligation.

CROSS REFERENCE TO STATUTE

Government Code, §2107.002.

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

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SUBCHAPTER E. PASS-THROUGH FARES AND TOLLS

The Texas Department of Transportation (department) adopts amendments to §5.53, repeal of §§5.54 - 5.59 and new §§5.54 - 5.60, concerning pass-through fares and tolls. The amendments to §5.53, repeal of §§5.54 - 5.59, and new §§5.54 - 5.60 are adopted without changes to the proposed text as published in the November 14, 2008, issue of the *Texas Register* (33 TexReg 9207) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, §222.104(b) authorizes the department to enter into an agreement with a public or private entity that provides for the payment of pass-through tolls to the public or private entity as reimbursement for the design, development, financing, construction, maintenance, or operation of a toll or non-toll facility on the state highway system by the public or private entity.

Transportation Code, §222.104(c) authorizes the department to enter into an agreement with a private entity that provides for the payment of pass-through tolls to the department as reimbursement for the department's design, development, financing, construction, maintenance, or operation of a toll or non-toll facility on the state highway system that is financed by the department.

Transportation Code, §91.075(b) authorizes the department to enter into an agreement with a public or private entity that provides for the payment of pass-through fares to the public or private entity as reimbursement for the acquisition, design, development, financing, construction, relocation, maintenance, or operation of a passenger railway facility or a freight railway facility by the entity. Title 43, Texas Administrative Code, Chapter 5, Subchapter E prescribes the policies and procedures governing the department's implementation of these statutory provisions.

Amendments to §5.53(a), Proposal requirements, clarify the information, and require additional information, that is to be provided in a proposal for a project under a pass-through agreement. Amendments to paragraph (1) add the requirement that the proposal include the geographic area affected by the project. Amendments to paragraph (3) provide examples of anticipated benefits that must be included in the proposal. Amendments to paragraph (4) require that the proposal contain documentation that evidences local public support or opposition for the project. Amendments to paragraph (9) clarify that the proposal must include financial information sufficient to show the proposer's financial strength to develop and complete the project. Amendments to paragraph (10) require that the reimbursement period for proposed pass-through payments be provided. Amendments to paragraph (11) clarify that project funding sources and amounts are required for each project cost category.

New §5.53(a)(12) requires the proposal to list the financial assistance requested from the department in addition to funding under the pass-through agreement. Existing paragraphs (12) -

(14) are renumbered as paragraphs (13) - (15) without change, and new paragraphs (16) and (17) are added. New §5.53(a)(16) requires a statement of whether the project is intended to be a part of a hurricane evacuation route. New §5.53(a)(17) requires a statement indicating whether the project has application to military base realignment or closure.

Each of the revised or new information requirements is added to §5.53(a) to provide the information necessary for the Texas Transportation Commission (commission) to adequately evaluate the proposals under the new criteria established in new §5.55.

New §5.54, Participation in the Program, is added to allow the commission the option of limiting the period of time during which submission of proposals will be received and limiting the total costs of all projects that will be reimbursed during a specific period, based on the commission's determination of the availability of program funds. The commission may also impose conditions that limit participation to either public or private entities, limit eligible projects to either highway or railway projects, or limit the type of project costs that will be reimbursed. To impose such limitations, the department must publish a notice describing the deadline for submitting proposals, the estimated total amount of funds available for the period described in the notice, and any limitations on public or private participation, eligibility of highway or railway projects, or on the type of project costs that will be reimbursed. After the deadline expires, the department will evaluate all of the proposals and present an analysis of each to the commission. The limitation option is being used to give all interested entities an equal opportunity to participate in the program and take advantage of the limited program funds.

Current §5.54, Commission Approval to Negotiate, is repealed and added as new §5.55 with the changes described by this paragraph to expand the considerations that the department will use in reviewing proposals. New §5.55(1) requires the consideration of the proposer's proposed financial contribution and its relationship to total project costs, and deletes the criterion dealing with the general financial benefits to the state. The proposing entities are encouraged to contribute significant amounts of their own resources to the project. A higher contribution demonstrates the importance of the project to the region and maximizes the use and leveraging of state funds. The deleted general financial benefits to the state concept is being replaced with other specific criteria in this section that better illustrate the benefits to the state. New paragraph (2) requires the consideration of the geographic area affected by the project. The proposing entities are encouraged to select potential projects that affect broad geographic areas. Projects that contribute to the statewide transportation system would be considered more beneficial than regional projects which, in turn, would be considered more beneficial than projects serving only a local geographic area. New §5.55(6) requires the consideration of the potential safety benefit that may be derived from the project. The proposing entity is encouraged to consider specific projects which have the greatest potential to enhance the safety of the transportation system as evidenced by the crash rate of the existing transportation segment under consideration compared to statewide averages for similar transportation segments. New §5.55(9) requires the consideration of the extent to which the project will close gaps in the state transportation system. New §5.55(11) adds consideration of the entity's proposed period for department reimbursement. The proposing entities should consider the longest reimbursement period feasible to maximize the use and leveraging of state funds. New §5.55(12) adds consideration of the economic development potential in the area. The proposing entities should consider the effect of the proposed project on economic development and explain the relationship of the project to that specific commission goal. New §5.55(13) adds consideration of the financial strength of the proposing entity and replaces paragraph (10) of the current section. The proposing entities should provide sufficient information to give an indication of their financial ability to bring the project to a timely completion date. New §5.55(14) adds consideration of whether the project is part of a hurricane evacuation route. The proposing entities are encouraged to give any explanation of the relationship of the project, if applicable, to any hurricane evacuation route that would assist in facilitating traffic movement in the event of these weather related events. New §5.55(15) adds consideration of whether the project has application to a military base realignment or closure. The proposing entities are encouraged to give an explanation of the relationship of the project, if applicable, to any military base realignment or closure with respect to the contribution that the project will make, in the case of realignment, to national defense and base transportation efficiency or, in the case of closure, to future economic development in the area of the base closure. New §5.55(16) adds consideration of the experience of the entity in developing similar transportation projects and replaces paragraphs (7) and (8) of the current section. The proposing entities should describe or list their experience with similar transportation projects with respect to timely project completion in the context of federal and state laws and regulations. New §5.55(17) adds consideration of the relationship of the project to stated commission goals. The proposing entities should describe the relationship of the project to the commission goals of reducing congestion, improving safety, enhancing and expanding economic opportunity, improving air quality, and increasing the value of transportation assets. Current §5.54(2) - (6) is reenacted as new §5.55(3) - (5), (7), and (8) without change.

Current §5.55, Proposals from Private Entities, is repealed and added as new §5.56 with the changes to adjust the cross references within the section to conform to the renumbering of the sections. Also, the reference in current §5.55(c) to the relative weight given to criteria in the department's evaluation of private entities' proposals is removed to provide the department with greater flexibility in considering criteria under changing cash flow scenarios and to be consistent with the approach adopted for evaluation of all proposals under new §5.54(d).

Current §5.56, Final Approval, is repealed and added as new §5.57. New §5.57(b)(2) adds a requirement that a pass-through agreement must include identification of the one or more categories of project costs paid by the proposer for which the department will make a reimbursement under the program. This requirement makes the agreement correspond to any limitations imposed on department reimbursement as set out in the particular notice described in new §5.54. All other provisions of repealed §5.56 are reenacted as new §5.57.

Current §5.57, Calculation of Pass-Through Fares and Tolls, is repealed and added as new §5.58 with no additional changes.

Current §5.58, Project Development by Public or Private Entity, is repealed and added as new §5.59 with minor cross referencing changes in new §5.59(c)(7) and (9) to conform to the renumbering of the sections. New §5.59(f) adds a requirement that a public or private entity that intends to sell bonds and use pass-through tolls or fares as evidence of financial capability to repay the bonds, must provide the department with an opportunity to review and comment on the bond offering documents prior

to sale of the bonds. The department would have a minimum of five business days to review and have the right to approve provisions in the offering documents that describe the pass-through agreement, the department's obligations under agreement, the interrelationship of the department, commission, and state highway fund, and the department's obligation to provide updated information on the state highway fund. This requirement is necessary to give the department an opportunity prior to sale of the bonds to correct any mistakes in the offering documents that relate to the pass-through toll agreement and the department's obligations and to make sure that the department can comply with the future disclosure requirements. Otherwise, no additional changes are made from current §5.58 to new §5.59.

Current §5.59, Operation, is reenacted in its entirety as new §5.60.

COMMENTS

Comments on the proposed repeals, amendments, and new sections were received from one private entity, HDR Engineering, Inc. (HDR); one public entity, Montgomery County; and one former county official, Jim Powers. Each commenter's concerns and the department's responses are grouped by commenter.

Comment: HDR suggests replacing the terms "pass-through fares" and "pass-through tolls" with the term "pass-through financing." The commenter notes that the use of the word "toll" has created artificially inflated resistance to the pass-through finance program by many elected officials and members of the public. It is believed that new terminology that better reflects the actuality of the program will alleviate much of this conflict. The differences between highway and rail projects can be incorporated into more concise language rather than repeating much of the language as is currently the case.

Response: The terms "pass-through fares" and "pass-through tolls" are statutory language and therefore not subject to change by rule. Should the statute be changed in the future, the rules could be revised to reflect that revised statutory language and also consolidate the highway and rail project language. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: HDR notes that the rule revision would allow the commission to restrict the types of project costs that will be reimbursed. The commenter suggests that the types of costs that will be reimbursed be established and not subject to change with each project call. Because of the competitive nature of the project calls, many entities will be developing their applications well in advance of the commission issuing a call for projects. An established list of items that will be reimbursed under the pass-through program will allow a level playing field for those entities that proceed at-risk in developing applications. The ability of the project to satisfy the program guidelines, the regional significance of the project, and local equity contribution should be the differentiating factors where funding limitations exist for the commission in a given call for projects. This proposed change will allow applicants to proceed with financial plans with greater certainty of the criteria and focus more of their energies on anticipated participation.

Response: The proposed rule revision in §5.54 allows the commission some flexibility to continue the program under limited funding conditions. The level of funding available will influence the categories of project costs that will be considered for reimbursement. It also allows the opportunity for more entities to participate in the program under these limiting conditions. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County makes a general observation that the proposed amendments reflect a more bureaucratic and less predictable approach to the administration of the pass-through program. The amendments propose to add additional criteria to the evaluation and processing of pass-through applications, yet in many cases those criteria are highly subjective in nature. The consequence would be to vest more control in the department staff and less control over the program by local entities who are the intended beneficiaries of the program. Shifting control away from local entities and undermining the predictability of the process will discourage continued participation in the program by local entities. As is evidenced by Montgomery County's experience, and that of other local governments who have used pass-through financing to accelerate the delivery of important transportation projects through local control, the program has been very successful in its present form. Montgomery County submits that it would be a mistake to adopt the sweeping changes reflected in the proposed amendments, and that a better approach would be to make minor changes with the benefit of input from local entities.

Response: The proposed rule revisions do not take away any local control of project submission or, once the project is selected, project implementation by the entity. The proposed revisions allow the department and the commission to make more informed decisions with respect to project selection and with respect to the ultimate successful conclusion of the project. The revisions allow both the proposing entity and the department to examine the project from several perspectives to properly evaluate the need for the project and the resources needed to bring the project to an expeditious conclusion. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County states that other proposed amendments are either unnecessary or overly burdensome to local entities. One proposed amendment would add a provision to §5.53(a)(4) requiring documentation evidencing local public support for the pass-through project and any local public opposition. Such a requirement would place a significant additional burden on local entities. Projects are already required to be in metropolitan approved plans and are most often presented by governmental sponsors. It is unlikely they would bring projects forward that do not have local support or for which there is not a perceived need. The department does not need to second-guess local decisions to bring projects forward by requiring further documentary proof. Moreover, the nature of the required documentation is vague and unclear, leaving local entities without adequate direction as to how to comply with the requirement. Montgomery County therefore recommends eliminating this proposed requirement or limiting its application to projects presented by private entity applicants.

Response: The commission has continually expressed a desire for evidence of local project support. There could be cases where some local governmental entities do not have full knowledge or are not in complete agreement with a proposed project. The commission wants all input to be considered before going forward with project development. In the past, simple letters or resolutions have been adequate documentation of local support. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County states that the proposed amendment to §5.53(a)(9) would require "financial information sufficient to show the financial strength and capability of the proposer to develop and complete the project." It is important that the pass-through rules continue to take into account the unique characteristics of the communities and project served by the program. Additionally, proposed §5.55(13) would require the commission to consider the financial strength of the proposer prior to authorizing the executive director to negotiate the financial terms of a pass-through agreement. Montgomery County believes that the intent of the pass-through program would be better served by looking at project-specific funding rather than the financial strength of the proposer. Many counties and other local entities (particularly rural cities and counties where an entity's tax base may be modest) are unable to demonstrate significant financial strength on paper, yet nevertheless have projects backed by strong project-specific financing. Montgomery County therefore recommends modifying rules §5.53(a)(9) and §5.55(13) to consider the financial strength of the project (and proposed project financing) rather than the financial strength of the proposer itself.

Response: The rules as proposed do not make any requirement of a specific level of financial strength that must be shown. In fact, §5.53(a)(9) refers the financial strength component specifically toward the capability to develop and complete the project. An entity's proposed project, showing sufficient financial strength through strong project-specific financing, would not be unacceptable absent any other financial information to the contrary. However, that is why overall strength of the entity must be a consideration. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County notes that several of the proposed amendments place substantial discretion in the hands of the department creating too much subjectivity and, therefore, potentially discouraging participation. For example, proposed §5.54(a) would grant the department the discretion to periodically limit the periods of time during which they will accept proposals based on "circumstances that may impair the ability of entities to equally participate in the program." No further guidance is offered. The subjectivity inherent in allowing the department to periodically determine whether "equal participation" (a vague and undefined phrase in itself) is possible would undermine local initiative and give the department too much discretion. Local transportation needs do not fall neatly into program cycles. Montgomery County recommends focusing on adequate funding for the program and leaving the application process open, rather than allowing it to be periodically closed at the discretion of the department for subjectively determined reasons.

Response: The revised rule allows the commission the flexibility to accept pass-through proposals individually as received or by providing for a program call for a specified period of time during which proposals will be accepted. Some entities have expressed concern about: the time and cost spent in submitting proposals individually when funds are not available; having their proposal equally considered with other proposed projects as opposed to simply which entity is the first to submit a proposal; and knowing which costs would be eligible for reimbursement under a pass-through agreement prior to spending resources to develop a project proposal. This revision allows the commission to consider those concerns under various proposal submission and funding scenarios. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County states that proposed §5.54(b)(5) would require the notice regarding availability of pass-through financing to specify the categories of project costs that will be considered eligible for reimbursement. This, too, should be a project-specific determination, as the cost categories needed will vary based on the unique characteristics of the project. It should not be up to the department to prescribe this in a "one size fits all" approach. Montgomery County recommends removing proposed §5.54(b)(5) or modifying it to reflect a project-specific approach.

Response: One of the purposes of the new section is to provide some level of program continuation even in periods of very limited cash flow. Another purpose is to extend the opportunity for participation to as many entities as possible. By limiting the financing to specific areas of participation, the limited funds can be extended to more entities and projects, acknowledging that the level of participation on the part of the proposer will increase if specific project cost categories are excluded from reimbursement. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County notes that proposed §5.55(1) would require the commission to consider the proposer's proposed financial contribution to the project from sources other than the department prior to authorizing negotiation of a pass-through agreement. Montgomery County recommends modifying this rule as well to clarify that financing costs that local entities will bear are included in the calculation.

Response: The commission has consistently indicated that financing costs will not be considered as part of the negotiation of the reimbursement amount. The inclusion of these costs would negate much of the benefit of the pass-through program approach from a state level perspective. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County states that proposed §5.55(7) would require the commission to consider the potential benefits to regional air quality that may be derived from a project. Montgomery County recommends specifically limiting that requirement to non-attainment or near non-attainment areas, as the benefit of air quality is otherwise irrelevant.

Response: Other than re-numbering, there has been no revision to the current rule language. It continues in its original form. The commission has indicated that one of their goals is improving air quality throughout the State of Texas. The commission has not indicated that this goal is limited to non-attainment or near non-attainment areas. Therefore, this paragraph allows for the entity to make a statement about any potential benefits to regional air quality that may be derived from the project. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County notes that proposed §5.55 lists several criteria that the commission must consider prior to authorizing the executive director to negotiate the terms of a pass-through agreement. Some of the criteria are far too subjective, including "the extent to which the project would close gaps in the state transportation system" (§5.55(9)) and "the relationship of the proposed project to stated commission goals" (§5.55(17)). There is tremendous subjectivity involved in determining whether or to what extent a project would close gaps in the state transportation system. The relationship of a project to commission goals is equally subjective, as there are

not identified goals or criteria against which to measure the project. Again, as noted at the outset, subjectivity in the process reduces its predictability and will discourage local participation, which is not in the best interest of the department or the state. Montgomery County recommends removing these two items from the list of criteria to be considered by the commission or, in the alternative, outlining specific goals or parameters for measuring these criteria to reduce their subjectivity.

Response: The commission and department staff need the ability to consider a project from several perspectives. A project's effect on closing gaps in the system may be statewide, regional, or local in nature. The commission's stated goals of reducing congestion, enhancing safety, expanding economic opportunity, improving air quality, and preserving the value of transportation assets are another set of issues with which projects may be considered. A project proposal should have the flexibility to address these issues from an equally varied set of perspectives and explain the individual project's impact on these issues without restriction. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County recommends clarifying the time frame for the pass-through agreement discussed in proposed §5.57(b) and changing the reference to the "project development agreement" in the proposed §5.59(c)(4) to "pass-through agreement" and cross-referencing §5.57(b).

Response: The comment is not clear with respect to the time frame discussed in §5.57(b). The agreement will begin upon execution by both parties and terminate upon completion of the reimbursement payments. If the comment references the deadlines for key stages of project development, those deadlines will be negotiated by both parties as part of the agreement and will vary for each individual project. With respect to naming the referenced agreement, the agreement once executed has to do with the development of the project and the reimbursement schedule. While the suggested reference could be used, the agreement reference to project development seems more definitive at the point of agreement execution. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County recommends that proposed §5.57(b)(4) be deleted. Pass-through financing was established as a means for local communities to accelerate the development of needed transportation projects by allowing local entities to seek reimbursement from the department for upfront costs of constructing or expanding a state highway project. As a result, local control, and more specifically the delegation of control over key project development responsibilities to local entities, is a critical component of the pass-through program. Yet, as noted previously, many of the proposed changes have the potential to erode local control. For example, proposed §5.57(b) sets forth various requirements for the contents of a pass-through agreement, including "allocation of responsibility for all significant work to be performed, including environmental documentation, right of way acquisition, utility adjustments, engineering, construction, and maintenance" (§5.57(b)(4)). Montgomery County submits that there should be no "allocation" of responsibility for the referenced activities - those responsibilities should, as they do now, remain under control of the local government sponsor. Making these negotiated items in a pass-through agreement means that the department may try to assume responsibility for some or all of the activities. That, in turn, divests the local entity of control over important project development functions and introduces uncertainty into the project development process - uncertainty which is untenable if a local entity is financing a project from third party sources. In other words, the delegation of responsibility for key functions like environmental reviews and right-of-way acquisition to a local project sponsor allows them to retain control over timing and performance - important controls they would lose if the department insists on performing these functions in the negotiation of a pass-through agreement.

Response: Other than re-numbering, there has been no revision of the language contained in proposed paragraph (4) (see current §5.56(b)(3)). Section 5.57(b)(4) assigns responsibility to the parties in the agreement. It prevents work from having to be repeated by both parties and ensures that significant work is not overlooked. For example, if the department has already completed a portion of the environmental documentation, the agreement will provide for the department to turn that documentation over to the entity and let the environmental process progress forward from that point. This paragraph will not take project control from the local entity once the project development agreement is executed. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County recommends that §5.57(b)(10) be deleted. The reference is to an agreement including "deadlines for key stages of project development." Even with the current delegation of key functions to local sponsors there are too many unknowns to commit to project deadlines within the body of a pass-through agreement. Those deadlines can be subject to a number of influences, not the least of which is the department and the time it takes to review various submittals and information as part of its oversight function. Current practice is to incorporate milestone dates in project development schedules, which are primarily determined between the local sponsor and its project developer. Doing so allows the local entity to retain control over the schedule and, if desired, transfer risk and responsibility to its project developer. Therefore, those deadlines do not belong in a pass-through agreement with the department, and requiring otherwise will further divest local entities of control over their project.

Response: Other than re-numbering, there has been no revision of the language contained in proposed paragraph (10) (see current §5.56(b)(9)). The pass-through toll program has experienced delays in some projects moving forward after execution of the project development agreement. This has contributed to funds for the program being in limbo with respect to how much and when the department may have to start reimbursement payments. Internal auditors have cited these project delays as contributing to the inefficiency of the program. The purpose of this paragraph is not to take over the project schedule, but to encourage the upfront development of a realistic project schedule that allows completion of the project and reimbursement to the entity to progress in a timely and efficient manner. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County states proposed §5.58(a)(1)(A)(i) requires the commission to consider, in determining the level of pass-through fares, whether "the project's estimated benefits to mobility warrant a pass-through fare at a level that is more or less than the department's estimate of project costs." This gives undue weight to the department's cost estimates, which could be incorrect. The proper measure should be estimates agreed to by the department and the

project sponsor. Montgomery County also directed these same comments to §5.58(b)(1)(A)(i).

Response: Other than re-numbering, there has been no revision of the language contained in proposed §5.58(a)(1)(A)(i) or (b)(1)(A)(i) (see current §5.57(a)(1)(A)(i) and (b)(1)(A)(i)). The department's estimate acts as a baseline to ensure that the department does not pay more for the project than the project would have cost the department if done internally. The proposer will also be able to submit their independent estimate as part of the project application. Past experience indicates that the parties discuss differences in their respective estimates. However, because of the long term commitment of state highway fund resources, the department will rely on its own independent project estimate. It is noted that differences in project cost between the two parties can still be a factor in the negotiation of the final project reimbursement amount. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County states that clarification is also needed regarding §5.58(a)(1)(B)(i), which provides that the commission may approve payment of pass-through fares in excess of the department's current estimate "by the difference between the department's current estimate and the department's estimate for the time when the project would likely have been completed in the absence of a pass-through agreement." It is well known that the department faces serious funding challenges, and that the pass-through program was shut down (notwithstanding its popularity and success) because of funding constraints. It is unclear when, if ever, the department may have sufficient funds to complete projects brought forward under the pass-through program. Montgomery County recommends deleting this possibility, and limiting the payments to agreed upon cost estimates plus some stated adjustment for inflation. Montgomery County also directed these same comments to §5.58(b)(1)(B)(i).

Response: Other than re-numbering, there has been no revision of the language contained in proposed §5.58(a)(1)(B)(i) or (b)(1)(B)(i) (see current §5.57(a)(1)(B)(i) or (b)(1)(B)(i)). It should be noted at the outset that the department will have funds available to honor all project reimbursements as reflected in executed project agreements. The difference between the department's current estimate and the department's estimate for the time when the project would likely have been completed would generally be an inflation factor. As stated in a previous response, the department's estimate acts as a baseline to ensure that the department does not pay more for the project than the project would have cost the department if done internally. If a case of differences in applying the future inflation factor occurs, the reimbursement amount is still subject to negotiation between the two parties. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County states that proposed §5.58(a)(1)(A)(iii) requires the commission to consider, in establishing the level of pass-through fares, whether "the public or private entity proposes to share in the cost of the project." Montgomery County recommends modifying this rule to clarify that financing costs that local entities will bear are included in that calculation. Financing costs can be a major component of the project development costs that local entities will bear, and there is no reason not to consider those as part of a local entity's cost sharing and financial contribution to a project. Montgomery County also directed these same comments to §5.58(b)(1)(A)(iii).

Response: Other than re-numbering, there has been no revision of the language contained in proposed §5.58(a)(1)(A)(iii) or (b)(1)(A)(iii) (see current §5.57(a)(1)(A)(iii) or (b)(1)(A)(iii)). The commission has consistently indicated that financing costs will not be considered as part of the negotiation of the reimbursement amount. If the department had the resources to bear the financing costs of the state highway system project, then there is little benefit to using a pass-through agreement in terms of completing the project. Simply stated, the department could just complete the project now and finance the cost based on future revenues and incur the debt service internally. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County notes that proposed §5.58(a)(1)(B)(ii) states that the commission will not consider any financing costs incurred by the local entity in determining the level of pass-through fares. To do so ignores a significant component of project costs and potential cash flow requirements facing a local entity. Also, to do so seems inconsistent with the intent of Transportation Code, §91.075(b) which provides that pass-through fares may be reimbursement for the "acquisition, design, development, *financing,* construction, relocation, maintenance, or operation of a passenger rail facility or freight facility" (emphasis added). Montgomery County therefore recommends deleting §5.58(a)(1)(B)(ii).

Response: The language contained in proposed §5.58(a)(1)(B)(ii) is unchanged from current §5.57(a)(1)(B)(ii) language. The commission has consistently indicated that financing costs will not be considered as part of the negotiation of the reimbursement amount. The inclusion of these costs would negate much of the benefit of the pass-through program approach from a state level perspective. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County recommends deleting a portion of §5.58(a)(3)(A) and §5.58(b)(3)(A) (addressing pass-through fares and pass-through tolls, respectively,) which state that "Unless authorized by the commission and incorporated in a pass-through agreement by the department, the department's liability under a pass-through agreement shall be neither increased nor decreased by cost overruns and underruns." Montgomery County recommends deleting the first portion of that sentence (in each referenced section) to remove the commission's discretion to modify the department's liability by agreement. The rules should recognize that it is up to the local entity to deliver the project. The local entity is in a better position than the department to assume the risks and benefits associated with project delivery and to negotiate appropriate risk transfers with its developer. By assuming the risk, the local entity bears the responsibility for any cost overruns, but it is also appropriate that the entity benefit from any cost underruns. They should not be penalized for delivering the project "under budget."

Response: Other than re-numbering, there has been no revision of the language contained in proposed §5.58(a)(3)(A) and §5.58(b)(3)(A) (see current §5.57(a)(3)(A) and §5.58(b)(3)(A)). The reimbursement amount to be paid to the entity by the department is fixed in the agreement. Project cost overruns or underruns are the responsibility of the entity and do not affect the amount of reimbursement as described in the executed agreement unless there was a mutually agreeable change in the scope of the project. Any amendments to the agreement would have to be agreed to and executed by both parties. Project cost under-

runs would not result in a penalty to the entity. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County notes that in addition and similar to proposed §5.58(a)(1)(B)(ii), proposed §5.58(b)(1)(B)(ii) states that financing costs will not be considered in determining the level of pass-through tolls. Again, it is completely unfair to eliminate the substantial costs that local entities bear to accelerate a project from the calculus of the level of pass-through tolls. Those are real costs and are being paid during the same period that pass-through toll payments are being received. There is no reason not to consider these costs, and to exclude them seems inconsistent with the intent of Transportation Code, §222.104(b) which provides that pass-through tolls may be reimbursement for the "design, development, *financing,* construction, maintenance, or operation of a toll or non-toll facility" (emphasis added).

Response: The language contained in proposed §5.58((b)(1)(B)(ii) is unchanged from current §5.57(b)(1)(B)(ii). The commission has consistently indicated that financing costs will not be considered as part of the negotiation of the reimbursement amount. The inclusion of these costs would negate much of the benefit of the pass-through program approach from a state level perspective. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County states that proposed §5.58(b)(2)(B)(iii) and (iv) include among the potential bases for variation in pass-through tolls, the condition of the roadway and whether the highway is tolled. Neither of those factors should impact the pass-through toll amount. That amount should be influenced by project costs and traffic volumes, and Montgomery County therefore recommends deleting this section.

Response: Other than re-numbering, there has been no revision of the language contained in proposed §5.58(b)(2)(B)(iii) and (iv) (see current §5.57(b)(2)(B)(iii) and (iv)). The factors cited, such as the condition of the roadway and whether the highway is tolled, will have a direct impact on both the project costs and the projected traffic volumes. The ability to consider such project factors and their influence on traffic volume needs to be the basis for negotiation of the project development agreement and the associated reimbursement amount. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County notes that §5.59(a)(1) provides that the department may choose to conduct the environmental review and public involvement for a project. Montgomery County believes that it is essential that environmental review and public involvement should be delegated to the local entity and should remain under local control. Montgomery County recommends deleting the last sentence of proposed §5.59(a) so that local entities can more predictably develop the project schedules referenced above (in connection with proposed §5.57(b)(10)).

Response: Other than re-numbering, there has been no revision of the language contained in proposed §5.59(a) (see current §5.58(a)). Subsection (a) does not restrict an entity from having local control of the environmental review or public involvement process that is assigned as part of the agreement. However, the department may already have started environmental review and/or public involvement prior to a project being selected as a pass-through candidate. It may simply be more efficient for the department to complete some or all of the processes in order to keep the project on schedule to construction. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Montgomery County states that §5.59(f) would require public or private entities intending to sell bonds and use pass-through tolls or fares as evidence of financial capability to repay the bonds, to provide the department with an opportunity to review and comment on the bond offering documents prior to the sale of the bonds. While using debt to finance projects is relatively new to the department, public and private entities have issued bonds to finance projects for decades. The market requires a legal opinion to accompany any bond offering, including one from the Attorney General, which is ample safeguard to potential purchasers. No benefit is achieved by inserting the department in the process, and in fact this provision could add significant delay to a timely issuance - critical to a local entity. This provision also raises concern of whether the department is attempting to "approve" the issuance of debt, a role that is not appropriate for the agency. Montgomery County therefore recommends eliminating this proposed requirement.

Response: The intention of §5.59(f) is not for the department to approve the issuance of debt by another entity. The department wants an opportunity to review the bond offering documents to understand any obligations or interrelationships between the offering and the department, commission, or state highway fund, and any department obligation to provide bond investors with updated information on the status of the state highway fund. No additional action affecting the substance of these rules as proposed is made as a result of these comments.

Comment: Former county official Mr. Jim Powers notes that the majority of the proposed amendments to §5.53 are standard proposal requirements and should be readily available to proposers.

Response: The comment is noted and no additional action affecting the substance of these rules as proposed is made as a result of this comment.

Comment: Mr. Powers notes that the proposed §5.54 is intended to provide transparency in terms of notifying the public of available funding for program periods and to provide planning capability to the department in determining program periods.

Response: The comment is noted and no additional action affecting the substance of these rules as proposed is made as a result of this comment.

Comment: Mr. Powers notes that, along with the proposed programmatic changes in administrating the program, the additions to the proposed §5.55 are the substantive changes proposed for the pass-through program. Requiring proposers to enumerate specific benefits should give the department's evaluation efforts more transparency and put proposers on "equal footing" with regard to project selection.

Response: The comment is noted and no additional action affecting the substance of these rules as proposed is made as a result of this comment.

Comment: Mr. Powers notes that proposed §5.56 and §5.57 provide consistency with proposed proposal requirements and criteria.

Response: The comments are noted and no additional action affecting the substance of these rules as proposed is made as a result of these comments.

43 TAC §§5.54 - 5.59

STATUTORY AUTHORITY

The repeals 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, §91.075(d), which provides the commission with the authority to adopt rules for a pass-through fare program and Transportation Code, §222.104(g), which provides the commission with the authority to adopt rules for a pass-through toll program.

CROSS REFERENCE TO STATUTE

Transportation Code, §91.075 and §222.104.

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

Filed with the Office of the Secretary of State on January 30, 2009.

TRD-200900364
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: February 19, 2009
Proposal publication date: November 14, 2008
For further information, please call: (512) 463-8683

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43 TAC §§5.53 - 5.60

STATUTORY AUTHORITY

The amendments and new sections 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, §91.075(d), which provides the commission with the authority to adopt rules for a pass-through fare program and Transportation Code, §222.104(g), which provides the commission with the authority to adopt rules for a pass-through toll program.

CROSS REFERENCE TO STATUTE

Transportation Code, §91.075 and §222.104.

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

Filed with the Office of the Secretary of State on January 30, 2009.

TRD-200900365
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: February 19, 2009
Proposal publication date: November 14, 2008
For further information, please call: (512) 463-8683

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CHAPTER 15. TRANSPORTATION PLANNING AND PROGRAMMING

SUBCHAPTER H. TRANSPORTATION CORPORATIONS

43 TAC §15.92

The Texas Department of Transportation (department) adopts amendments to §15.92, concerning transportation corporations. The amendments to §15.92 are adopted with changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9957). The section was modified to correct a typographical error in subsection (a)(1)(A).

EXPLANATION OF ADOPTED AMENDMENTS

To maintain and build on the department's commitment to integrity and ethical behavior, the Texas Transportation Commission (commission) ordered the department to develop an internal compliance program (ICP) designed to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law and departmental policies. The rule changes expand the use of that concept to require transportation corporations to have and enforce compliance with an internal ethics and compliance program. The purpose of the changes is to discourage fraudulent and illegal activity by persons who receive financial assistance from or contract with the department.

Amendments to §15.92, Miscellaneous Powers and Duties of Corporations, add new subsection (c) to require a transportation corporation formed under the Texas Transportation Corporation Act (Transportation Code, Chapter 431) for the promotion and development of public transportation facilities and systems to adopt an ethics and compliance program that satisfies new 43 TAC §1.8, Internal Ethics and Compliance Program. The amendments give a transportation corporation approximately one year to satisfy the requirement. The amendments also add new subsection (d), which requires the transportation corporation to enforce compliance with the program.

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.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 431.

§15.92. Miscellaneous Powers and Duties of Corporations.

(a) Open Meetings and Public Information.

(1) A corporation is subject to the Open Meetings Act, Government Code, Chapter 551.

(A) Except as provided in subparagraph (B) of this paragraph, the Board shall file notice of each meeting of the board in the same manner and in the same location as is required of a state governmental body under Chapter 551, Government Code.

(B) If the commission designates an area of the state in which a corporation may act on behalf of the commission, the board shall file notice of each meeting of the board in the same manner and the same location as is required of a governmental body under Government Code, §551.053.

(2) The Board is subject to the Public Information Act, Government Code, Chapter 552.

(b) Texas Non-Profit Corporation Act. The Texas Non-Profit Corporation Act applies to a transportation corporation to the extent that the provisions of that Act are not inconsistent with provisions of the Transportation Corporation Act, Transportation Code, Chapter 431, and this subchapter.

(c) Internal ethics and compliance program. A corporation shall adopt an internal compliance and ethics program that satisfies the requirements of §1.8 of this title (relating to Internal Ethics and Compliance Program) before the later of:

(1) January 1, 2010; or

(2) the first anniversary of the date on which the corporation is created.

(d) Enforcement of compliance program. A corporation shall enforce compliance with the internal compliance and ethics program adopted under subsection (c) of this section.

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

Filed with the Office of the Secretary of State on January 30, 2009.

TRD-200900366
Bob Jackson
General Counsel
Texas Department of Transportation
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Proposal publication date: December 5, 2008
For further information, please call: (512) 463-8683

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CHAPTER 21. RIGHT OF WAY

The Texas Department of Transportation (department) adopts amendments to §§21.142, 21.149 - 21.151, 21.155, 21.160, 21.411, 21.431, 21.441, 21.521, 21.531, 21.541, 21.561, and 21.572, concerning regulation of signs along interstate and primary highways and control of signs along rural roads. The amendments to §§21.149, 21.151, 21.155, 21.160, 21.411, 21.431, 21.441, 21.521, 21.531, 21.541, 21.561, and 21.572 are adopted without changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9958) and will not be republished. The amendments to §21.142 and §21.150 are adopted with changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9958). The sections are changed from the proposal to correct typographical errors in §21.142(2)(O) and §21.150(e)(1). These amendments are effective March 1, 2009.

EXPLANATION OF ADOPTED AMENDMENTS

The department is in the process of restructuring department duties and responsibilities. With these changes, the department is looking for ways to streamline work processes and increase efficiency in specific programs such as the outdoor advertising program. The department believes that moving from a de-centralized, district-based management system to a central or regional administration process will achieve more uniformity in the program and will be a more efficient use of the state's limited resources. In order to make any changes to the structure of the program, the department must eliminate references to district offices and district engineers throughout the outdoor advertising rules.

All references to district offices and district engineers are replaced with either the department or the executive director. These changes will allow the department the flexibility to restructure the program in a manner that is most efficient. The department believes that these changes will also improve the consistency of the program.

Amendments to §21.142, Definitions, delete the definition of director and district engineer. These rules remove all references to director and district engineer; therefore, the definitions are no longer needed. These amendments add the definition of executive director, which is defined as the executive director of the Department of Transportation or the executive director's designee not below the level of regional manager, division director, or office director. The executive director replaces the district engineer throughout these amendments in references to decision authority. The inclusion of the designee language allows the executive director to designate another staff member the responsibilities under the program as long as the selected staff is of a level of regional manager, division director, or office director or higher. The amendments to the definitions are needed to correspond with other amendments.

Amendments to §21.149, Licenses, replace director with executive director for the approval of license applications, revocations, or suspensions of the license, and the filing of appeal requests. By eliminating the reference to the Right of Way Division Director, the department has the flexibility to structure the outdoor advertising program into either a regional or centralized program. The amendments also make a grammatical correction, changing "outdoor advertisers surety bond" to "outdoor advertiser's surety bond."

Amendments to §21.150, Permits, replace district engineer with the department for the receipt of permit applications and renewals and requests for replacement permit plates. On these issues, the district engineer is not exercising decision authority. The term is used to provide the location for the documents to be sent and reviewed. The language of the current rule limited the department's ability to review additional submission alternatives such as a web-based system. By this change, the department has the flexibility to review and determine the most efficient manner to receive and review applications. The department will provide submission location information on application forms and other correspondence so that the applicants and affected parties will know where and how to submit documents to the department.

Amendments to §21.150 also replace the district engineer with the executive director for the approval of permit applications, the notification for the removal of signs or cancellation of a permit, and the approval of non-profit sign applications. This substitution provides the executive director or his designee of a level not below regional manager, division director, or office director decision authority for outdoor advertising issues. By removing references to a particular position these changes allow the department flexibility in structuring the outdoor advertising program into either a regional or centralized program.

Amendments to §21.151, Local Control, delete the term director of the right of way division and replace it with the executive director as the position to receive information from political subdivisions regarding the local certification program. The amendments also substitute the executive director as the party responsible for

consulting with the Federal Highway Administration as it relates to the department's opinion that the political subdivision has adequate sign and zoning ordinances. The amendments also move the authority to de-certify a political subdivision to the executive director. By the new definition, the executive director can designate another employee of a level of regional manager, division director, or office director or higher to carry out these duties. By eliminating the reference to the Right of Way Division Director the department has the flexibility to structure the outdoor advertising program into either a regional or centralized program.

Amendments to §21.155, Directional Signs, delete reference to district engineer and replace it with the executive director in the determination of whether a particular sign advertises an activity or attraction which is nationally or regionally known and of outstanding interest to the traveling public. By moving this authority to the executive director the department can be more consistent throughout the state in making these types of decisions. This change also allows the department to restructure the outdoor advertising program into either a central or regional program.

Amendments to §21.160, Relocation, delete the references to district engineer and replace it with the executive director as the approval authority for determining the necessity and approval of the relocation permit application. Changing to the executive director will improve the consistency throughout the state and will allow the department the flexibility in structuring the outdoor advertising program into either a regional or centralized program.

Amendments to §21.411, Definitions, add the definition of executive director. The term is defined as the executive director of the Department of Transportation or the executive director's designee not below the level of regional manager, division director, or office director. The inclusion of the designee language allows the executive director to designate another staff member the responsibilities under the program as long as the selected staff is of a level of regional manager, division director, or office director or higher. By other amendments, the term has been added throughout the subchapter so it is necessary that the definition be included.

Amendments to §21.431, Registration of Existing Off-Premise Signs, delete the district engineer and the district office as the location and person in which an applicant submits required permit applications. This change allows the department to review alternative methods for the submission of documents and allows for the flexibility of a central or regional program to accommodate the department's current restructuring efforts. The department will provide submission location information on application forms and other correspondence so that the applicants and affected parties will know where and how to submit documents to the department.

Amendments to §21.441, Permit for Erection of Off-Premise Sign, replace the district engineer with the executive director regarding who has the authority to approve permit applications and transfers. By designating the executive director, the rules will provide the department the flexibility to establish a central or regional program. This section is also amended by deleting references to the district office to allow the department the ability to review alternative methods for the submission of documents. The department will provide submission location information on application forms and other correspondence so that the applicants and affected parties will know where and how to submit documents to the department. The changes to this section will also provide for more consistent application of the rules throughout the state and also allows for either a central or regional program to accommodate the department's current restructuring efforts.

Amendments to §21.521, On-Premise Sign Erectors, replace the director of right of way with the executive director with all decision authority regarding on-premise signs. By eliminating the references to the Right of Way Division Director, the department has the flexibility to structure the outdoor advertising program into either a regional or centralized program.

Amendments to §21.531, Board of Variance, replace the term engineer-director of the department with the executive director. The engineer-director is considered the executive director so there is no transfer of duty under this amendment. The change is only to correct the terminology to the more current term used by the department.

Amendments to §21.541, Revocation of Permits, replace the director of right of way with the executive director regarding the authority to revoke permits. By eliminating the reference to the Right of Way Division Director, the department has the flexibility to structure the outdoor advertising program into either a regional or centralized program.

Amendments to §21.561, Removal of Sign, transfer the authority to the executive director to determine whether to order a sign to be removed. This change will provide for more consistent application of this rule throughout the state and will also allow for either a central or regional program to accommodate the department's current restructuring efforts.

Amendments to §21.572, Notice and Appeal, replace the director of right of way with the executive director regarding the authority to issue revocation notices. The executive director must also receive the requests for the administrative hearing. By eliminating the references to the Right of Way Division Director, the department has the flexibility to structure the outdoor advertising program into either a regional or centralized program.

COMMENTS

No comments on the proposed amendments were received.

SUBCHAPTER I. REGULATION OF SIGNS ALONG INTERSTATE AND PRIMARY HIGHWAYS

43 TAC §§21.142, 21.149 - 21.151, 21.155, 21.160

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, §391.032, which provides authority to establish rules to regulate the orderly and effective display of outdoor advertising on primary roads, Transportation Code, §391.065, which provides authority to establish rules to standardize forms and regulate the issuance of outdoor advertising licenses, and Transportation Code, §394.004, which provides the commission with the authority to establish rules to regulate the erection and maintenance of signs on rural roads.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 391 and 394.

§21.142. Definitions.

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

(1) Act--Transportation Code, Chapter 391, concerning beautification of a regulated highway.

(2) Commercial or industrial activities--Those activities customarily permitted only in zoned commercial or industrial areas except that none of the following shall be considered commercial or industrial:

(A) outdoor advertising structures;

(B) agricultural, forestry, ranching, grazing, farming, and related activities, including, but not limited to, temporary wayside fresh produce stands;

(C) activities not:

(i) housed in a permanent building or structure;

(ii) having an indoor restroom, telephone, running water, functioning electrical connections, and adequate heating; or

(iii) having permanent flooring other than material such as dirt, gravel, or sand;

(D) activities not housed in a permanent building that is visible from the traffic lanes of the main-traveled way;

(E) activities conducted in a building primarily used as a residence;

(F) railroad right of way;

(G) activities that do not have a portion of the regularly used buildings, parking lots, storage or processing areas within 200 feet from the edge of the right of way;

(H) activities conducted only seasonally;

(I) activities conducted in a building having less than 300 square feet of floor space devoted to the activities;

(J) activities that do not have at least one person who is at the activity site, performing work, an average of at least 30 hours per week or at least five days per week;

(K) activities which have not been open for at least 90 days;

(L) recreational facilities such as campgrounds, golf courses, tennis courts, wild animal parks, and zoos, except for the portion of the activities occupied by permanent buildings which otherwise meet the criteria in this subsection and parking lots;

(M) apartment houses or residential condominiums;

(N) areas used by public or private preschools, secondary schools, colleges and universities for education or recreation (this does not preclude trade schools or corporate training campuses);

(O) quarries or borrow pits, except for any portion of the activities occupied by permanent buildings which otherwise meet the criteria in this paragraph and parking lots; and

(P) cemeteries, or churches, synagogues, mosques, or other places primarily used for worship.

(3) Commission--The Texas Transportation Commission.

(4) Conforming sign--A sign which is lawfully in place and complies with size, lighting, and spacing requirements and any other lawful regulations pertaining thereto.

(5) Department--The Texas Department of Transportation.

(6) Electronic sign--A sign, display, or device that changes its message or copy by programmable electronic or mechanical processes.

(7) Erect--To construct, build, raise, assemble, place, affix, attach, embed, create, paint, draw, or in any other way bring into being or establish.

(8) Executive Director--The executive director of the department or the executive director's designee not below the level of regional manager, division director, or office director.

(9) Freeway--A divided highway with frontage roads or full control of access. A proposed freeway is designated a freeway for the purposes of this subchapter when the construction contract is awarded, regardless of whether the main-traveled way is open to the public.

(10) Interchange--A system of interconnecting roadways in conjunction with one or more grade separations that provides for the movement of traffic between two or more roadways or highways on different levels. A proposed interchange is designated an interchange for the purposes of this subchapter when the construction contract is awarded, regardless of whether it is open to the public.

(11) Intersection--The common area at the junction of two roadways as defined in Transportation Code, §541.303.

(12) Interstate highway system--That portion of the national system of interstate and defense highways located within the State of Texas which now or hereafter may be so designated officially by the commission and approved pursuant to 23 United States Code §103.

(13) License--An outdoor advertising license issued by the department pursuant to the provisions of Subchapter C of the Act.

(14) Main-traveled way--The traveled way of a highway that carries through traffic. In the case of a divided highway, the traveled way of each of the separate roadways for traffic in opposite directions is a main-traveled way. It does not include such facilities as frontage roads, turning roadways, or parking areas.

(15) National Highway System--That portion of connected main highways located within the State of Texas which now or hereafter may be so designated officially by the commission and approved pursuant to 23 United States Code §103.

(16) Nonconforming sign--A lawfully erected sign that does not comply with the provisions of a law or rule promulgated at a later date, or which later fails to comply with a law or rule due to changed conditions.

(17) Nonprofit sign--A sign erected and maintained by a nonprofit organization in a municipality or the extraterritorial jurisdiction of a municipality if the sign advertises or promotes only the municipality or another political subdivision whose jurisdiction is in whole or in part concurrent with the municipality.

(18) Outdoor advertising or sign--An outdoor sign, display, light, device, figure, painting, drawing, message, plaque, placard, poster, billboard, logo or symbol, or other thing which is designed, intended, or used to advertise or inform, if any part of the advertising or information contents is visible from any place on the main-traveled way of a regulated highway.

(19) Permit--The authorization granted for either the erection and/or maintenance, of an outdoor advertising sign as provided in the Act, §391.068.

(20) Person--An individual, association, partnership, limited partnership, trust, corporation, or other legal entity.

(21) Primary system or federal-aid primary system--That portion of connected main highways which were designated by the commission as the federal-aid primary system in existence on June 1, 1991 and any highway which is not on that system but which is on the National Highway System.

(22) Public park--A public park, forest, playground, nature preserve, or scenic area designated and maintained by a political subdivision or governmental agency.

(23) Regulated highway--A highway on the interstate highway system or primary system.

(24) Removed--The dismantling and removal of a substantial portion of the parts and materials of a sign or sign structure from the view of the motoring public. The term shall not include the temporary removal of a sign face for operational reasons.

(25) Rest area--An area of public land designated by the department as a rest area, comfort station, picnic area, or roadside park.

(26) Sign face--The part of the sign that contains the message or informative contents and is distinguished from other parts of the sign and other sign faces by separation borders or decorative trim. It does not include lighting fixtures, aprons, and catwalks unless they display part of the message or informative contents of the sign.

(27) Sign structure--All of the interrelated parts and materials, such as beams, poles, braces, apron, catwalk, and stringers, that are used, designed to be used, or are intended to be used to support or display a sign face.

(28) Traveled way--That portion of the roadway used for the movement of vehicles, exclusive of shoulders.

(29) Turning Roadway--A connecting roadway for traffic turning between two intersection legs of an interchange.

(30) Unzoned commercial or industrial area--

(A) An area along the highway right of way which has not been zoned under authority of law, which is not predominantly used for residential purposes, and which is within 800 feet, measured along the edge of the highway right of way, of, and on the same side of the highway as, the principal part of at least two adjacent recognized commercial or industrial activities. To be considered an unzoned commercial or industrial area, the following requirements must be met.

(i) A portion of the regularly used buildings, parking lots, storage or processing areas where each respective business activity is conducted must be within 200 feet of the highway right of way and the permanent building where the activity is conducted must be visible from the main-traveled way.

(ii) To be considered adjacent, there must be no separation of the regularly used buildings, parking lots, storage or processing areas of the two activities by vacant lots, undeveloped areas over 50 feet wide, roads, or streets.

(iii) Two activities may occupy one building as long as each has 300 square feet of floor space dedicated to that activity and otherwise meets the definition of a commercial or industrial activity. There must be separation of the two activities by a dividing wall, separate ownership, or other distinctive characteristics. A separate product line offered by one business will not be considered two activities.

(B) An unzoned commercial or industrial area is more specifically identified as follows.

(i) The area to be considered, based upon the qualifying activities, is 1,600 feet (800 feet on each side) plus the actual or projected frontage of the commercial or industrial activities, measured along the highway right of way by a depth of 660 feet in accordance with §21.144(b) of this title (relating to Measurements).

(ii) The area shall be located on the same side of the highway as the principal part of the qualifying activities.

(iii) The area must be considered as a whole prior to the application of the test for predominantly residential.

(iv) An area shall be considered to be predominantly residential if more than 50% of the area is being used for residential purposes. Roads and streets with residential property on both sides shall be considered as being used for residential purposes. Other roads and streets will be considered nonresidential.

(31) Visible--Capable of being seen, whether legible or not, without visual aid by a person with normal visual acuity.

(32) Zoned commercial or industrial area--An area designated, through a comprehensive zoning action, for general commercial or industrial use by a political subdivision with legal authority to zone. The following areas are not zoned areas:

(A) areas that permit limited commercial or industrial activities incident to other primary land uses;

(B) areas designated for and created primarily to permit outdoor advertising structures along a regulated highway;

(C) unrestricted areas; and

(D) small parcels or narrow strips of land that cannot be put to ordinary commercial or industrial use and are designated for a use classification different from and less restrictive than that of the surrounding area.

§21.150. Permits.

(a) Eligibility. Except as provided in subsection (l) of this section, a permit under this section may only be issued to a person holding a valid license issued pursuant to §21.149 of this title (relating to Licenses).

(b) Application and issuance.

(1) Except as provided in §21.151 of this title (relating to Local Control) a person who desires a permit to erect or maintain a sign along a regulated highway must file an application in a form prescribed by the department, which shall include, but not be limited to:

(A) the complete name and address of the applicant;

(B) the proposed location and description of the sign;

(C) the complete legal name and address of the designated site owner;

(D) verification of the applicant's nonprofit status if the sign is a nonprofit sign; and

(E) additional information the department deems necessary.

(2) No permit may be approved unless the applicant has obtained written permission from the owner of the designated site. The department may provide a space on the permit application for this signature or the applicant may provide a copy of the written lease for the site or a consent statement in a form prescribed by the department. The signature must be the signature of the property owner or the owner's duly authorized representative. The owner's permission operates as permission for the life of the permit, unless the owner provides a writ-

ten statement that permission for the maintenance of the sign has been withdrawn and documentation showing that the lease allowing the sign has been terminated in accordance with the terms of the lease agreement or through a court order. If the sign owner disputes the lease termination in court with the owner, the department will not cancel the permit until a court order is provided.

(3) The application must be signed under oath by the sign owner and filed with the department and shall be accompanied by the prescribed fee or fees and, if the sign is located within the jurisdiction of a municipality with a population of more than 1.9 million that is exercising its authority to regulate outdoor advertising, a certified copy of the permit issued by the municipality.

(4) An application will not be approved unless the sign for which the permit is requested is located in an unzoned commercial or industrial area or in a zoned commercial or industrial area, and meets all applicable requirements of the sections under this subchapter, or was lawfully in existence when the sign became subject to the Act.

(5) If approved, a copy of the application, endorsed by the executive director and a Texas sign permit plate will be issued to the applicant. Not later than 30 days after erection of the permitted sign, or after the issuance of a permit if the sign is lawfully in existence when the highway along which it is located becomes subject to control by the department, the sign owner shall cause the permit plate to be securely attached to that portion of the sign structure nearest the highway and visible from the main-traveled way. If the permit plate becomes illegible, the department may require that a replacement plate be obtained in accordance with subsection (f) of this section. The plate must be attached and may not be removed from the sign described in the application.

(6) The proposed location for a new sign must be identified by the applicant on the ground by a stake or paint with at least two feet of the stake visible above the ground. The stake must be set at the proposed location of the center pole. Staking the site is considered part of the application. Stakes must not be moved or removed until the application is denied, or if approved, until the sign has been erected. The sketch submitted with the application must reflect the location of the center-pole and show the exact location of the sign faces in relation to the center pole.

(c) Priority. Permits will be considered on a first-come, first-serve basis. If an application is returned because of errors or incomplete information, other applications received for the same or conflicting sites between the time a denied application is returned to the applicant and the time it is resubmitted, will be considered before the resubmitted application. A second application for a conflicting site may be held until a decision is made on the first application.

(d) Renewals.

(1) Subject to the terms and location stated in the permit application, a permit issued or renewed under this section shall be valid for a period of one year, provided that the sign is erected and maintained in accordance with the applicable sections under this subchapter. The permitted sign must be erected within one year from the date the original permit is issued in order for a sign permit to be eligible for renewal.

(2) A permit issued by the department prior to September 6, 1985, must be renewed no later than October 1, of each succeeding year.

(3) An annual permit issued subsequent to September 5, 1985, must be renewed on or before the anniversary date of the date of issuance.

(4) If a sign continues to meet all applicable requirements, a permit holder may renew a permit by filing with the department a written request in a form prescribed by the department and the prescribed renewal fee.

(e) Transfer.

(1) A permit may only be transferred with the written approval of the executive director. At the time of the transfer, both the transferor and the transferee must hold a valid outdoor advertising license issued pursuant to §21.149 of this title (relating to Licenses), except as provided in paragraphs (3) - (5) of this subsection.

(2) A permit holder who desires to transfer one or more permits must file a written request in a form prescribed by the department and the prescribed transfer fee at the department. The transferor and transferee will each be issued a copy of the approved permit transfer form.

(3) A permit issued under subsection (l) of this section may be transferred to a nonprofit organization that does not hold a valid outdoor advertising license issued under §21.149 of this title (relating to Licenses) if the permit is transferred for the purpose of maintaining a nonprofit sign.

(4) A permit issued under subsection (l) of this section may be transferred for a purpose other than maintaining a nonprofit sign if the transferee holds a valid outdoor advertising license at the time of the transfer.

(5) The executive director will approve the transfer of one or more sign permits from a lapsed outdoor advertising license to a valid outdoor advertising license, with or without the signature of the transferor, if:

(A) legal documents showing the sale of the sign are provided; and

(B) documents are provided that indicate the transferor is dead or cannot be located.

(6) A permit that has an unresolved permit violation, will not be transferred. An unresolved permit violation means that a permit cancellation is impending or a cancellation has been abated pursuant to subsection (k) of this section pending the outcome of a hearing.

(f) Replacement. In the event a permit plate is lost or stolen, is missing from the sign structure, or becomes illegible, the sign owner must submit a request for a replacement plate in a form prescribed by the department, together with the prescribed replacement plate fee.

(g) Fees.

(1) Except as provided in paragraphs (2) and (3) of this subsection, for a permit issued pursuant to this section:

(A) the original fee is $96;

(B) the annual renewal fee is $40;

(C) the transfer fee is $25 per permit up to a maximum of $2,500 for a single transaction; and

(D) the replacement plate fee is $25.

(2) For a nonprofit sign permit:

(A) the original fee is $10 for each sign;

(B) the annual renewal fee is $10 for each sign; and

(C) the transfer fee is waived for the transfer of a permit issued under subsection (l) of this section if the permit is transferred

under subsection (e)(3) of this section. Any other permit transfer is subject to the provisions of paragraph (1) of this subsection.

(3) The initial permit fee is $50 for a sign lawfully in existence which becomes subject to the Act.

(4) A fee prescribed in this subsection is payable by check, cashier's check, or money order, and is nonrefundable.

(5) If a check or money order submitted for fees described in this section is dishonored upon presentment by the department, the permit, renewal, or transfer will be void from inception.

(h) Expiration. A permit automatically expires if:

(1) it is not renewed by the permit holder;

(2) the license under which it was issued expires or is revoked by the department pursuant to §21.149 of this title (relating to Licenses); or

(3) the sign is acquired by the state.

(i) Cancellation. The executive director may cancel a permit if the sign structure:

(1) is removed;

(2) is not maintained in accordance with applicable sections under this subchapter or the Act;

(3) is damaged beyond the repair threshold contained in §21.156 of this title (relating to Discontinuance of Signs);

(4) is abandoned, as determined by §21.156 of this title (relating to Discontinuance of Signs);

(5) is not built in the location described on the permit application or in accordance with the description of the structure on the permit application;

(6) is built by an applicant who uses false or materially misleading information on the permit application;

(7) is located on property owned by a person who withdraws, in writing, the permission granted pursuant to §21.150(b)(2) of this title (relating to Permits);

(8) is located in an area in which the activity has ceased in accordance with §21.145(b) of this title (relating to Cessation of Activities);

(9) is erected, repaired, or maintained in violation of §21.161 of this title (relating to Destruction of Trees/Violation of Control of Access);

(10) has been made more visible by the permit holder clearing vegetation from the highway right of way in violation of §21.161 of this title; or

(11) does not have permit plates properly attached under §21.150(b) and (f) of this title (relating to Permits).

(j) Removal. If a permit expires without renewal, is canceled without reinstatement, or if a sign other than an exempt sign is erected or maintained without a permit, the owner of the involved sign and sign structure shall, upon written notification by the executive director, remove the sign at no cost to the state.

(k) Notice and appeal. Upon determination that a permit should be canceled, the executive director shall mail by certified mail a notice of cancellation to the address of the record license holder. Notice shall be presumed to be received five days after mailing. The recipient of the notice may provide proof that the notice was not received five days from mailing, in which case, the executive director may extend the time for requesting a hearing.

(1) The notice shall clearly state:

(A) the reason for the cancellation;

(B) the effective date of the cancellation; and

(C) the right of the permit holder to request an administrative hearing on the question of the cancellation.

(2) A request for an administrative hearing under this subsection must be made in writing to the executive director within 10 days of the receipt of the notice of cancellation.

(3) If timely requested, an administrative hearing shall be conducted in accordance with §§1.21 et seq. of this title (relating to Contested Case Procedure), and shall serve to abate the cancellation unless and until that cancellation is affirmed by order of the commission.

(l) Nonprofit signs.

(1) A nonprofit organization may obtain a permit under this section to erect or maintain a nonprofit sign.

(2) In order to qualify for a permit issued under this subsection, a sign must comply with all applicable requirements under this subchapter from which it is not specifically exempted.

(3) An application for a permit under this section must include, in detail, the content of the message to be displayed on the sign. Prior to changing the message, the permit holder must obtain the approval of the executive director.

(4) If at any time the sign ceases to be a nonprofit sign, the permit will be subject to cancellation pursuant to subsection (i) of this section.

(5) If the holder of a permit issued under this subsection loses its nonprofit status or wishes to advertise or promote something other than the municipality or political subdivision, an outdoor advertising license must be obtained pursuant to §21.149 of this title (relating to Licenses), the permit must be converted to a permit for a sign other than a nonprofit sign, and the holder must pay the original permit and annual renewal fees set forth in subsection (g) of this section.

(6) A nonprofit organization that holds a valid permit for a nonconforming sign that would otherwise qualify for a permit under this subsection may convert its permit to one issued under this subsection.

(m) Conversion of rural road permits and registrations. The department will convert a registration issued under §21.431 of this title (relating to Registration of Existing Off-Premise Signs) or a permit issued under §21.441 of this title (relating to Permit for Erection of Off-Premise Sign) to a permit under this section if a highway previously regulated in accordance with Transportation Code, Chapter 394 becomes subject to control under the Act. A holder of a permit or registration converted under this subsection will not be required to pay an original permit fee under subsection (g) of this section; however, the permit must be renewed annually under subsection (d) of this section, on the date the renewal of the permit or registration issued under §21.431 or §21.441 of this title would have been due. In the event a sign owner has prepaid registration fees, the outstanding prepayment will be credited to the sign owner's annual renewal fee. The department will issue permit plates to a holder of a permit or a registration converted under this subsection at no charge. In the event replacement plates are needed after the initial issuance, fees will be charged in accordance with this section.

(n) New highway or change in highway designation. Owners of signs that become subject to the Act because of the construction of a new highway or the change in designation of an existing highway must apply to the department for a permit and must obtain an outdoor advertiser's license pursuant to §21.149 of this title (relating to Licenses) within 30 days after being notified by the department that the sign has become subject to the Act. If the owner of the sign cannot be identified from information on the sign, notice may be given by prominently posting notice on the sign for a period of 30 days.

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

Filed with the Office of the Secretary of State on January 30, 2009.

TRD-200900367
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: March 1, 2009
Proposal publication date: December 5, 2008
For further information, please call: (512) 463-8683

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SUBCHAPTER K. CONTROL OF SIGNS ALONG RURAL ROADS

43 TAC §§21.411, 21.431, 21.441, 21.521, 21.531, 21.541, 21.561, 21.572

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, §391.032, which provides authority to establish rules to regulate the orderly and effective display of outdoor advertising on primary roads, Transportation Code, §391.065, which provides authority to establish rules to standardize forms and regulate the issuance of outdoor advertising licenses, Transportation Code, §394.004, which provides the commission with the authority to establish rules to regulate the erection and maintenance of signs on rural roads.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 391 and 394.

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

Filed with the Office of the Secretary of State on January 30, 2009.

TRD-200900368
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: March 1, 2009
Proposal publication date: December 5, 2008
For further information, please call: (512) 463-8683

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CHAPTER 27. TOLL PROJECTS

SUBCHAPTER E. FINANCIAL ASSISTANCE FOR TOLL FACILITIES

43 TAC §27.53

The Texas Department of Transportation (department) adopts amendments to §27.53, concerning financial assistance for toll facilities. The amendments to §27.53 are adopted with changes to the proposed text as published in the December 5, 2008, issue of the *Texas Register* (33 TexReg 9966).

EXPLANATION OF ADOPTED AMENDMENTS

To maintain and build on the department's commitment to integrity and ethical behavior, the Texas Transportation Commission (commission) ordered the department to develop an internal compliance program (ICP) designed to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law and departmental policies. The rule changes expand the use of that concept to require that to be eligible to receive funds from the department for the financing of a toll facility that is not under the jurisdiction of the department, an entity must have an internal ethics and compliance program and enforce compliance with that program. The purpose of the changes is to discourage fraudulent and illegal activity by persons who receive financial assistance from the department.

Amendments to §27.53, Request, add new subsection (a)(3) to provide that, to be eligible for financing by the department of a toll facility that is not under the jurisdiction of the department, an entity must have adopted, and must enforce compliance with, an ethics and compliance program that satisfies new 43 TAC §1.8, Internal Ethics and Compliance Program. While most entities that apply for financial assistance for toll facilities currently have ethics and compliance programs in place, the commission recognizes that some potential applicants may not have those programs. It is the intent of the commission that the requirements of this new paragraph will apply only for applications for financial assistance submitted to the department after January 1, 2010, and the application forms for the assistance will contain such a provision.

COMMENTS

No comments on the proposed amendments were received. The wording of §27.53(a)(3) has been modified to emphasize that the requirements of that new provision apply only to applications for financial assistance submitted to the department after January 1, 2010.

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, §222.103, which provides the commission with the authority to establish rules to finance the cost of a toll facility of a public or private entity.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 222, Subchapter E.

§27.53. Request.

(a) Eligibility.

(1) A public or private entity that is authorized by state law to construct or maintain a toll facility is eligible to submit a request for financing under this subchapter.

(2) A private entity is not eligible to submit a request for a grant.

(3) For requests submitted after January 1, 2010, to be eligible to receive funds under this subchapter, an entity must have adopted an internal ethics and compliance program that satisfies the requirements of §1.8 of this title (relating to Internal Ethics and Compliance Program) and must enforce compliance with that program.

(b) Basic request. Except as otherwise noted below with respect to a request for funding of development costs only, a request must be accompanied by:

(1) an overview of the project, which shall include a description of the project, the estimated total cost of the project or the preliminary cost estimate of development costs if the request is to fund only development costs, and the proposed use of the requested financial assistance;

(2) a list of all proposed funding sources, including, but not limited to, bond revenue, any equity contribution from the requestor, and grants or loans requested under this subchapter, and the proposed use of the funding;

(3) the requested financing terms if loan financing is requested;

(4) a description of the need, or potential need in the case of a request for financing of development costs, for the project and potential impact on traffic congestion and mobility;

(5) a statement of the amount of unencumbered (or unreserved) cash on hand or the requestor's latest audited financial statement;

(6) the latest bond rating obtained by the requestor when using similar sources of revenue to be pledged, if applicable;

(7) a preliminary design study which includes:

(A) an initial route and potential alignments;

(B) the project's logical termini and independent utility, if applicable; and

(C) potential revisions or changes to state highway system facilities necessitated by the project;

(8) a description of the extent to which the requestor's toll collection system or plan for a toll collection system provides interoperability;

(9) unless the request is to fund development costs only, official written approval of the project by the governing body of each entity that may become liable for repayment of any financial assistance;

(10) a binding commitment that the environmental consequences of the proposed project will be fully considered in accordance with, and that the proposed project will comply with, all applicable local, state, and federal environmental laws, regulations, and requirements;

(11) a binding commitment to implement all EPIC; and

(12) documentary evidence, to the extent then available, of community involvement in development of the proposed project and public opinion about it.

(c) Supplemental information and data. Except as provided in subsection (d) of this section, the requestor shall submit the following supplemental information and data.

(1) Financial feasibility study. Unless the request is to fund development costs only, the requestor shall submit a financial feasibility study that includes:

(A) a project construction or asset acquisition schedule identifying the timing, amount, and source of all funds required;

(B) an analysis of the expected financing period of the project;

(C) a pro forma annual cash flow analysis for the expected financing period of the project showing:

(i) if applicable, anticipated revenues to be used in repayment by source;

(ii) anticipated disbursements for preliminary studies and engineering, construction, EPIC, right of way acquisition, utility adjustments, operations, and maintenance;

(iii) anticipated debt service coverage ratios for each debt obligation; and

(iv) funds expected to be used to meet the requirements of any sinking funds, reserve funds, and loan amortization payments;

(D) a description of the methods used in preparing the financial feasibility study, the assumptions contained in the study, and persons and entities responsible for the preparation of the study;

(E) if loan financing is requested under this subchapter, the length of time the financial assistance will be outstanding or obligated;

(F) the anticipated interest rates for any and all debt outstanding during the term of the financial assistance;

(G) the anticipated benefits to the state and to the requestor resulting from the assistance; and

(H) based upon then available information and analyses, a description of how the requested assistance will, to the extent applicable, accomplish the following (it being understood that failure to accomplish all of these items will not necessarily cause a request to be ineligible for financial assistance):

(i) expand the availability of funding for transportation projects;

(ii) reduce direct state costs;

(iii) maximize private and local participation in financing projects; and

(iv) improve the efficiency of the state's transportation systems.

(2) Project impacts. The requestor shall provide the following information concerning the impact of the project:

(A) how the project will be consistent with the Statewide Transportation Plan and, if appropriate, with the metropolitan transportation plan developed by an MPO;

(B) if the project is in a nonattainment area, how the project will be consistent with the Statewide Transportation Improvement Program, with the conforming plan and Transportation Improvement Program for the MPO in which the project is located (if necessary), and with the State Implementation Plan; and

(C) a preliminary description of any known environmental, social, economic, or cultural resource issues, such as hazardous material sites, impacts on wetlands and other water resources, endangered species, parks, neighborhoods, businesses, historic buildings or bridges, and archeological sites.

(d) Waiver of required information or data. The executive director may waive submission of individual items of information or data required by subsection (c) of this section if:

(1) the information or data required by this section is not relevant to the project or the financial assistance requested;

(2) the department already possesses information or data in a format that may be substituted for the required information or data; or

(3) the past performance of the requestor on previous projects developed in collaboration with the department indicates that the requestor will adequately and prudently address the issues and impacts described in the requested information or data.

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

Filed with the Office of the Secretary of State on January 30, 2009.

TRD-200900369
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: February 19, 2009
Proposal publication date: December 5, 2008
For further information, please call: (512) 463-8683

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.

Agency Rule Review Plan

Texas Education Agency

Title 19, Part 2

TRD-200900424
Filed: February 4, 2009

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Adopted Rule Reviews

Texas Education Agency

Title 19, Part 2

The State Board of Education (SBOE) adopts the review of 19 TAC Chapter 30, Administration, Subchapter A, State Board of Education: General Provisions, pursuant to the Texas Government Code, §2001.039. The SBOE proposed the review of 19 TAC Chapter 30, Subchapter A, in the December 12, 2008, issue of the *Texas Register* (33 TexReg 10193).

The SBOE finds that the reasons for adopting 19 TAC Chapter 30, Subchapter A, continue to exist and readopts the rule. The SBOE received no comments related to the rule review requirement.

The SBOE is proposing an amendment in 19 TAC Chapter 30, Subchapter A. Section 30.1, Petition for Adoption of Rule Changes, would be modified to adopt in rule as a figure the form used to petition for the adoption of rule changes. The proposed amendment to 19 TAC Chapter 30, Subchapter A, may be found in the Proposed Rules section of this *Texas Register* issue.

TRD-200900426
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: February 4, 2009

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Texas Board of Pardons and Paroles

Title 37, Part 5

The Texas Board of Pardons and Paroles files this notice of readoption of 37 TAC Chapter 141 (General Provisions), Chapter 143 (Executive Clemency), Chapter 145 (Parole), Chapter 146 (Revocation of Parole or Mandatory Supervision), Chapter 147 (Hearings), Chapter 149 (Mandatory Supervision), Chapter 150 (Memorandum of Understanding and Board Policy Statements) and all the sections contained within them. The Board amended §141.60 to clarify the review period for offenders who are eligible for parole review; §143.12 to revise the contact for proof of application; §143.21 to revise the board rule reference contained within the rule; §143.23 to remove the board rule reference contained within the rule; and §145.17 to clarify the procedures regarding subsequent reviews of parole panel votes to deny release to parole or mandatory supervision. The Board amended §§143.4, 143.11, 143.52, 143.58, 143.74, 145.12, 145.23, 145.24, 146.6, 146.8, and 149.3 to update the statutory references contained within these rules. The readoption of Chapters 141, 143, 145, 146, 147, 149 and 150 is filed in accordance with the Board of Pardons and Paroles' Notice of Intent to Review published in the August 15, 2008, issue of the *Texas Register* (33 TexReg 6611) and the August 29, 2008, issue of the *Texas Register* (33 TexReg 7312). No public comments were received.

The assessment of Chapters 141, 143, 145, 146, 147, 149, and 150 indicates that the original justifications for these rules continues to exist, and the Board is readopting the rules in accordance with Texas Government Code, §2001.039. This concludes the review of 37 TAC Chapters 141, 143, 145, 146, 147, 149, and 150.

TRD-200900347
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Filed: January 29, 2009

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 10 TAC Chapter 49--Preamble

Scoring Breakdown in Descending Order of Points for the 2009 QAP

QAP Para.#	Topic	Total Points	Notes	Legislative Citation - Compare to QAP
1	Financial Feasibility	28	N/A	§2306.6710(b)(1)(A)
2	QCP from Neighborhood Organizations	24 Max	Range of +24 to 0	§2306.6710(b)(1)(B); §2306.6725(a)(2)
3	Income Levels of the Tenants	22	N/A	§2306.6710(b)(1)(C) and (e); §2306.111(g)(3)(B) and (E); §42(m)(1)(B)(ii)(I)
4	Size and Quality of the Units	20	N/A	§2306.6710(b)(1)(D); §42(m)(1)(C)(iii)
5	Commit. of Funds by LPS	18	N/A	§2306.6710(b)(1)(E)
6	State Rep. or Senator Support/Opposition	14 Max	Range of +14 to -14	§2306.6710(b)(1)(F) and (g); §2306.6725(a)(2)
7	Rent Levels of the Units	12	N/A	§2306.6710(b)(1)(G)
8	Cost Per Square Foot	10	N/A	§2306.6710(b)(1)(H); 42(m)(1)(C)(iii)
9	Services Provided to Tenants	8	N/A	§2306.6710(b)(1)(I); Rider 7; §2306.254; §2306.6725(a)(1)
10	Declared Disaster Areas	7	N/A	§2306.6710(b)(1)
11	Rehabilitation (which includes reconstruction) or Adaptive Reuse	6	N/A	N/A
12	Housing Needs Characteristics	6	N/A	§42(m)(1)(C)(ii)
13	Revitalization or Historic Preservation	6	N/A	§42(m)(1)(C)(iii)
14	Pre-Application Participation	6	N/A	§2306.6704
15	Economic Development Initiative	4	N/A	§2306.127
16	Development Location	4	N/A	§2306.6725(a)(4) and (b)(2); §2306.127; Rider 6; §42(m)(1)(C)(i) and (vii)
17	Green Building Initiatives	6	N/A	§2306.6725(a)(4); §42(m)(1)(C)(i)
18	Community Input Other Than QCP	6	Range of 6 to 0	N/A
19	Census Tracts with No Other Existing Developments Supported by Tax Credits	6	N/A	§2306.6725(b)(2)
20	Special Housing Needs Populations	4	N/A	§42(m)(1)(C)(v)
21	Length of Affordability Period	4	N/A	§2306.6725(a)(5); §2306.111(g)(3)(C); §2306.185(a)(1) and (c); §2306.6710(e)(2); §42(m)(1)(B)(ii)(II)
22	Site Characteristics	4	Up to 4 points for positive amenities and 6 points for negative features.	N/A
23	Development Size	3	N/A	N/A
24	Location in QCT with Revitalization	1	N/A	§42(m)(1)(B)(ii)(III)
25	Sponsor Characteristics	2	N/A	§42(m)(1)(C)(iv)
26	Right of First Refusal	1	N/A	§2306.6725(b); §42(m)(1)(C)(viii)
27	Leveraging of Private, State and Federal Funds	1	N/A	§2306.6725(a)(3)
28	Third Party Commit. Outside of QCT	1	N/A	§2306.6710(e)(1)
29	Penalties	N/A	Range	§2306.6710(b)(2)
Maximum Number of Points Possible:		**234**		

Figure: 19 TAC §30.1(a)

Attachment A

STATE BOARD OF EDUCATION
Petition for Adoption of a Rule

The Texas Government Code, §2001.021, provides that any interested person may petition an agency requesting the adoption of a rule.

Petitions should be signed and submitted to:

Commissioner of Education
Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494

Name:

Affiliation/Organization (if applicable):

Address:

Telephone: Date:

Proposed rule text (indicate words to be added or deleted from the current text):

Statutory authority for the proposed rule action:

Why is this rule action necessary or desirable?

(If more space is required, attach additional sheets.)

Petitioner's Signature

Figure: 25 TAC §289.202(ggg)(2)(E)

Name	Symbol	Atomic Number	Name	Symbol	Atomic Number
Actinium	Ac	89	Mercury	Hg	80
Aluminum	Al	13	Molybdenum	Mo	42
Americium	Am	95	Neodymium	Nd	60
Antimony	Sb	51	Neptunium	Np	93
Argon	Ar	18	Nickel	Ni	28
Arsenic	As	33	Niobium	Nb	41
Astatine	At	85	Nitrogen	N	7
Barium	Ba	56	Osmium	Os	76
Berkelium	Bk	97	Oxygen	O	8
Beryllium	Be	4	Palladium	Pd	46
Bismuth	Bi	83	Phosphorus	P	15
Bromine	Br	35	Platinum	Pt	78
Cadmium	Cd	48	Plutonium	Pu	94
Calcium	Ca	20	Polonium	Po	84
Californium	Cf	98	Potassium	K	19
Carbon	C	6	Praseodymium	Pr	59
Cerium	Ce	58	Promethium	Pm	61
Cesium	Cs	55	Protactinium	Pa	91
Chlorine	Cl	17	Radium	Ra	88
Chromium	Cr	24	Radon	Rn	86
Cobalt	Co	27	Rhodium	Rh	45
Copper	Cu	29	Rubidium	Rb	37
Curium	Cm	96	Ruthenium	Ru	44
Dysprosium	Dy	66	Samarium	Sm	62
Einsteinium	Es	99	Scandium	Sc	21
Erbium	Er	68	Selenium	Se	34
Europium	Eu	63	Silicon	Si	14
Fermium	Fm	100	Silver	Ag	47
Fluorine	F	9	Sodium	Na	11
Francium	Fr	87	Strontium	Sr	38
Gadolinium	Gd	64	Sulfur	S	16
Gallium	Ga	31	Tantalum	Ta	73
Germanium	Ge	32	Technetium	Tc	43
Gold	Au	79	Tellurium	Te	52
Hafnium	Hf	72	Terbium	Tb	65
Holmium	Ho	67	Thallium	Tl	81
Hydrogen	H	1	Thorium	Th	90
Indium	In	49	Thulium	Tm	69
Iodine	I	53	Tin	Sn	50
Iridium	Ir	77	Titanium	Ti	22
Iron	Fe	26	Tungsten	W	74
Krypton	Kr	36	Uranium	U	92

Name	Symbol	Atomic Number	Name	Symbol	Atomic Number
Lanthanum	La	57	Vanadium	V	23
Lead	Pb	82	Xenon	Xe	54
Lutetium	Lu	71	Ytterbium	Yb	70
Magnesium	Mg	12	Yttrium	Y	39
Manganese	Mn	25	Zinc	Zn	30
Mendelevium	Md	101	Zirconium	Zr	40

Figure: 25 TAC §289.202(ggg)(8)

BRC Form 202-2

Texas Department of State Health Services/Radiation Control

CUMULATIVE OCCUPATIONAL EXPOSURE HISTORY

1. NAME (LAST, FIRST, MIDDLE INITIAL)	2. IDENTIFICATION NUMBER	3. ID TYPE	4. SEX MALE ☐ FEMALE ☐	5. DATE OF BIRTH

6. MONITORING PERIOD		7. LICENSEE OR REGISTRANT NAME		8. LICENSE OR REGISTRATION NUMBER		9. RECORD ☐ ESTIMATE ☐ NO RECORD ☐	10. ROUTINE ☐ PSE ☐
11. DDE	12. LDE	13. SDE, WB	14. SDE, ME	15. CEDE	16. CDE	17. TEDE	18. TODE
6. MONITORING PERIOD		7. LICENSEE OR REGISTRANT NAME		8. LICENSE OR REGISTRATION NUMBER		9. RECORD ☐ ESTIMATE ☐ NO RECORD ☐	10. ROUTINE ☐ PSE ☐
11. DDE	12. LDE	13. SDE, WB	14. SDE, ME	15. CEDE	16. CDE	17. TEDE	18. TODE
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11. DDE	12. LDE	13. SDE, WB	14. SDE, ME	15. CEDE	16. CDE	17. TEDE	18. TODE
6. MONITORING PERIOD		7. LICENSEE OR REGISTRANT NAME		8. LICENSE OR REGISTRATION NUMBER		9. RECORD ☐ ESTIMATE ☐ NO RECORD ☐	10. ROUTINE ☐ PSE ☐
11. DDE	12. LDE	13. SDE, WB	14. SDE, ME	15. CEDE	16. CDE	17. TEDE	18. TODE
6. MONITORING PERIOD		7. LICENSEE OR REGISTRANT NAME		8. LICENSE OR REGISTRATION NUMBER		9. RECORD ☐ ESTIMATE ☐ NO RECORD ☐	10. ROUTINE ☐ PSE ☐
11. DDE	12. LDE	13. SDE, WB	14. SDE, ME	15. CEDE	16. CDE	17. TEDE	18. TODE
6. MONITORING PERIOD		7. LICENSEE OR REGISTRANT NAME		8. LICENSE OR REGISTRATION NUMBER		9. RECORD ☐ ESTIMATE ☐ NO RECORD ☐	10. ROUTINE ☐ PSE ☐
11. DDE	12. LDE	13. SDE, WB	14. SDE, ME	15. CEDE	16. CDE	17. TEDE	18. TODE

19. SIGNATURE OF MONITORED INDIVIDUAL	20. DATE SIGNED	21. CERTIFYING ORGANIZATION	22. SIGNATURE OF DESIGNEE	23. DATE SIGNED

INSTRUCTIONS AND ADDITIONAL INFORMATION PERTINENT TO THE COMPLETION OF BRC FORM 202-2
(All doses should be stated in rems)

1. Type or print the full name of the monitored individual in the order of last name (include "Jr." "Sr." "III." etc.), first name, middle initial (if applicable).

2. Enter the individual's identification number, including punctuation. This number should be the 9-digit social security number if at all possible. If the individual has no social security number, enter the number from another official identification such as a passport or work permit.

3. Enter the code for the type of identification used as shown below:

CODE	ID TYPE
SSN	U.S. Social Security Number
PPN	Passport Number
CSI	Canadian Social Insurance Number
WPN	Work Permit Number
IND	INDEX Identification Number
OTH	Other

4. Check the box that denotes the sex of the individual being monitored.

5. Enter the date of birth of the individual being monitored in the format MM/DD/YY.

6. Enter the monitoring period for which this report is filed. The format should be MM/DD/YY - MM/DD/YY.

7. Enter the name of the licensee, registrant, or facility not licensed by the Agency that provided monitoring.

8. Enter the Agency license or registration number or numbers.

9. Place an "X" in Record, Estimate, or No Record. Choose "Record" if the dose data listed represent a final determination of the dose received to the best of the licensee's or registrant's knowledge. Choose "Estimate" only if the listed dose data are preliminary and will be superseded by a final determination resulting in a subsequent report. An example of such an instance would be dose data based on self-reading dosimeter results and the licensee or registrant intends to assign the record dose on the basis of TLD results that are not yet available.

10. Place an "X" in either Routine or PSE. Choose "Routine" if the data represent the results of monitoring for routine exposures. Choose "PSE" if the listed dose data represents the results of monitoring of planned special exposures received during the monitoring period. If more than one PSE was received in a single year, the licensee should sum them and report the total of all PSEs.

11. Enter the deep dose equivalent (DDE) to the whole body.

12. Enter the eye dose equivalent (LDE) recorded for the lens of the eye.

13. Enter the shallow dose equivalent recorded for the skin of the whole body (SDE,WB).

14. Enter the shallow dose equivalent recorded for the skin of the extremity receiving the maximum dose (SDE,ME).

15. Enter the committed effective dose equivalent (CEDE).

16. Enter the committed dose equivalent (CDE) recorded for the maximally exposed organ.

17. Enter the total effective dose equivalent (TEDE). The TEDE is the sum of items 11 and 15.

18. Enter the total organ dose equivalent (TODE) for the maximally exposed organ. The TODE is the sum of items 11 and 16.

19. Signature of the monitored individual. The signature of the monitored individual on this form indicates that the information contained on the form is complete and correct to the best of his or her knowledge.

20. Enter the date this form was signed by the monitored individual.

21. [OPTIONAL] Enter the name of the licensee, registrant or facility not licensed by the Agency, providing monitoring for exposure to radiation (such as a DOE facility) or the employer if the individual is not employed by the licensee or registrant and the employer chooses to maintain exposure records for its employees.

22. [OPTIONAL] Signature of the person designated to represent the licensee, registrant or employer entered in item 21. The licensee, registrant or employer who chooses to countersign the form should have on file documentation of all the information on the Agency Form Y being signed.

23. [OPTIONAL] Enter the date this form was signed by the designated representative.

Figure: 25 TAC §289.202(ggg)(9)

BRC Form 202-3 — Texas Department of State Health Services/Radiation Control

OCCUPATIONAL EXPOSURE RECORD FOR A MONITORING PERIOD

1. NAME (LAST, FIRST, MIDDLE INITIAL)	2. IDENTIFICATION NUMBER	3. ID TYPE	4. SEX ☐ MALE ☐ FEMALE	5. DATE OF BIRTH

6. MONITORING PERIOD	7. LICENSEE OR REGISTRANT NAME	8. LICENSE OR REGISTRATION NUMBER(S)	9A. ☐ RECORD ☐ ESTIMATE	9B. ☐ ROUTINE ☐ PSE

INTAKES

10A. RADIONUCLIDE	10B. CLASS	10C. MODE	10D. INTAKE IN µCi

DOSES (in rem)

DEEP DOSE EQUIVALENT (DDE)	11.
EYE DOSE EQUIVALENT TO THE LENS OF THE EYE (LDE)	12.
SHALLOW DOSE EQUIVALENT, WHOLE BODY (SDE,WB)	13.
SHALLOW DOSE EQUIVALENT, MAX EXTREMITY (SDE,ME)	14.
COMMITTED EFFECTIVE DOSE EQUIVALENT (CEDE)	15.
COMMITTED DOSE EQUIVALENT, MAXIMALLY EXPOSED ORGAN (CDE)	16.
TOTAL EFFECTIVE DOSE EQUIVALENT ***(BLOCKS 11+15) (TEDE)***	17.
TOTAL ORGAN DOSE EQUIVALENT, MAX ORGAN ***(BLOCKS 11+16) (TODE)***	18.

19. COMMENTS

20. SIGNATURE -- LICENSEE OR REGISTRANT	21. DATE PREPARED

INSTRUCTIONS AND ADDITIONAL INFORMATION PERTINENT TO THE COMPLETION OF BRC FORM 202-3

(All doses should be stated in rems)

1. Type or print the full name of the monitored individual in the order of last name (include "Jr." "Sr." "III," etc.), first name, middle initial (if applicable).

2. Enter the individual's identification number, including punctuation. This number should be the 9-digit social security number if at all possible. If the individual has no social security number, enter the number from another official identification such as a passport or work permit.

3. Enter the code for the type of identification used as shown below:

CODE	ID TYPE
SSN	U.S. Social Security Number
PPN	Passport Number
CSI	Canadian Social Insurance Number
WPN	Work Permit Number
IND	INDEX Identification Number
OTH	Other

4. Check the box that denotes the sex of the individual being monitored.

5. Enter the date of birth of the individual being monitored in the format MM/DD/YY.

6. Enter the monitoring period for which this report is filed. The format should be MM/DD/YY - MM/DD/YY.

7. Enter the name of the licensee or registrant.

8. Enter the Agency license or registration number or numbers.

9A. Place an "X" in Record or Estimate. Choose "Record" if the dose data listed represent a final determination of the dose received to the best of the licensee's or registrant's knowledge. Choose "Estimate" only if the listed dose data are preliminary and will be superseded by a final determination resulting in a subsequent report. An example of such an instance would be dose data based on self-reading dosimeter results and the licensee intends to assign the record dose on the basis of TLD results that are not yet available.

9B. Place an "X" in either Routine or PSE. Choose "Routine" if the data represent the results of monitoring for routine exposures. Choose "PSE" if the listed dose data represents the results of monitoring of planned special exposures received during the monitoring period. If more than one PSE was received in a single year, the licensee or registrant should sum them and report the total of all PSEs.

10A. Enter the symbol for each radionuclide that resulted in an internal exposure recorded for the individual, using the format "Xx-###x," for instance, Cs-137 or Tc-99m.

10B. Enter the lung clearance class as listed in subsection (ggg)(2)(F) of this section for all intakes by inhalation.

10C. Enter the mode of intake. For inhalation, enter "H." For absorption through the skin, enter "B." For oral ingestion, enter "G." For injection, enter "J."

10D. Enter the intake of each radionuclide in μCi.

11. Enter the deep dose equivalent (DDE) to the whole body.

12. Enter the eye dose equivalent (LDE) recorded for the lens of the eye.

13. Enter the shallow dose equivalent recorded for the skin of the whole body (SDE,WB).

14. Enter the shallow dose equivalent recorded for the skin of the extremity receiving the maximum dose (SDE,ME).

15. Enter the committed effective dose equivalent (CEDE) or "NR" for "Not Required" or "NC" for "Not Calculated".

16. Enter the committed dose equivalent (CDE) recorded for the maximally exposed organ or "NR" for "Not Required" or "NC" for "Not Calculated".

17. Enter the total effective dose equivalent (TEDE). The TEDE is the sum of items 11 and 15.

18. Enter the total organ dose equivalent (TODE) for the maximally exposed organ. The TODE is the sum of items 11 and 16.

19. COMMENTS.
In the space provided, enter additional information that might be needed to determine compliance with limits. An example might be to enter the note that the SDE,ME was the result of exposure from a discrete hot particle. Another possibility would be to indicate that an overexposed report has been sent to the Agency in reference to the exposure report.

20. Signature of the person designated to represent the licensee or registrant.

21. Enter the date this form was prepared.

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 Assistive and Rehabilitative Services

Notice of Public Hearing for DARS Maximum Allowable Payment Schedule (MAPS), to be effective April 1, 2009

The Department of Assistive and Rehabilitative Services (DARS) will hold a public hearing from 2:00 p.m. to 4:00 p.m. on Tuesday, March 3, 2009, in Conference Room 250 of the DARS Administration Building at 4800 North Lamar Boulevard in Austin, Texas 78756, to receive public comments on the proposed FY 2009-2010 Maximum Allowable Payment Schedule (MAPS) rates used for the purchase of medical and medical-related services. The proposed implementation date for the new MAPS rates is April 1, 2009.

The schedule of proposed rates may be viewed or copies may be obtained by calling Stuart McPhail with DARS at (512) 424-4144 or visiting DARS at the Brown Heatly Building at 4900 North Lamar; Austin, Texas 78751.

Written comments on the proposed rates may be submitted to Stuart McPhail, Department of Assistive and Rehabilitative Services, 4900 North Lamar Boulevard, Austin, Texas 78751.

TRD-200900360
Sylvia F. Hardman
Deputy Commissioner for Legal Services
Department of Assistive and Rehabilitative Services
Filed: January 30, 2009

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Automobile Burglary and Theft Prevention Authority

Notice of Invitation for Applications

The Automobile Burglary and Theft Prevention Authority is soliciting applications for grants to be awarded for projects under the Automobile Burglary and Theft Prevention Authority (ABTPA) Fund. This grant cycle will be one year in duration, and will begin on September 1, 2009. One or more of the following types of projects may be awarded, depending on the availability of funds:

Law Enforcement/Detection/Apprehension Projects, to establish motor vehicle burglary and theft enforcement teams and other detection/apprehension programs. Priority funding may be provided to state, county, precinct commissioner, general or home rule cities for enforcement programs in particular areas of the state where the problem is assessed as significant. Enforcement efforts covering multiple jurisdictional boundaries may receive priority for funding.

Prosecution/Adjudication/Conviction Projects, to provide for prosecutorial and judicial programs designed to assist with the prosecution of persons charged with motor vehicle burglary and theft offenses.

Prevention, Anti-Theft Devices and Automobile Registration Projects, to test experimental equipment which is considered to be designed for auto theft deterrence and registration of vehicles in the Texas Help End Auto Theft (H.E.A.T.) Program.

Reduction of the Sale of Stolen Vehicles or Parts Projects, to provide vehicle identification number labeling, including component part labeling and etching methods designed to deter the sale of stolen vehicles or parts.

Public Awareness and Crime Prevention/Education/Information Projects, to provide education and specialized training to law enforcement officers in auto burglary and theft prevention procedures, provide information linkages between state law enforcement agencies on auto theft crimes, and develop a public information and education program on theft prevention measures.

Eligible Applicants:

State agencies, local general-purpose units of government, independent school districts, nonprofit, and for profit organizations are eligible to apply for grants for automobile burglary and theft prevention assistance projects. Nonprofit and profit organizations shall be required to provide with their grant applications sufficient documentation to evaluate the credibility and the community support of the organization and the viability of the organization's existing activities in the context of providing automobile burglary and theft prevention assistance.

Contact Person:

Detailed specifications, including selection process and schedule for workshops for applicants will be made available through ABTPA. Copies of the Administrative Guide and the application can be found at www.txwatchyourcar.com.

Contact Charles Caldwell, Interim Director, Texas Automobile Burglary and Theft Prevention Authority, (512) 374-5101.

Application Workshops:

A **mandatory** workshop for all applicants that wish to apply for the Texas Automobile Burglary and Theft Prevention Grant funds with at least **one (1)** representative has been selected to be held: **March 31, 2009, Tuesday, Austin, Texas,** 8:00 a.m. - 5:00 p.m., Crown Plaza Hotel 6121 North IH-35, Austin, Texas, 78752, (512) 323-5466. Attendees are responsible for making individual hotel reservations. Registration for the workshops must be done on the ABTPA Website at www.txwatchyourcar.com.

Application Deadline and Submission Requirements:

The Authority must receive applications by 5 p.m., Friday, May 8, 2009 or postmarked by May 8, 2009. Each Application must:

1. Include all signed certifications and signature pages.

2. Application must be mailed or delivered to:

Texas Automobile Burglary and Theft Prevention Authority,

4000 Jackson Avenue

Austin, Texas 78731

3. Submit **one (1) original** and **four (4) copies** of the proposal.

4. Facsimile transmissions will not be accepted. If mailed, applications must be marked "Personal and Confidential" and addressed to the

contact person listed above. If delivered, please leave application with the contact person (or designee) at the address listed.

Selection Process:

Applications will be selected according to rules §§57.2, 57.4, 57.7, and 57.14, as published in Title 43, Chapter 57, Texas Administrative Code. Grant award decisions by ABTPA are final and not subject to judicial review. Grants will be awarded on or before September 1, 2009.

TRD-200900371
Charles Caldwell
Director
Automobile Burglary and Theft Prevention Authority
Filed: January 30, 2009

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 02/09/09 - 02/15/09 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 02/09/09 - 02/15/09 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005[3] for the period of 02/01/09 - 02/28/09 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The monthly ceiling as prescribed by §303.005 for the period of 02/01/09 - 02/28/09 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

TRD-200900403
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: February 3, 2009

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Texas Education Agency

Request for Applications Concerning the 2009-2010 Adult Education and Family Literacy Program and Temporary Assistance for Needy Families Program

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-09-109 from eligible applicants to provide literacy services to adults in Texas. Eligible applicants include local educational agencies; community-based organizations of demonstrated effectiveness; volunteer literacy organizations of demonstrated effectiveness; institutions of higher education; public or private nonprofit agencies; libraries; public housing authorities; nonprofit institutions that have the ability to provide literacy services to adults and families; or a consortium of eligible agencies, organizations, institutions, libraries, or authorities. For-profit entities are not eligible providers.

Description. The objectives of the 2009-2010 Adult Education and Family Literacy (Adult Ed) and Temporary Assistance for Needy Families (TANF) programs are to assist adults to become literate and obtain the knowledge and skills necessary for employment and self-sufficiency; assist adults who are parents to obtain the educational skills necessary to become full partners in the educational development of their children; assist adults in the completion of a secondary school education; assist adults who have limited English proficiency with English language acquisition; and assist adults who are incarcerated in a correctional facility or other institution who function at less than a secondary completion level with basic academic and functional context skills.

Project Dates. The Adult Ed and TANF programs will be implemented during the 2009-2010 school year. Applicants should plan for a starting date of no earlier than July 1, 2009, and an ending date of no later than June 30, 2010.

Project Amount. Funding will be provided for approximately 60 projects. Available funding is approximately $32.7 million in federal Adult Ed funds with approximately $12.7 million available in supplemental state Adult Ed and TANF funds. Each eligible organization can apply for only one project for the 2009-2010 school year. An eligible organization can also participate as a sub-recipient of an eligible organization applying for this grant.

Selection Criteria. Applications will be selected based on the independent reviewers' assessment of each applicant's ability to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. The TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA and that are most advantageous to the project.

The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. Due to the high cost of printing and mailing RFAs, they will no longer be available in print. The announcement letter and complete RFA will be posted on the TEA website at http://burleson.tea.state.tx.us/GrantOpportunities/forms for viewing and downloading. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Training Available on Texas Education Telecommunication Network (TETN). TEA is offering training via TETN (TETN Event #34865) on Wednesday, February 25, 2009, from 3:15 p.m. to 5:15 p.m. This training will cover the Adult Ed and TANF grant application and will provide the opportunity for questions and answers. As space is limited, individuals planning to attend the event must reserve seating with their regional education service center.

Further Information. For clarifying information about the RFA, contact Iris Adams, Division of Discretionary Grants, Texas Education Agency, (512) 463-9269. To assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any information that is different from or in addition to information provided in the RFA will be provided only in response to written inquiries. Copies of all such inquiries and the written answers thereto will be posted on the

TEA website in the format of Frequently Asked Questions (FAQ) at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of Applications. Applications must be certified and submitted through the eGrants online application system to the TEA by 5:00 p.m. (Central Time), Thursday, April 16, 2009, to be considered for funding.

TRD-200900425
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: February 4, 2009

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Commission on State Emergency Communications

Correction of Error

The Commission on State Emergency Communications submitted a notice of readoption (adopted review) of 1 TAC Chapter 251 for publication in the December 5, 2008, issue of the *Texas Register* (33 TexReg 10069).

An error appears on page 10069, second column, in the second paragraph of the notice. The section number 252.7 should be 251.7. The paragraph should read as follows:

"Based on its statutory review, CSEC readopts without amendment §251.2 and §251.7...."

TRD-200900357

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **March 16, 2009**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on March 16, 2009**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: Wayne Dobbins dba 3D Vacuum Service; DOCKET NUMBER: 2008-1534-SLG-E; IDENTIFIER: RN102984226; LOCATION: Victoria, Victoria County; TYPE OF FACILITY: sludge transporter business; RULE VIOLATED: 30 Texas Administrative Code (TAC) §312.143 and the Code, §26.121(a)(1), by failing to deposit waste at a facility designated by or acceptable to the generator where the owner or operator of the facility agrees to receive the wastes and the (Texas) facility has written authorization by permit or registration issued by the executive director to receive wastes; and 30 TAC §312.145, by failing to maintain complete records of each individual collection and deposit; PENALTY: $3,080; ENFORCEMENT COORDINATOR: Evette Alvarado, (512) 239-2573; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(2) COMPANY: Aqua Utilities, Inc. dba Aqua Texas, Inc.; DOCKET NUMBER: 2008-1294-MWD-E; IDENTIFIER: RN101524767; LOCATION: Orange County; TYPE OF FACILITY: wastewater system; RULE VIOLATED: 30 TAC §305.125(4), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0012109001, Permit Conditions Number 2.g., and the Code, §26.121(a), by failing to prevent the unauthorized discharge of wastewater; 30 TAC §305.125(9)(A), TPDES Permit Number WQ0012109001, Monitoring and Reporting Requirements Number 7.a., and the Code, §26.039(b), by failing to submit noncompliance notification; and 30 TAC §317.7(e), by failing to ensure that the plant area is completely fenced off with lockable gates at all access points; PENALTY: $7,260; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(3) COMPANY: Bobby Enterprises, Inc. dba One Stop Shopping Mart; DOCKET NUMBER: 2008-1354-PST-E; IDENTIFIER: RN102450665; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.246(4) and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain Stage II records at the station; and 30 TAC §115.242(1)(C) and THSC, §382.085(b), by failing to upgrade the Stage II equipment to onboard refueling vapor recovery systems; PENALTY: $1,650; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: City of Broaddus; DOCKET NUMBER: 2007-0888-MLM-E; IDENTIFIER: RN101720928; LOCATION: San Augustine County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(17) and TPDES Permit Number WQ0011772001, Sludge Provisions, by failing to submit the annual sludge reports; 30 TAC §317.3(e)(4)(C) and TPDES Permit Number WQ0011772001, Operational Requirements Number 1, by failing to ensure that all systems of collection, treatment, and disposal are properly operated and maintained; 30 TAC §330.15(a) and TPDES Permit Number WQ0011772001, Sludge Provisions, by failing to dispose of sludge at a TCEQ authorized land application site or co-disposal landfill; 30 TAC §317.6(b)(1)(D) and (E) and TPDES Permit Number WQ0011772001, Operational Requirements Number 1, by failing to properly maintain safety equipment for the gas chlorination facilities; 30 TAC §317.7(b) and TPDES Permit Number WQ0011772001, Operational Requirements Number 1, by failing to maintain an accessible stairway to the facility; 30 TAC §305.125(5) and TPDES

Permit Number WQ0011772001, Operational Requirements Number 1, by failing to ensure that all systems of collection, treatment, and disposal are properly operated and maintained; 30 TAC §319.11(c) and (d) and TPDES Permit Number WQ0011772001, Monitoring and Reporting Requirements Number 2, by failing to properly perform chlorine residual analysis; and 30 TAC §319.11(a) and TPDES Permit Number WQ0011772001, Monitoring and Reporting Requirements Number 2, by failing to properly prepare complete chain of custody records; PENALTY: $29,367; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: Burdick Homes, Limited; DOCKET NUMBER: 2008-1792-WQ-E; IDENTIFIER: RN105626568; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: residential construction site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(c), by failing to renew authorization to discharge storm water associated with construction activities; PENALTY: $3,000; ENFORCEMENT COORDINATOR: Evette Alvarado, (512) 239-2573; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(6) COMPANY: Jeff Davidson dba C & W One Stop 12; DOCKET NUMBER: 2008-1125-PST-E; IDENTIFIER: RN102438462; LOCATION: Mertzon, Irion County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(c)(2)(C) and the Code, §26.3475(d), by failing to inspect the cathodic protection system; 30 TAC §334.49(c)(4)(C) and the Code, §26.3475(d), by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection at a frequency of at least once every three years; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) for releases; 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide release detection for the piping associated with the USTs; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; and 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; PENALTY: $9,880; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(7) COMPANY: Carmax Auto Superstores, Inc.; DOCKET NUMBER: 2008-1569-AIR-E; IDENTIFIER: RN105001614; LOCATION: Austin, Travis County; TYPE OF FACILITY: auto paint shop; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain authorization for auto body refinishing activities; PENALTY: $3,000; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5700, (512) 339-2929.

(8) COMPANY: Chireno Independent School District; DOCKET NUMBER: 2008-1451-MWD-E; IDENTIFIER: RN101521631; LOCATION: Nacogdoches County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1) and TPDES Permit Number WQ0013917001, Operational Requirements Number 1, by failing to properly maintain the staff gauge and the effluent weir; 30 TAC §319.7(c) and TPDES Permit Number WQ0013917001, Monitoring and Reporting Requirements Number 3.b, by failing to make records readily available for review; 30 TAC §305.125(1) and TPDES Permit Number WQ0013917001, Other Requirements Number 6, by failing to maintain records of the septic tank inspections and the sludge removal manifests; 30 TAC §305.125(5) and TPDES Permit Number WQ0013917001, Operational Requirements Number 1, by failing to ensure that the facility and all of its systems of collections, treatment, and disposal are properly operated and maintained; 30 TAC §305.125(5) and TPDES Permit Number WQ0013917001, Operational Requirements Number 1, by failing to properly operate and maintain septic tanks; and 30 TAC §319.11(c) and (d) and TPDES Permit Number WQ0013917001, Monitoring and Reporting Requirements Number 3.a., by failing to monitor samples and take measurements in a manner representative of the monitored activity; PENALTY: $5,114; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(9) COMPANY: Clean Harbors Environmental Services, Inc.; DOCKET NUMBER: 2008-1624-AIR-E; IDENTIFIER: RN102184173; LOCATION: La Porte, Harris County; TYPE OF FACILITY: incinerator and landfill site; RULE VIOLATED: 30 TAC §§122.143(4), 122.145(2)(B) and (C), and 122.146(1) and (2), Federal Operating Permit (FOP) Number O-01566, General Terms and Conditions (GTC), and THSC, §382.085(b), by failing to submit a permit compliance certification and semi-annual deviation report; PENALTY: $5,950; ENFORCEMENT COORDINATOR: Jeremy Escobar, (512) 239-1460; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(10) COMPANY: Exxon Mobil Corporation; DOCKET NUMBER: 2008-1477-AIR-E; IDENTIFIER: RN102212925; LOCATION: Baytown, Harris County; TYPE OF FACILITY: chemical company; RULE VIOLATED: 30 TAC §§101.20(3), 116.115(c), and 122.143(4), 40 CFR §61.348(a)(1)(i), Permit Number O-01553, Special Condition (SC) Number 14, Permit Number 3452 and PSD-TX-302M2, SC Number 5, and THSC, §382.085(b), by failing to limit the flow-weighted annual average benzene waste stream concentration to ten parts per million by weight; and 30 TAC §§101.20(3), 116.115(c), and 122.143(4), 40 CFR §61.342(c)(3)(ii)(B), Permit Number O-01553, SC Number 14, Permit Number 3452 and PSD-TX-302M2, SC Number 5, and THSC, §382.085(b), by failing to limit the flow-weighted uncontrolled annual average benzene waste stream concentration to two megagrams per year; PENALTY: $30,400; Supplemental Environmental Project (SEP) offset amount of $12,160 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: John Muennink, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(11) COMPANY: Fin & Feather Lodge LLC; DOCKET NUMBER: 2008-1618-MWD-E; IDENTIFIER: RN101608081; LOCATION: Sabine County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0012143001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permit effluent limits for total suspended solids (TSS) and biochemical oxygen demand; PENALTY: $3,200; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(12) COMPANY: Fort Worth Excavating, Inc.; DOCKET NUMBER: 2008-1540-AIR-E; IDENTIFIER: RN100733138; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: sand mining and mulching plant; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain a permit or to satisfy the conditions of a permit by rule; PENALTY: $5,450; ENFORCEMENT COORDINATOR: Carlie Konkol, (361) 825-3100; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: H. E. Butt Grocery Company; DOCKET NUMBER: 2008-1680-EAQ-E; IDENTIFIER: RN102842143; LOCATION: San

Antonio, Bexar County; TYPE OF FACILITY: commercial project site; RULE VIOLATED: 30 TAC §213.4(a)(1) and §213.5(a)(4), by failing to obtain approval of an aboveground storage tank facility plan; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(14) COMPANY: INVISTA S.a.r.l.; DOCKET NUMBER: 2008-1609-AIR-E; IDENTIFIER: RN104392626; LOCATION: Orange, Orange County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §§101.20(1), 113.100, 113.120, 116.115(c), and 122.123(4), 40 CFR §§63.11(b)(6)(ii), 60.18(c)(3)(ii), 63.113(a)(1)(i), and 60.702(b), FOP Number O-01897, Special Terms and Conditions (STC) Numbers 1.A., 12, and 20, New Source Review (NSR) Permit Number 1302, SC Numbers 2(3) and 4.B., and THSC, §382.085(b), by failing to maintain the minimum net heating value of 200 British thermal units per standard cubic foot in the gas stream; PENALTY: $3,680; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(15) COMPANY: J. T. HEATH HOME & AUTO SUPPLY COMPANY dba H & H Grocery 1; DOCKET NUMBER: 2008-1781-PST-E; IDENTIFIER: RN102057577; LOCATION: Van Horn, Culberson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide release detection for the piping associated with the UST system; and 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors; PENALTY: $2,412; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(16) COMPANY: LEADING EDGE AVIATION SERVICES AMARILLO, INC.; DOCKET NUMBER: 2008-1459-AIR-E; IDENTIFIER: RN100611201; LOCATION: Amarillo, Potter County; TYPE OF FACILITY: aircraft painting plant; RULE VIOLATED: 30 TAC §116.115(c), NSR Permit Number 28896, SC Number 8, and THSC, §382.085(b), by failing to store all waste paint, solvents, and clean-up rags in closed containers until removed from the site; 30 TAC §116.115(c), NSR Permit Number 28896, SC Number 6E, and THSC, §382.085(b), by failing to ensure that the height of exhaust stacks comply with the permit; 30 TAC §116.115(c), NSR Permit Number 28896, SC Number 6E, and THSC, §382.085(b), by failing to ensure the exhaust stacks have no exhaust restrictions or obstructions; 30 TAC §116.115(b)(2)(E)(ii) and (c), NSR Permit Number 28896, General Condition Number 7, and SC Numbers 7B1 and B2, C, and D, and THSC, §382.085(b), by failing to maintain records at the plant; 30 TAC §116.115(c), NSR Permit Number 28896, SC Number 6B, 40 CFR §63.745(g)(2)(i)(A), and THSC, §382.085(b), by failing to equip each hangar with dry filters that meet the particular matter removal efficiency requirements of 40 CFR §63.745(g)(2)(i)(A); 40 CFR §63.9(b)(2) and §63.753(a)(1), and THSC, §382.085(b), by failing to submit initial notification for existing sources; 40 CFR §63.753(c)(1) and (2) and THSC, §382.085(b), by failing to submit semiannual reports stating compliance or listing noncompliances with applicable standards for control devices and annual reports listing the number of times the pressure drop for each dry filter was outside the limit(s); 40 CFR §63.745(g)(2)(iv) and THSC, §382.085(b), by failing to install differential pressure gauges across filter banks; 30 TAC §116.115(c), NSR Permit Number 28896, General Condition Number 7, SC Numbers 7A1 and 7B1, and THSC, §382.085(b), by failing to maintain information and data sufficient to demonstrate compliance with the permit; 30 TAC §116.116(b)(1) and THSC, §382.085(b), by failing to not vary from any representation when a change will cause a change in the method of control of emissions; and 30 TAC §116.115(b), NSR Permit Number 28896, General Condition Number 1., and THSC, §382.085(b), by failing to not vary from representations contained in a permit application; PENALTY: $26,750; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(17) COMPANY: Dale Risinger dba Loma Linda Water Supply; DOCKET NUMBER: 2008-1533-PWS-E; IDENTIFIER: RN105600639; LOCATION: Jim Wells County; TYPE OF FACILITY: public water system; RULE VIOLATED: 30 TAC §290.42(e)(3), by failing to provide disinfection equipment; and 30 TAC §290.39(e) and (m), by failing to provide notification to the commission of the startup of a new public water supply system and by failing to submit engineering plans; PENALTY: $600; ENFORCEMENT COORDINATOR: John Shelton, (512) 239-2563; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(18) COMPANY: MEMC Pasadena, Inc.; DOCKET NUMBER: 2008-1378-AIR-E; IDENTIFIER: RN101062099; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 9597, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(c) and THSC, §382.085(b), by failing to submit the final record; PENALTY: $9,639; SEP offset amount of $3,856 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(19) COMPANY: National Stations, Inc.; DOCKET NUMBER: 2008-1428-PST-E; IDENTIFIER: RN101792935; LOCATION: Plainview, Hale County; TYPE OF FACILITY: wholesale and retail sales of gasoline, liquid gas, and petroleum based products; RULE VIOLATED: 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs; 30 TAC §334.49(c)(2)(C) and the Code, §26.3475(d), by failing to inspect the impressed current cathodic protection system; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases; and 30 TAC §334.51(a)(6) and the Code, §26.3475(c)(2), by failing to ensure that all spill and overfill prevention devices are maintained in good operating condition; PENALTY: $6,756; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(20) COMPANY: City of New Summerfield; DOCKET NUMBER: 2008-1558-PWS-E; IDENTIFIER: RN102692621; LOCATION: New Summerfield, Cherokee County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(f)(2) and (3)(A)(iv) and (E)(iv), by failing to provide facility records to commission personnel at the time of the investigation; 30 TAC §290.41(c)(1)(F), by failing to provide a sanitary control easement; 30 TAC §290.110(c)(4)(B), by failing to monitor the disinfectant residual at representative locations throughout the distribution system; 30 TAC §290.45(b)(1)(D)(iii) and THSC, §341.0315(c), by failing to provide two or more service pumps having a total capacity of two gallons per minute per connection; 30 TAC §290.39(j)(1)(A) and THSC, §341.0351, by failing to notify the commission prior to making any significant change or addition where the change in the existing distribution system results in an increase or decrease in production, treatment, storage, or pressure maintenance capacity; 30 TAC §290.46(s)(1), by failing to calibrate two of the facility's well meters once every three years; and 30 TAC §290.109(c)(1)(B), by failing to collect routine distribution coliform samples; PENALTY: $2,492; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(21) COMPANY: NNY, Inc. dba A & I Food Store; DOCKET NUMBER: 2008-1592-PST-E; IDENTIFIER: RN101536431; LOCATION: Lancaster, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.244(1) and (3) and THSC, §382.085(b), by failing to conduct daily and monthly inspections of the Stage II vapor recovery system (VRS); 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training in the operation and maintenance of the Stage II VRS and each current employee receives in-house Stage II vapor recovery training; 30 TAC §115.246(1) and (3) and THSC, §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for inspection; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; 30 TAC §115.222(1) and THSC, §382.085(b), by failing to ensure that the submerged drop tubes have a maximum clearance of six inches from the bottom of the tank; 30 TAC §115.242(3)(A) and (J) and THSC, §382.085(b), by failing to maintain the Stage II VRS in proper operating condition; 30 TAC §334.7(d)(3), by failing to provide an amended UST registration; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to ensure that all USTs are monitored in a manner which will detect a release; 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide release detection for the piping associated with the USTs; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; 30 TAC §334.50(d)(1)(B)(iii)(I) and the Code, §26.3475(c)(1), by failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; 30 TAC §334.48(c), by failing to conduct effective manual or automatic control procedures for all USTs; 30 TAC §334.10(b), by failing to maintain the required UST records and make them immediately available for the inspection; and 30 TAC §334.51(a)(6) and the Code, §26.3475(c)(2), by failing to ensure that all spill and overfill prevention devices are maintained in good operating condition and that such devices are inspected and serviced in accordance with manufacturers' specifications; PENALTY: $15,570; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(22) COMPANY: Oxea Corporation; DOCKET NUMBER: 2008-1440-MLM-E; IDENTIFIER: RN105195655; LOCATION: Bay City, Matagorda County; TYPE OF FACILITY: organic chemical manufacturing plant; RULE VIOLATED: 30 TAC §335.221(a)(6), Industrial Hazardous Waste Permit Number 50398, and 40 CFR §266.102(e)(4), by failing to comply with the permitted hazardous waste feed rate for chromium of 21.0 grams per hour; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(23) COMPANY: Parkway Construction & Associates, LP; DOCKET NUMBER: 2009-0040-WQ-E; IDENTIFIER: RN105464630; LOCATION: Denton, Denton County; TYPE OF FACILITY: construction company; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(24) COMPANY: Nile J. Patterson, Jr.; DOCKET NUMBER: 2008-0953-PST-E; IDENTIFIER: RN101875342; LOCATION: Claude, Armstrong County; TYPE OF FACILITY: USTs; RULE VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, two USTs; PENALTY: $5,500; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(25) COMPANY: Jose Perales; DOCKET NUMBER: 2008-1482-PST-E; IDENTIFIER: RN104504204; LOCATION: Liberty, Liberty County; TYPE OF FACILITY: USTs; RULE VIOLATED: 30 TAC § 334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST; and 30 TAC §334.7(d)(3), by failing to provide an amended registration for any change or additional information regarding the USTs; PENALTY: $3,675; ENFORCEMENT COORDINATOR: Michael Pace, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(26) COMPANY: Rick Sage dba RCS Auto Recyclers; DOCKET NUMBER: 2009-0113-WQ-E; IDENTIFIER: RN103208633; LOCATION: Smith County; TYPE OF FACILITY: recycling; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a multi-sector general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(27) COMPANY: Se Young Corporation dba Family Mart; DOCKET NUMBER: 2008-1434-PST-E; IDENTIFIER: RN101564995; LOCATION: Arlington, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide proper release detection; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(a) and (c)(1), by failing to ensure that all tanks are monitored for releases; 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one facility representative receives training and instruction in the operation and maintenance of the Stage II VRS; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: $6,271; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(28) COMPANY: SHANE TRANSPORTATION, INC.; DOCKET NUMBER: 2008-1328-PST-E; IDENTIFIER: RN105359921; LOCATION: Orange County; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §115.221 and THSC, §382.085(b), by failing to control displaced vapors by a vapor control or a vapor balance system during the transfer of gasoline; 30 TAC §334.51(a)(3)(A) and the Code, §26.3475(c)(2), by failing to physically present at or near the fuel transfer point and have an unobstructed view of the fuel transfer point at all times during the fuel transfer operation; and 30 TAC §334.51(a), by failing to prevent an unauthorized discharge of gasoline; PENALTY: $4,100; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(29) COMPANY: Shell Chemical LP; DOCKET NUMBER: 2008-1456-AIR-E; IDENTIFIER: RN100209832; LOCATION: Houston, Harris County; TYPE OF FACILITY: pilot plant facility for oil and chemical studies; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(c), FOP Number O-01604, GTC, and THSC, §382.085(b), by failing to timely submit three deviation reports; PENALTY: $9,300; SEP offset amount of $3,720 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(30) COMPANY: Sidney Independent School District; DOCKET NUMBER: 2008-1430-PWS-E; IDENTIFIER: RN101283919; LOCATION: Comanche County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(e)(4)(A) and THSC, §341.033(a), by failing to operate the water system at all times under the direct supervision of a water works operator who holds a Class "D" or higher license; 30 TAC §290.46(f)(2) and (3)(A)(i)(III), by failing to make available and provide for commission review all of the public water system's operating records; 30 TAC §290.46(n)(2) and §290.121(a), by failing to maintain an up-to-date map of the distribution system and an up-to-date chemical and microbiological monitoring plan; 30 TAC §290.46(s)(1), by failing to calibrate the well meter at least once every three years; and 30 TAC §290.110(c)(4)(A), by failing to monitor the disinfectant residual in the distribution system at least once every seven days; PENALTY: $892; ENFORCEMENT COORDINATOR: Stephen Thompson, (512) 239-2558; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(31) COMPANY: Texas Petrochemicals LP; DOCKET NUMBER: 2008-1568-AIR-E; IDENTIFIER: RN104964267; LOCATION: Port Neches, Jefferson County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Air Permit Number 20485, SC Number 1, FOP Number O-01327, STC Number 15, and THSC, §382.085(b), by failing to prevent the unauthorized release of air contaminants into the atmosphere; PENALTY: $8,000; SEP offset amount of $3,200 applied to Texas Parent Teacher Association - *Clean School Bus Program*; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(32) COMPANY: Timber Lane Utility District; DOCKET NUMBER: 2008-1353-MWD-E; IDENTIFIER: RN102844909; LOCATION: Harris County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0011142002, Interim I Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permit effluent limits for ammonia nitrogen and flow; PENALTY: $10,250; SEP offset amount of $8,200 applied to Gulf Coast Waste Disposal Authority - River, Lakes, Bays 'N Bayous Trash Bash; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(33) COMPANY: Top New Wave, Inc. dba Riverside Shell; DOCKET NUMBER: 2008-1768-PST-E; IDENTIFIER: RN101547669; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.242(3)(A) and THSC, §382.085(b), by failing to maintain the Stage II VRS in proper operating condition; 30 TAC §115.244(1) and (3) and THSC, §382.085(b), by failing to conduct daily and monthly inspections of the Stage II VRS; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; and 30 TAC §115.248(2) and THSC, §382.085(b), by failing to ensure that at least one Station representative receives training and instruction in the operation and maintenance of the Stage II VRS; PENALTY: $9,692; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(34) COMPANY: TXI Operations, L.P.; DOCKET NUMBER: 2008-1547-AIR-E; IDENTIFIER: RN102171238; LOCATION: McKinney, Collin County; TYPE OF FACILITY: ready-mix concrete plant; RULE VIOLATED: 30 TAC §106.4(c) and THSC, §382.085(b), by failing to properly maintain all emission control equipment in good condition and operating properly; 30 TAC §106.201(3) and THSC, §382.085(b), by failing to pave all permanent in-plant roads with a cohesive hard surface that can be repeatedly swept, washed, and maintained intact and cleaned as necessary to achieve maximum control of dust emissions; and 30 TAC §106.8(c)(5) and THSC, §382.085(b), by failing to maintain records pertaining to the maintenance of abatement equipment; PENALTY: $2,900; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(35) COMPANY: University of Texas at El Paso; DOCKET NUMBER: 2008-1604-AIR-E; IDENTIFIER: RN100220359; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by failing to comply with the seven pounds per square inch absolute maximum Reid vapor pressure requirements for unleaded gasoline; PENALTY: $770; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(36) COMPANY: Ona Van Dorn; DOCKET NUMBER: 2008-1414-PST-E; IDENTIFIER: RN101815405; LOCATION: Oakville, Live Oak County; TYPE OF FACILITY: USTs; RULE VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system; PENALTY: $2,625; ENFORCEMENT COORDINATOR: Michael Pace, (817) 588-5800; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(37) COMPANY: Victron Stores, L.P. dba Tiger Mart 2; DOCKET NUMBER: 2008-1460-PST-E; IDENTIFIER: RN101569226; LOCATION: Cleburne, Johnson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.221 and THSC, §382.085(b), by failing to control displaced vapors by a vapor control or a vapor balance system; 30 TAC §§334.10(b), 334.50(e)(2)(C), and 334.51(b)(3)(D), by failing to maintain UST records and make them immediately available for inspection; 30 TAC §334.49(c)(2)(C) and the Code, §26.3475(d), by failing to inspect the impressed current cathodic protection system; and 30 TAC §334.45(c)(3)(A), by failing to install and maintain a secure anchor at the base of each Underwriters' Laboratories listed emergency shutoff valve in a piping system; PENALTY: $10,606; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(38) COMPANY: City of Whitesboro; DOCKET NUMBER: 2008-1673-MWD-E; IDENTIFIER: RN102796679; LOCATION: Whitesboro, Grayson County; TYPE OF FACILITY: wastewater treatment system; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010464001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for TSS and five-day carbonaceous biochemical oxygen demand; PENALTY: $5,160; SEP offset amount of $4,128 applied to Keep Texas Beautiful; ENFORCEMENT COORDINATOR: Evette Alvarado, (512) 239-2573; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200900404
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 3, 2009

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Enforcement Orders

An agreed order was entered regarding David Hughitt dba Hughitt Tire Disposal, Docket No. 2003-0081-MSW-E on January 16, 2009 assessing $6,930 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ballpark Mart, Inc. dba Ballpark Mart, Docket No. 2003-1244-PST-E on January 16, 2009 assessing $3,920 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Cox, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MZEE, Inc. dba Key Truck Stop, Docket No. 2004-0285-PST-E on January 16, 2009 assessing $5,775 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney at (512) 239-2053, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ricardo Aguero dba Aguero's Trucking, Docket No. 2004-0706-MSW-E on January 16, 2009 assessing $27,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding RFK Enterprises, Inc. dba Food Spot 2, Docket No. 2005-0613-PST-E on January 16, 2009 assessing $4,950 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney at (512) 239-2053, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Robert Durham dba A & A Auto Parts and Rebuilders, Docket No. 2006-0506-WQ-E on January 16, 2009 assessing $2,040 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gary Shiu, Staff Attorney at (713) 422-8916, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dung Thanh Nguyen dba VIP Cleaners, Docket No. 2006-1083-DCL-E on January 16, 2009 assessing $656 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Shali Enterprises, Inc. dba US Cleaners, Docket No. 2006-1215-DCL-E on January 16, 2009 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Peipey Tang, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Shali Enterprises, Inc. dba US Cleaners, Docket No. 2006-1234-DCL-E on January 16, 2009 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Peipey Tang, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Mohammed K. Ali dba Sunnys Food Store, Docket No. 2006-1518-PST-E on January 16, 2009 assessing $8,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Saif Malik Enterprises, Inc. dba Step N Go, Docket No. 2006-1569-PST-E on January 16, 2009 assessing $3,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Nel-Mark Properties, LLC dba Anjalo Food Mart, Docket No. 2007-0942-PST-E on January 16, 2009 assessing $14,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Cox, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Premcor Refining Group Inc., Docket No. 2007-1455-AIR-E on January 16, 2009 assessing $14,641 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Raymond Marlow, Enforcement Coordinator at (409) 899-8785, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Johnny Gore, Docket No. 2007-1601-MLM-E on January 16, 2009 assessing $13,580 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Oloko, Staff Attorney at (713) 422-8918, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Pulak Barua dba Sunshine Food Mart, Docket No. 2007-1842-PST-E on January 16, 2009 assessing $217,775 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin Thompson, Staff Attorney at (512) 239-0600, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default and shutdown order was entered regarding Steven Switzer dba Our C Store 502, Docket No. 2007-1907-PST-E on January 16, 2009 assessing $18,125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin Thompson, Staff Attorney at (512) 239-0600,

Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Monarch Utilities I L.P., Docket No. 2008-0047-PWS-E on January 16, 2009 assessing $2,100 in administrative penalties with $420 deferred.

Information concerning any aspect of this order may be obtained by contacting Richard Croston, Enforcement Coordinator at (512) 239-5717, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dirgin Water Supply Corporation, Docket No. 2008-0125-MLM-E on January 16, 2009 assessing $27,557 in administrative penalties with $23,957 deferred.

Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding River City Waste, Inc., Docket No. 2008-0146-MLM-E on January 16, 2009 assessing $3,787 in administrative penalties with $757 deferred.

Information concerning any aspect of this order may be obtained by contacting Mike Meyer, Enforcement Coordinator at (512) 239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Wendland Manufacturing Corp., Docket No. 2008-0572-MLM-E on January 16, 2009 assessing $6,420 in administrative penalties with $1,248 deferred.

Information concerning any aspect of this order may be obtained by contacting Mike Meyer, Enforcement Coordinator at (512) 239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GREENSPOINT ENTERPRISES LLC dba Courtesy Chevron 6, Docket No. 2008-0590-PST-E on January 16, 2009 assessing $6,869 in administrative penalties with $1,373 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jantje Van Gosliga dba Vango Dairy, Docket No. 2008-0627-AGR-E on January 16, 2009 assessing $9,575 in administrative penalties with $1,915 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Huntsman Petrochemical Corporation, Docket No. 2008-0664-AIR-E on January 16, 2009 assessing $49,728 in administrative penalties with $9,945 deferred.

Information concerning any aspect of this order may be obtained by contacting Raymond Marlow, Enforcement Coordinator at (409) 899-8785, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chemical Lime, Ltd., Docket No. 2008-0696-AIR-E on January 16, 2009 assessing $1,050 in administrative penalties with $210 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Kingsville, Docket No. 2008-0697-MSW-E on January 16, 2009 assessing $12,540 in administrative penalties with $2,508 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ramon Martinez, Jr. Docket No. 2008-0744-PST-E on January 16, 2009 assessing $5,250 in administrative penalties with $4,050 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Lopez, Enforcement Coordinator at (512) 239-1896, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Darryl Wheeler dba Magnolia Lake RV Park, Docket No. 2008-0748-PWS-E on January 16, 2009 assessing $2,335 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Pflugerville, Docket No. 2008-0749-MWD-E on January 16, 2009 assessing $10,300 in administrative penalties with $2,060 deferred.

Information concerning any aspect of this order may be obtained by contacting Pam Campbell, Enforcement Coordinator at (512) 239-4493, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Javier De La O dba J De La O Electric, Docket No. 2008-0811-PST-E on January 16, 2009 assessing $10,450 in administrative penalties with $2,090 deferred.

Information concerning any aspect of this order may be obtained by contacting Craig Fleming, Enforcement Coordinator at (512) 239-5806, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TXI Operations, LP, Docket No. 2008-0813-IWD-E on January 16, 2009 assessing $3,566 in administrative penalties with $713 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (254) 761-3048, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LAMBERTI USA, INCORPORATED, Docket No. 2008-0839-IWD-E on January 16, 2009 assessing $80,507 in administrative penalties with $16,101 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at (512) 239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding JARODIYA & SONS LLC. dba D&S Food Mart, Docket No. 2008-0840-PST-E on January 16, 2009 assessing $9,794 in administrative penalties with $1,958 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Anas Ahmad dba Mobil Discount Inspection and Brakes, Docket No. 2008-0845-PST-E on January 16, 2009 assessing $12,401 in administrative penalties with $2,480 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Fleetwood Travel Trailers of Texas, Inc., Docket No. 2008-0858-AIR-E on January 16, 2009 assessing $10,250 in administrative penalties with $2,050 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Clovercreek Municipal Utility District, Docket No. 2008-0861-MWD-E on January 16, 2009 assessing $2,700 in administrative penalties with $540 deferred.

Information concerning any aspect of this order may be obtained by contacting Steve Villatoro, Enforcement Coordinator at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Exxon Mobil Corporation, Docket No. 2008-0872-AIR-E on January 16, 2009 assessing $47,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Race 4 Time, Inc., Docket No. 2008-0887-SLG-E on January 16, 2009 assessing $6,000 in administrative penalties with $1,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (254) 761-3048, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Department of Transportation, Docket No. 2008-0902-MWD-E on January 16, 2009 assessing $10,345 in administrative penalties with $2,069 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas A&M University, Docket No. 2008-0903-AIR-E on January 16, 2009 assessing $4,375 in administrative penalties with $875 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding EHAN, Inc. dba Metro Mart 5, Docket No. 2008-0907-PST-E on January 16, 2009 assessing $5,350 in administrative penalties with $1,070 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding FOCUS METROPLEX, INC. dba City Star, Docket No. 2008-0908-PST-E on January 16, 2009 assessing $5,400 in administrative penalties with $1,080 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Mount Pleasant, Docket No. 2008-0924-MWD-E on January 16, 2009 assessing $9,500 in administrative penalties with $1,900 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CCAA, L.L.C. dba BCS Stop & Go Potties, Docket No. 2008-0925-MSW-E on January 16, 2009 assessing $3,477 in administrative penalties with $695 deferred.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding RAJWANI & ALI'S CORPORATION dba K & W Corner Store, Docket No. 2008-0950-PST-E on January 16, 2009 assessing $3,150 in administrative penalties with $630 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Citgo Products Pipeline Company, Docket No. 2008-0963-AIR-E on January 16, 2009 assessing $2,675 in administrative penalties with $535 deferred.

Information concerning any aspect of this order may be obtained by contacting Raymond Marlow, Enforcement Coordinator at (409) 899-8785, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jack Vanover and Rhonda Vanover dba Casey Homes Estates Public Water Supply, Docket No. 2008-0966-PWS-E on January 16, 2009 assessing $1,850 in administrative penalties with $370 deferred.

Information concerning any aspect of this order may be obtained by contacting Stephen Thompson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Block Creek Concrete Products, L.L.C., Docket No. 2008-0980-AIR-E on January 16, 2009 assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Salvation Army, Docket No. 2008-0984-MWD-E on January 16, 2009 assessing $4,085 in administrative penalties with $817 deferred.

Information concerning any aspect of this order may be obtained by contacting Steve Villatoro, Enforcement Coordinator at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Atrium Companies, Inc. dba Danvid Window, Docket No. 2008-0994-AIR-E on January 16, 2009 assessing $770 in administrative penalties with $154 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sabina Petrochemicals LLC, Docket No. 2008-1021-AIR-E on January 16, 2009 assessing $5,150 in administrative penalties with $1,030 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ameron International Corporation, Docket No. 2008-1056-AIR-E on January 16, 2009 assessing $19,500 in administrative penalties with $3,900 deferred.

Information concerning any aspect of this order may be obtained by contacting Bryan Elliott, Enforcement Coordinator at (512) 239-6162, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Flint Hills Resources, LP, Docket No. 2008-1066-AIR-E on January 16, 2009 assessing $27,100 in administrative penalties with $5,420 deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding National Oilwell Varco, L.P., Docket No. 2008-1084-AIR-E on January 16, 2009 assessing $1,140 in administrative penalties with $228 deferred.

Information concerning any aspect of this order may be obtained by contacting Kirk Schoppe, Enforcement Coordinator at (512) 239-0489, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Standley Feed & Seed, Inc., Docket No. 2008-1091-WQ-E on January 16, 2009 assessing $7,500 in administrative penalties with $1,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Mark Oliver, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ADDISON ENTERPRISES, INC. dba C Store Royal, Docket No. 2008-1101-PST-E on January 16, 2009 assessing $5,821 in administrative penalties with $1,164 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Greimel, Enforcement Coordinator at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding James Lewis Allen dba Holiday Springs Mobil Home Park, Docket No. 2008-1131-PWS-E on January 16, 2009 assessing $356 in administrative penalties with $71 deferred.

Information concerning any aspect of this order may be obtained by contacting Stephen Thompson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jeff Hamm, Docket No. 2008-1139-LII-E on January 16, 2009 assessing $986 in administrative penalties with $197 deferred.

Information concerning any aspect of this order may be obtained by contacting Lanae Foard, Enforcement Coordinator at (512) 239-2554, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Oldcastle Windows, Inc. dba Vistawall, Docket No. 2008-1168-AIR-E on January 16, 2009 assessing $770 in administrative penalties with $154 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ALBERTSON'S LLC dba Albertsons Express 4209, Docket No. 2008-1200-PST-E on January 16, 2009 assessing $6,375 in administrative penalties with $1,275 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Lopez, Enforcement Coordinator at (512) 239-1896, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Cresson, Docket No. 2008-1203-PWS-E on January 16, 2009 assessing $3,165 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Richard Croston, Enforcement Coordinator at (512) 239-5717, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ant Enterprises Incorporated, Docket No. 2008-1216-AIR-E on January 16, 2009 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Flying Star Transport, L.L.C., Docket No. 2008-1242-MSW-E on January 16, 2009 assessing $1,200 in administrative penalties with $240 deferred.

Information concerning any aspect of this order may be obtained by contacting Ross Fife, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Stop N Shine, Inc., Docket No. 2008-1244-PST-E on January 16, 2009 assessing $8,955 in administrative penalties with $1,791 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Lopez, Enforcement Coordinator at (512) 239-1896, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Dow Chemical Company, Docket No. 2008-1248-AIR-E on January 16, 2009 assessing $6,725 in administrative penalties with $1,345 deferred.

Information concerning any aspect of this order may be obtained by contacting Bryan Elliott, Enforcement Coordinator at (512) 239-6162, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ross Construction, Inc., Docket No. 2008-1290-WQ-E on January 16, 2009 assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting Lanae Foard, Enforcement Coordinator at (512) 239-2554, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Goodyear Tire & Rubber Company, Docket No. 2008-1379-AIR-E on January 16, 2009 assessing $6,175 in administrative penalties with $1,235 deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Kendrick Oil Company, Docket No. 2008-1530-PST-E on January 16, 2009 assessing $875 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Flat Rock Minerals, LLC, Docket No. 2008-1579-WQ-E on January 16, 2009 assessing $700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Larry Smith, Docket No. 2008-1582-WQ-E on January 16, 2009 assessing $700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200900436
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 4, 2009

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Executive Director's Response to Public Comment on Texas Commission on Environmental Quality General Permit Number TXG530000

The executive director of the Texas Commission on Environmental Quality (commission or TCEQ) files this Response to Public Comment on Texas Pollutant Discharge Elimination System Permit Number TXG530000. As required by Texas Water Code (TWC), §26.040(d) and 30 Texas Administrative Code (TAC) §205.3(e), before a general permit is issued, the executive director must prepare a response to all timely, relevant and material, or significant comments. The response must be made available to the public and filed with the Office of the Chief Clerk at least ten days before the commission considers the approval of the general permit. This response addresses all timely received public comments, whether or not withdrawn. No comments were received.

BACKGROUND

Introduction

The TCEQ adopted a general permit that authorizes discharges from on-site wastewater treatment systems from single family residences located within the San Jacinto River Basin in Harris County in the State of Texas that will expire five years from the date of its issuance. The executive director now proposes, with the reissuance and amendment of this proposed general permit, to continue to authorize these eligible discharges under TCEQ General Permit Number TXG530000. Consistent with 30 TAC §205.2, issuance of this permit is allowable, since the on-site wastewater treatment systems that serve qualifying residences would be similarly operated and discharge the same or similar type of waste. The general permit, if issued, would establish the same operating conditions and similar monitoring requirements for these facilities. These types of discharges are more appropriately regulated under a general permit based upon the requirements of 30 TAC §205.2(a)(5), insomuch as the TCEQ can readily enforce the general permit and can monitor compliance of the terms of the permit. The permit would establish monitoring, record keeping, and reporting requirements.

Procedural Background

The Office of the Chief Clerk received the permit file on February 22, 2008. In accordance with 30 TAC §205.3(a)(2), the Notice of Proposed Amendment of General Permit Authorizing the Discharge of Wastewater was published in the *Texas Register* on March 7, 2008 (33 TexReg 2062), and in the *Houston Chronicle* on March 3, 2008. Mailed notice was also provided in accordance with 30 TAC §205.3(b). The comment period ended on April 7, 2008. No comments were received.

TRD-200900406
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 3, 2009

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Notice of District Petition

Notice issued January 16, 2009

TCEQ Internal Control No. 09252008-D02; Lancaster Municipal Utility District No. 1 filed a petition with the Texas Commission on Environmental Quality (TCEQ) for the annexation of 107.760 and 109.711 acres under Chapter 54 of the Texas Water Code and the procedural rules of the TCEQ. The petition states the following: (1) Gary J. Baker and Deborra L. Baker hold title to the Property (the proposed annexation area) and are owners of a majority in value of the land to be included in the District; (2) the Property contains approximately 217.471 acres located in Hood County, Texas; and (4) the Property is within the extraterritorial jurisdiction of the City of Lancaster (City), within Dallas County and partially within Ellis County. Pursuant to Texas Water Code §54.016 and §42.0425, the District petitioned the City for consent to include the Property into the District. Pursuant to Resolution No. 2008-03-23 dated March 10, 2008, the City denied the request to consent to the addition of the Property. On June 6, 2008, the Property Owners submitted to the City a Petition for Water and Wastewater Service, which was denied by Resolution No. 2008-07-63. Pursuant to

Texas Water Code §54.016(d), the Petitioners then filed an application with the Commission for annexation of the Property into the District.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing;" (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en Español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200900435
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 4, 2009

♦ ♦ ♦

Notice of Intent to Perform Removal Action at the Process Instrumentation and Electrical (PIE) Proposed State Superfund Site, in Odessa, Ector County, Texas

The executive director of the Texas Commission on Environmental Quality (TCEQ or commission) hereby issues public notice of intent to perform a removal action, as provided by Texas Health and Safety Code (THSC), §361.133, for the Process Instrumentation and Electrical (PIE) proposed state Superfund site (the site). The site, including all land, structures, appurtenances, and other improvements, is approximately one acre located at the northwest corner of Andrews Highway (Highway 385) and 48th Street adjacent to the City of Odessa, Ector County, Texas. The site also includes any areas where hazardous substances have come to be located as a result, either directly or indirectly, of releases of hazardous substances from the site.

The facility proposed for listing is located within the Oil, Gas and Construction, Inc. property and consists of a cinder block building where a chrome plating shop once operated. The site description may change as additional information is gathered on the sources and extent of contamination.

The site is located in a light commercial/residential area adjacent to the Odessa city limits. It is believed a chrome plating shop operated on the site between 1953 and 1962. The site is currently inactive. Chromium was detected in nearby wells above the United States Environmental Protection Agency (EPA) National Primary Drinking Water Regulations Maximum Contaminant Level (MCL) of 100 parts per billion (ppb). The volatile organic compounds 1,2-dichloroethane (1,2-DCA) and tetrachloroethene (PCE) were also detected above their MCLs of 5 ppb in some wells. Most residences are connected to city water; however, the TCEQ installed filtration systems and began monitoring contaminant concentrations on a regular basis in some residences that use private groundwater wells. To date, the TCEQ continues to monitor the groundwater contaminant plumes and maintain the filtration systems. The removal action will consist of connecting the residences whose drinking water wells have levels of 1,2-DCA, PCE and/or Chromium above the MCLs to a municipal drinking water source.

The site is proposed for listing under THSC, Chapter 361, Subchapter F. Providing an alternate drinking water source to the residences is an integral strategy to protect human health as well as beneficial for the future remediation and restoration of the contaminated groundwater. A removal can be completed without extensive investigation and planning and will achieve a significant cost reduction for the site.

A portion of the record for this site, including documents pertinent to the executive director's determination of eligibility, is available for review at the Ector County Public Library, 321 West 5th Street, Odessa, Texas, (432) 332-0633, during regular business hours. Copies of the complete public record file may be obtained during regular business hours at the commission's Records Management Center, Building E, First Floor, Records Customer Service, 12100 Park 35 Circle, Austin, Texas 78753, (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee. Parking for persons with disabilities is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

For further information, please contact Jeffrey E. Patterson, TCEQ Project Manager, Remediation Division, at (512) 239-2489 or Kelly Peavler, TCEQ Community Relations Liaison at (512) 239-1352 or (800) 633-9363.

TRD-200900407
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 3, 2009

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Notice of Opportunity to Request a Public Meeting for a New Municipal Solid Waste Transfer Station Registration Application

APPLICATION. Starr County, 100 North FM 3167, Suite 202, Rio Grande City, Texas, 78582, has applied to the Texas Commission on Environmental Quality (TCEQ) for proposed Registration No. 40238, to construct and operate a Type V municipal solid waste transfer station. The proposed facility, Starr County Transfer Station will be located north of Ruben Salmon Road, 0.4 miles west of the intersection of Old Charco-Blanco Road, in Starr County. This facility is requesting authorization to transfer municipal solid waste which includes municipal solid waste from citizens and commercial enterprises within Starr County and surrounding areas. The registration application is available for viewing and copying at the TCEQ Region 15 Office, 1804 West

Jefferson Avenue, Harlingen, Texas 78550-5247 and may be viewed online at http://www.rkci.com/pages/services_envio_permits.aspx .

PUBLIC COMMENT/PUBLIC MEETING. Written public comments or written requests for a public meeting must be submitted to the Office of Chief Clerk at the address included in the information section below. Comments may also be received if a public meeting is held on the facility. A public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the development is to be located, or if there is a substantial public interest in the proposed development. The purpose of the public meeting is for the public to provide input for consideration by the commission, and for the applicant and the commission staff to provide information to the public. A public meeting is not a contested case hearing. The executive director will review and consider public comments and written requests for a public meeting submitted prior to the notice of final determination. The executive director is not required to file a response to comments.

EXECUTIVE DIRECTOR ACTION. The executive director shall, after review of an application for registration, determine if the application will be approved or denied in whole or in part. If the executive director acts on an application, the chief clerk shall mail or otherwise transmit notice of the action and an explanation of the opportunity to file a motion to reconsider the executive director's decision. The chief clerk shall mail this notice to the owner and operator, the public interest counsel, to adjacent landowners as shown on the required land ownership map and landowners list, and to other persons who timely filed public comment in response to public notice. Not all persons on the mailing list for this notice will receive the notice letter from the Office of the Chief Clerk.

INFORMATION. Written public comments or requests to be placed on the permanent mailing list for this application should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-30887 or electronically submitted to http://www5.tceq.state.tx.us/rules/ecomments/. Individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Further information may also be obtained from Starr County at the address stated above or by calling Mr. Eduardo D. Choquis, P.E., Associate, Raba-Kistner Consultants, Inc. at (713) 996-8990.

TRD-200900432
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 4, 2009

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Notice of Receipt of Application and Intent to Obtain a Municipal Solid Waste Permit Amendment

Permit No. 2325A

APPLICATION. Abilene Environmental Landfill Inc., 1150 Estates Drive, Suite D, Abilene, Jones County, Texas 79602, has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to request the suspension of groundwater monitoring at the Abilene Environmental Landfill. The facility is located on FM 3034, 1.5 miles north of Abilene, approximately 500 feet east of US Highway 277. The TCEQ received the application on October 1, 2008. The permit application is available for viewing and copying at the Jones County Clerk's Office, 12th Street and Commercial, Anson, Texas 79501.

ADDITIONAL NOTICE. TCEQ's Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant's name and permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; and, the statement "[I/we] request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose. Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

The Commission will only grant a contested case hearing on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised in timely filed comments that were not subsequently withdrawn.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s)

and send your request to TCEQ Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION. All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically at www.tceq.state.tx.us/about/comments.html. If you need more information about this permit application or the permitting process, please call TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. Si desea información en Español, puede llamar al 1-800-687-4040. General information about TCEQ can be found at our web site at www.tceq.state.tx.us. Further information may also be obtained from Abilene Environmental Landfill Inc. at the address stated above or by calling Mr. James Lawrence, P.G., SCS Engineers at (817) 571-2288.

TRD-200900433

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: February 4, 2009

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Notice of Water Quality Applications

The following notices were issued during the period of December 18, 2008 through January 29, 2009.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ) has initiated a minor modification of the Texas Pollutant Discharge Elimination System (TPDES) permit WQ0010397005 issued to the Brownsville Public Utility Board, to incorporate a substantial modification to the approved pretreatment program. The Applicant has applied to the TCEQ for approval of a substantial modification to its approved pretreatment program under the TPDES program. The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 10,000,000 gallons per day. The facility is located adjacent to and east of Robindale Road approximately half mile north of the intersection of Robindale Road and Farm-to-Market Road 802 in Cameron County, Texas.

ACTION MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0014211001, 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 on the west bank of McCarty Branch, approximately 2.6 miles south of the intersection of U.S. Highway 377 and Farm-to-Market Road 167 in Hood County, Texas.

STAFFORD MOBILE HOME PARK INC. has applied for a renewal of TPDES Permit No. WQ0014064001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day. The facility is located on Stafford Run Creek, approximately 3800 feet northeast of the intersection of Farm-to-Market Road 1092 and 5th Street in Fort Bend County, Texas.

NEAL AND FM548-1076 (Mann 1100) LLLP has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit proposed TPDES Permit No. WQ0014858001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,120,000 gallons per day. The applicant first applied for a discharge of 1,280,000 gallons per day but subsequently requested 1,120,000 gallons per day. The facility will be located 2400 feet southwest of the intersection of County Road 233 and Farm-to-Market Road 548 in Kaufman County, Texas.

BLACKSHER DEVELOPMENT CORPORATION has applied for a renewal of TPDES Permit No. WQ0013691001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The facility is located approximately 3,900 feet northwest of the intersection of State Highway 87 with State Highway 62 and approximately 260 feet west of State Highway 62 in Orange County, Texas.

AQUA DEVELOPMENT INC. has applied for a renewal of TPDES Permit No. WQ0014219001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility will be located approximately 3,250 feet northwest of the intersection of Old Needville-Fairchilds Road and Jeske Road in Fort Bend County, Texas.

BELL COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO 1 has applied for a renewal of TPDES Permit No. WQ0010351003, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 6,000,000 gallons per day. The facility is located on the west side of Farm-to-Market Road 2410 (a.k.a. 38th Street) and approximately 0.2 mile north of the intersection of U.S. Highway 190 (Business) and Farm-to-Market Road 2410 in the City of Killeen in Bell County, Texas.

SYNAGRO OF TEXAS CDR INC. has applied for a renewal of Permit No. WQ0004507000, which authorizes the land application of sewage sludge for beneficial use. The current permit authorizes land application of sewage sludge for beneficial use on 171.5 acres. The land application site is located approximately 3/4 mile west of the intersection of County Road 2171 and County Road 2172, south of the City of Whitehouse in Smith County, Texas.

CITY OF KERMIT has applied to the TCEQ for a new permit, Proposed Permit No. WQ0010200002, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 850,000 gallons per day via surface irrigation of 225 acres of non-public access pastureland. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 1.5 miles southeast of the intersection of State Highway 115 and State Highway 302 in Winkler County, Texas.

LA JOYA INDEPENDENT SCHOOL DISTRICT has applied to the TCEQ for a new permit, Proposed Permit No. WQ0013523012, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 9,000 gallons per day via non-public access subsurface low pressure dosing drainfields on a 4.3-acre site. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site will be located on the west side of North Doffing Road (Farm-to-Market Road 492), approximately 3,500 feet north of the intersection of Farm-to-Market Road 492 and Farm-to-Market Road 2221, northeast of Citrus City, Texas in Hidalgo County, Texas.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200900431

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 4, 2009

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Notice of Water Rights Applications

Notice issued January 27, 2009

APPLICATION NO. 06-4411G; The City of Lufkin, Applicant, P.O. Drawer 190, 300 E. Shepherd, Lufkin, TX 75902, has applied to amend their portion of Certificate of Adjudication No. 06-4411 to authorize the diversion of water from any point on the perimeter of Lake Sam Rayburn and to add Angelina County as a place of use. More information on the application and how to participate in the permitting process is given below. The application and a portion of the required fees were received on July 1, 2008. Additional information and fees were received on October 30, 2008. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on December 3, 2008. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "I/we request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200900434

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 4, 2009

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Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800 or (800) 325-8506.

Deadline: 30-Day Pre-election Report due October 6, 2008

Brent Sheets, Career Colleges & Schools of Texas, P.O. Box 11539, Austin, Texas 78711-1539

Deadline: 8-Day Pre-election Report due October 27, 2008

Christopher G. Lane, 8025 Ohio Dr., Apt. 14101, Plano, Texas 75024

Todd A. Litteken, 1036 Bannack Dr., Arlington, Texas 76001

Michael Shultz, Consolidated Communications PAC, Inc. - Texas, 350 S. Loop 336 West, Conroe, Texas 77304-3308

Deadline: Monthly Report due December 5, 2008

James O. Marston, Texas League of Conservation Voters Political Committee, 44 E. Ave., Ste. 202, Austin, Texas 78701

TRD-200900420
David Reisman
Executive Director
Texas Ethics Commission
Filed: February 3, 2009

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Department of State Health Services

Correction of Error

The Department of State Health Services adopted new 25 TAC §289.256, concerning medical and veterinary use of radioactive material, in the January 9, 2009, issue of the *Texas Register* (34 TexReg 206). The new rule replaced old §289.256, which was repealed in the same issue. The new rule took effect January 18, 2009.

Two rule references to "(jj)(3)(B)(vii)" on page 219 are incorrect. The correct reference is "(jj)(1)(C)(ii)(VII)".

Concerning new §289.256(ff)(2)(B), page 219, column 1, the first part of subparagraph (B) should read "a physician who is an authorized user and who meets the requirements specified in subsections (jj) or (nn) and (jj)(1)(C)(ii)(VII) of this section,..."

Concerning new §289.256(hh)(2)(B), page 219, column 2, the first part of subparagraph (B) should read "a physician who is an authorized user and who meets the requirements specified in subsections (jj) or (nn) and (jj)(1)(C)(ii)(VII) of this section,..."

TRD-200900402

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Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Plano	Plano Wellness Clinic	L06207	Plano	00	01/14/09
Throughout Tx	Kakivik Asset Management L.L.C.	L06211	Nederland	00	01/21/09

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Alice	Adcock Pipe and Supply Inc.	L05491	Alice	04	01/20/09
Angleton	Isotherapeutics Group L.L.C.	L05969	Angleton	09	01/26/09
Arlington	Dallas Cardiology Associates P.A. dba Heart Place of Arlington	L05855	Arlington	03	01/21/09
Austin	Daughters of Charity Health Svcs. of Austin dba University Medical Ctr. at Brackenridge	L00268	Austin	102	01/06/09
Austin	Texas Oncology P.A. dba South Austin Cancer Center	L05108	Austin	19	01/22/09
Austin	Daughters of Charity Health Svcs. of Austin dba Seton Medical Center Austin	L02896	Austin	100	01/26/09
Austin	Daughters of Charity Health Svcs. of Austin dba University Medical Ctr. at Brackenridge	L00268	Austin	103	01/23/09
Beaumont	BASF Corporation	L02016	Beaumont	29	01/26/09
Burnet	Daughters of Charity Health Services of Austin dba Seton Highland Lakes	L03515	Burnet	36	01/16/09
Conroe	River Pointe Heart and Vascular Center	L05728	Conroe	07	01/29/09
Corpus Christi	Thomas Spann Clinic P.A.	L05733	Corpus Christi	04	01/22/09
Cypress	Houston Interventional Cardiology P.A.	L05470	Cypress	06	01/16/09
Cypress	North Cypress Med. Ctr. Operating Co. L.L.C.	L06020	Cypress	12	01/27/09
Dallas	The University of Texas Southwestern Medical Center at Dallas	L00384	Dallas	100	01/15/09
Dallas	Medi Physics Inc. dba G.E. Healthcare	L05529	Dallas	22	01/23/09
Dallas	Baylor University Medical Center	L01290	Dallas	92	01/28/09
Denton	Columbia Medical Ctr. of Denton Subsidiary L.P. dba Denton Regional Medical Center	L02764	Denton	64	01/29/09
Dumas	Memorial Hospital	L03540	Dumas	22	01/29/09
Edinburg	Doctors Hospital at Renaissance Ltd. dba Doctors Hospital at Renaissance	L05761	Edinburg	19	01/23/09
El Paso	The University of Texas at El Paso Radiation Safety Office	L00159	El Paso	58	01/20/09
El Paso	Tenet Hospitals Limited dba Sierra Medical Center	L04758	El Paso	24	01/20/09
Fort Worth	Baylor All Saints Medical Center	L02212	Fort Worth	81	01/12/09
Fort Worth	Baylor All Saints Medical Center dba Baylor Medical Center at S.W. Fort Worth	L04105	Fort Worth	29	01/12/09
Fort Worth	University of North Texas Health Science Ctr. dba UNT Health	L06123	Fort Worth	03	01/14/09
Fort Worth	Freese and Nichols Inc.	L04301	Fort Worth	18	01/26/09
Fort Worth	Harris Methodist Fort Worth	L01837	Fort Worth	115	01/28/09
Gainesville	Gainesville Hospital District dba North Texas Medical Center	L02585	Gainesville	31	01/12/09
Houston	Leachman Cardiology Associates P.A.	L05229	Houston	10	01/20/09
Houston	Diagnostic Nuclear Imaging	L05769	Houston	04	01/14/09

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	M. Basith Baig M.D. P.A.	L05666	Houston	04	01/14/09
Houston	U.T. Physicians	L05465	Houston	06	01/22/09
Houston	East Texas Cardiology P.A.	L06058	Houston	02	01/22/09
Houston	Harris County Hospital District dba LBJ General Hospital	L04412	Houston	38	01/26/09
Houston	Medi Physics Inc. dba G.E. Healthcare	L05517	Houston	16	01/27/09
Houston	Cardinal Health	L05536	Houston	23	01/23/09
Houston	Doctors Hospital 1997 L.P. dba Doctors Hospital Parkway	L01964	Houston	50	01/28/09
Humble	Memorial Hermann Hospital Systems dba Memorial Hermann Northeast	L02412	Humble	74	01/26/09
Irving	Abbott Laboratories	L04841	Irving	11	01/22/09
Kingsville	Christus Spohn Health System dba Christus Spohn Hospital Kleberg	L02917	Kingsville	45	01/26/09
Laredo	Laredo Texas Hospital Company L.P. dba Laredo Medical Center	L01306	Laredo	66	01/23/09
Lubbock	Rosa of the South Plains L.L.P. dba Rosa of the South Plains	L05484	Lubbock	13	01/22/09
Lubbock	Cardiac Diagnostic Center	L05506	Lubbock	03	01/21/09
Mexia	Parkview Regional Hospital Nuclear Medicine Department	L05144	Mexia	23	01/30/09
Midland	Tracer-Tech Services	L05375	Midland	09	01/20/09
Odessa	Ector County Hospital District dba Medical Center Hospital	L01223	Odessa	89	01/23/09
Port Arthur	The Medical Center of Southeast Texas L.P.	L01707	Port Arthur	68	01/16/09
Port Lavaca	Memorial Medical Center in Calhoun County	L04685	Port Lavaca	09	01/26/09
San Antonio	University of Texas Health Science Center at San Antonio Edinburg; Regional Academic Health Center Environmental Health and Safety Dept.	L06029	San Antonio	02	01/21/09
San Antonio	South Texas Radiology Imaging Centers	L00325	San Antonio	170	01/20/09
San Antonio	The University of Texas Health Science Center at San Antonio	L01279	San Antonio	118	01/23/09
San Antonio	Jawad Zar Shaikh M.D.	L06019	San Antonio	02	01/29/09
San Antonio	VHS San Antonio Partners L.L.C. dba Baptist Health System	L00455	San Antonio	182	01/26/09
Sherman	Texas Oncology P.A. dba North Texas PET Imaging	L05502	Sherman	13	01/26/09
Stafford	Burzynski Research Institute Inc.	L02948	Stafford	24	01/15/09
Stephenville	Tarleton State University	L05612	Stephenville	06	01/29/09
Sugarland	Memorial Hermann Healthcare System dba Memorial Hermann Sugarland Hospital	L03457	Sugarland	33	01/20/09
Throughout Tx	City of Abilene Neighborhood Services	L05459	Abilene	07	01/15/09
Throughout Tx	Enprotec/Hibbs & Todd Inc. dba Geotec Labs	L04266	Abilene	17	01/15/09
Throughout Tx	Eagle NDT L.L.C.	L06176	Abilene	06	01/26/09
Throughout Tx	Desert Industrial X-Ray L.P.	L04590	Abilene	93	01/29/09
Throughout Tx	Team Industrial Services Inc.	L00087	Alvin	199	01/28/09
Throughout Tx	Global X-Ray and Testing Corporation	L03663	Aransas Pass	109	01/27/09
Throughout Tx	Phoenix Non Destructive Testing Company	L04454	Channelview	57	01/27/09
Throughout Tx	NDE Solutions L.L.C.	L05879	College Station	20	01/27/09
Throughout Tx	Guardian Industries Corporation	L05213	Corsicana	06	01/26/09
Throughout Tx	Geotel Engineering Inc.	L05674	Dallas	04	01/20/09
Throughout Tx	Irisndt Inc.	L04769	Deer Park	67	01/27/09
Throughout Tx	Integrity Testing and Inspection Inc.	L06027	El Paso	05	01/16/09

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout Tx	Waggoner and Associates Inc. dba Waggoner-Texas and Associates Inc.	L06159	Flint	06	01/26/09
Throughout Tx	Fugro Consultants Inc.	L05843	Fort Worth	06	01/22/09
Throughout Tx	Freese and Nichols Inc.	L04301	Fort Worth	18	01/26/09
Throughout Tx	Wood Group Logging Services Inc.	L05262	Houston	32	01/20/09
Throughout Tx	Goolsby Testing Laboratories Inc.	L03115	Humble	94	01/27/09
Throughout Tx	Marco Inspection Services L.L.C.	L06072	Kilgore	19	01/26/09
Throughout Tx	Master Industries Inc.	L05872	Liberty	21	01/22/09
Throughout Tx	Enertech Wireline Services L.P.	L05738	Midland	14	01/21/09
Throughout Tx	Turner Specialty Services L.L.C.	L05417	Nederland	35	01/15/09
Throughout Tx	Fugro Consultants L.P.	L04322	Pasadena	96	01/27/09
Throughout Tx	Fugro Consultants Inc.	L04322	Pasadena	97	01/28/09
Throughout Tx	Conam Inspection and Engineering Inc.	L05010	Pasadena	162	01/26/09
Throughout Tx	Petrochem Inspection Services Inc.	L04460	Pasadena	95	01/26/09
Throughout Tx	Arias and Associates Inc.	L04964	San Antonio	32	01/16/09
Throughout Tx	GCT Inspection Inc.	L02378	South Houston	103	01/26/09
Throughout Tx	Schlumberger Technology Corporation	L01833	Sugarland	151	01/15/09
Throughout Tx	Schlumberger Technology Corporation	L00109	Sugarland	56	01/20/09
Throughout Tx	Ludlum Measurements Inc.	L01963	Sweetwater	83	01/20/09
Throughout Tx	Kleinfelder Central Inc.	L01351	Waco	64	01/23/09
Tyler	The University of Texas Health Center at Tyler	L01796	Tyler	65	01/21/09
Tyler	Trinity Mother Frances Health System	L01670	Tyler	143	01/26/09
Webster	Bay Area Heart Center	L05444	Webster	06	01/22/09

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Interventional Cardiology Associates	L05294	Houston	11	01/20/09
Jourdanton	San Miguel Electric Cooperative Inc.	L02347	Jourdanton	27	01/20/09
Pasadena	Cardiovascular Center P.A.	L04345	Pasadena	14	01/16/09
Throughout Tx	AECOM Technical Services Inc.	L05449	Brooks City-Base	07	01/22/09
Throughout Tx	Enercon Services Inc.	L05447	Dallas	08	01/28/09
Throughout Tx	Newpark Mats and Integrated Services L.L.C.	L04708	The Woodlands	18	01/15/09

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Bellaire	Mammography and Ultrasound Specialists dba Ultrasound Specialists	L05926	Bellaire	02	01/27/09
Dallas	Laboratory Corporation of America	L01716	Dallas	24	01/26/09
San Antonio	San Antonio College	L00745	San Antonio	21	01/16/09
Throughout Tx	Performance Irrigation	L06037	El Dorado	01	01/14/09
Throughout Tx	RJR Engineering Ltd. L.L.P.	L05416	Houston	06	01/15/09

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of 25 Texas Administrative Code (TAC) Chapter 289, regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC, Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county,

in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing - MC 2835, P.O. Box 149347, Austin, Texas 78714-9347. For information call (512) 834-6688.

TRD-200900411
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: February 3, 2009

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Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by FIRST NON-PROFIT INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Chicago, IL.

Application to change the name of INTERSTATE INDEMNITY COMPANY to AGCS MARINE INSURANCE COMPANY, a foreign fire and casualty company. The home office is in Chicago, IL.

Application to change the name of MID-CONTINENT INSURANCE COMPANY to MID-CONTINENT ASSURANCE COMPANY, a foreign fire and casualty company. The home office is in Tulsa, OK.

Application for admission to the State of Texas by MIDWEST BUILDERS' CASUALTY MUTUAL COMPANY, a foreign fire and casualty company. The home office is in Lenexa, KS.

Application for admission to the State of Texas by SUNSHINE STATE INSURANCE COMPANY, a foreign fire and casualty company. The home office is in St. Augustine, FL.

Application to change the name of PRESIDENTIAL LIFE INSURANCE COMPANY to GREAT SOUTHWEST LIFE INSURANCE COMPANY, a domestic life company. The home office is in Dallas, TX.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200900429
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 4, 2009

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Notice of Public Hearing

The Commissioner of Insurance will hold a public hearing under Docket No. 2704 to consider proposed new and amended rules, forms, rates, and endorsements, and other matters related to mineral coverage as addressed in the Department's proposal to amend SUBCHAPTER A Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas, by adding 28 TAC §9.40 that has been submitted to the *Texas Register* for publication on February 13, 2009. The hearing will begin at 9:30 a.m., in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, on April 23, 2009, and continue thereafter at dates, times, and places designated by the Commissioner until conclusion.

This notice is made pursuant to the Texas Insurance Code §2703.207. For additional information interested parties may contact Robert Carter, Deputy Commissioner for Title Insurance, Texas Department of Insurance, Mail Code 106-2T, P.O. Box 149104, Austin, Texas 78714-9104 or call at (512) 322-3482.

Copies of all matters to be considered for adoption may be obtained from the Department's website or on request from the Office of the Chief Clerk. Please submit your request to:

Office of the Chief Clerk

Texas Department of Insurance (Mail Code 113-2A)

P.O. Box 149104

Austin, Texas 78714-9104

TRD-200900430
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 4, 2009

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application of AMERICAN INSURANCE ADMINISTRATORS, LLC (using the assumed name of INSURANCE ADMINISTRATIVE SERVICES, LLC), a foreign third party administrator. The home office is DOVER, DELAWARE.

Application of PROFESSIONAL BROKERAGE CONSULTANTS, INC., (using the assumed names of AMERICAN ADMINISTRATORS and SELECT BENEFIT ADMINISTRATORS), a foreign third party administrator. The home office is KIRON, IOWA.

Application of ENVISION PHARMACEUTICAL SERVICES, INC., a foreign third party administrator. The home office is AURORA, OHIO.

Application of PROVIDENCE WASHINGTON INSURANCE SOLUTIONS, LLC., a foreign third party administrator. The home office is PROVIDENCE, RHODE ISLAND.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of David Moskowitz, MC 305-2E, 333 Guadalupe, Austin, Texas 78701.

TRD-200900440
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 4, 2009

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Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on January 22, 2009, amended by a filing on January 27, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Windjammer Communications, LLC for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 36629 before the Public Utility Commission of Texas.

The requested amended CFA service area excludes the service area of Clay County.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36629.

TRD-200900373
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 30, 2009

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on January 28, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Southwestern Bell Telephone Company d/b/a AT&T Texas for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 36648 before the Public Utility Commission of Texas.

The requested amended CFA service area includes municipalities and/or unincorporated areas in and around Midland/Odessa, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 36648.

TRD-200900414
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 3, 2009

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Notice of Application for Designation as an Eligible Telecommunications Carrier

Notice is given to the public of a petition filed with the Public Utility Commission of Texas on January 28, 2009, for designation as an eligible telecommunications carrier in the state of Texas for the limited purpose of offering Lifeline and Link Up Service to qualified households, pursuant to Substantive Rule §26.418.

Docket Title and Number: Petition of TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the state of Texas for the Limited Purpose of Offering Lifeline and Link Up Service to Qualified Households. Docket Number 36646.

The Application: TracFone Wireless, Inc. seeks ETC designation solely to provide Lifeline and Link Up service to qualifying Texas consumers. TracFone Wireless, Inc. has provided commercial mobile radio service throughout the state of Texas for the past 10 years. TracFone Wireless, Inc. seeks ETC designation in the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by March 5, 2009. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477. All comments should reference Docket Number 36646.

TRD-200900375
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 30, 2009

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Notice of Application for Retail Electric Provider (REP) Certification

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on January 27, 2009, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Hudson Energy JV, LLC for Retail Electric Provider (REP) Certification, Docket Number 36644 before the Public Utility Commission of Texas.

Applicant's requested service area by geography includes the entire state of Texas.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than February 20, 2009. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936- 7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36644.

TRD-200900374
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 30, 2009

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Notice of Application for Service Area Exception within Blanco County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on February 2, 2009, for an amendment to certificated service area for a service area exception within Blanco County, Texas.

Docket Style and Number: Application of Central Texas Electric Cooperative, Inc. to Amend a Certificate of Convenience and Necessity for Electric Service Area Exception within Blanco County. Docket Number 36660.

The Application: Central Texas Electric Cooperative, Inc. (CTEC) filed an application for a service area boundary exception to allow CTEC to provide service to a specific customer located within the certificated service area of Pedernales Electric Cooperative, Inc. (PEC). PEC has provided a letter of concurrence for the proposed change.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than February 20, 2009 by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936- 7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 36660.

TRD-200900419
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 3, 2009

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Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line in Childress County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on January 28, 2009, to amend a certificate of convenience and necessity for a proposed transmission line in Childress County, Texas.

Docket Style and Number: Application of AEP Texas North Company to amend a Certificate of Convenience and Necessity (CCN) for a 69/138-kV Transmission Line in Childress County, Texas. Docket Number 36463.

The Application: The application of AEP Texas North Company (TNC) for a proposed 69/138-kV transmission line is designated as the Brazos Electric Cooperative, Inc. Henry Substation to AEP TNC West Childress Substation Transmission Line Project. This application is the first of two transmission line segments in a project developed to serve a new Brazos Electric requested transmission point of delivery (POD) for service to its new Henry Substation that provides distribution service to South Plains Electric Cooperative. The miles of right-of-way for this project will be approximately 0.81 miles to 1.7 miles depending on route approved. The estimated date to energize facilities is December 31, 2009.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is March 16, 2009. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735- 2989. All comments should reference Docket Number 36463.

TRD-200900415
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 3, 2009

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Notice of Application to Amend Designation as an Eligible Telecommunications Carrier

Notice is given to the public of an application filed with the Public Utility Commission of Texas on January 26, 2009, for an amendment to its designation as an eligible telecommunications carrier (ETC) pursuant to P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of CT Cube, L.P. d/b/a West Central Wireless and d/b/a Right Wireless to Amend its Designation as an Eligible Telecommunications Carrier. Docket Number 36641.

The Application: The company is requesting to amend its ETC designation to include certain wire centers within the non-rural telephone company service area of Verizon Southwest.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by February 18, 2009. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477. All comments should reference Docket Number 36641.

TRD-200900358
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 29, 2009

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Notice of Application to Amend Designation as an Eligible Telecommunications Carrier

Notice is given to the public of an application filed with the Public Utility Commission of Texas on January 26, 2009, for an amendment to its designation as an eligible telecommunications carrier (ETC) pursuant to P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of CGKC&H #2 Rural Limited Partnership d/b/a West Central Wireless and d/b/a Right Wireless to Amend its Designation as an Eligible Telecommunications Carrier. Docket Number 36642.

The Application: The company is requesting to amend its ETC designation to include certain wire centers within the non-rural telephone company service area of Verizon Southwest.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by February 18, 2009. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477. All comments should reference Docket Number 36642.

TRD-200900359
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 29, 2009

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Notice of Application to Relinquish a Service Provider Certificate of Operating Authority

On January 28, 2009, Looking Glass Networks, Inc. filed an application with the Public Utility Commission of Texas (commission) to relinquish its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60372 in favor of a merger with its parent company, Level 3 Communications, Inc., holding SPCOA Certificate Number 60232.

The Application: Application of Looking Glass Networks, Inc. to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 36647.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than February 19, 2009. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 36647.

TRD-200900417
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 3, 2009

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Notice of Joint Petition for Declaratory Order

Notice is given to the public of a petition for declaratory order with the Public Utility Commission of Texas on January 29, 2009.

Docket Style and Number: Joint Petition for Declaratory Order of Oncor Electric Delivery Company LLC and United Electric Cooperative Services Regarding Service to Burleson Independent School District High School Number 2, Docket Number 36649.

The Application: Oncor Electric Delivery Company LLC (Oncor) and United Electric Cooperative Services (United) filed with the Public Utility Commission of Texas (commission) a joint petition for declaratory order concerning the provision of retail electric delivery service to Burleson Independent School District (Burleson ISD) at the Main Building of its High School Number 2.

The issue presented for the commission is whether United is authorized to provide retail electric delivery service to the Main Building, which will straddle a certification boundary line. Burleson ISD requested United to provide retail electric service to the Main Building. Oncor's position it that United may not lawfully provide retail electric delivery service to the entirety of the Main Building because only a portion of the Main Building will be within United's dual certificated service area while the majority of the building is within Oncor's single certificated area.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the Commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing-and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 36649.

TRD-200900418
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 3, 2009

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Texas Residential Construction Commission

Notice of Applications for Designation as a "Texas Star Builder"

The commission adopted rules regarding the procedures for designation as a "Texas Star Builder" at 10 TAC §303.300. The rules were adopted pursuant to §416.011, Property Code (Act effective September 1, 2003), which provides that the commission shall establish rules and procedures through which a builder can be designated as a "Texas Star Builder." The commission rules for application for designation can be found on the commission's website at www.trcc.state.tx.us.

10 TAC §303.300(i)(2) requires the commission to publish in the *Texas Register* notice of the application of each person seeking to become designated as a "Texas Star Builder" registered under this subchapter. The commission will accept public comment on each application for twenty-one (21) days after the date of publication of the notice. Information provided in response to this notice will be utilized in evaluating the applicants for approval. The Texas Star Builder designation requires that a builder or remodeler demonstrate that its education, experience and commitment to professionalism sets the builder or remodeler apart from its peers and offers some assurance to its customers that its quality of service and construction will be above average.

Pursuant to 10 TAC §303.300(i)(2) the commission hereby notices the application(s) for designation as a "Texas Star Builder" of:

Dallas Reconstruction LLC, 3432 Winged Foot CT, Dallas, TX 75229. Dallas Reconstruction LLC hold TRCC builder registration #1578518707. The applicant's registered agent is James Hill.

Casa Sereno Homes LLC, 13276 Research Blvd, #203, Austin, TX 78750. Casa Sereno Homes LLC holds TRCC builder registration #27156. The applicant's registered agent is John Chatham.

Interested persons may send written comments regarding this application to Susan K. Durso, General Counsel, The Texas Residential Construction Commission, P.O. Box 13509, Austin, TX 78711-3144. Comments regarding this application will be accepted for twenty-one days following the date of publication of this notice in the *Texas Register*. Thereafter, the comments will not be considered as timely filed.

TRD-200900422
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Filed: February 4, 2009

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Texas Department of Transportation

Public Hearing Notice - Statewide Transportation Improvement Program

The Texas Department of Transportation (department) will hold a public hearing on Tuesday, February 24, 2009, at 10:00 a.m. at the Texas Department of Transportation, 200 East Riverside Drive, Room 1A-2, Austin, Texas to receive public comments on the February 2009 Revisions to the Statewide Transportation Improvement Program (STIP) for FY 2008-2011. The STIP reflects the federally funded transportation projects in the FY 2008-2011 Transportation Improvement Pro-

grams (TIPs) for each Metropolitan Planning Organization (MPO) in the state. The STIP includes both state and federally funded projects for the nonattainment areas of Beaumont, Dallas-Fort Worth, El Paso, and Houston. The STIP also contains information on federally funded projects in rural areas that are not included in any MPO area, and other statewide programs as listed.

Title 23, United States Code, §134 and §135 require each designated MPO and the state, respectively, to develop a TIP as a condition to securing federal funds for transportation projects under Title 23 or the Federal Transit Act (49 USC §5301, et seq.).

Section 134(j) requires an MPO to develop its TIP in cooperation with the state and affected transportation operators, to provide an opportunity for interested parties to participate in the development of the program, and further requires the TIP to be updated at least once every four years and approved by the MPO and the Governor or Governor's designee. Section 135(g) requires the state to develop a STIP for all areas of the state in cooperation with the designated MPOs and, with respect to non-metropolitan areas, in consultation with affected local officials, and further requires an opportunity for participation by interested parties as well as approval by the Governor or the Governor's designee.

In accordance with 43 TAC §15.8(d), a copy of the proposed February 2009 Revisions to the FY 2008-2011 STIP will be available for review, at the time the notice of hearing is published, at each of the department's district offices, at the department's Transportation Planning and Programming Division offices located in Building 118, Second Floor, 118 East Riverside Drive, Austin, Texas, and on the department's website at:

www.txdot.gov

Persons wishing to review the February 2009 Revisions to the FY 2008-2011 STIP may do so online or contact the Transportation Planning and Programming Division at (512) 486-5033.

Persons wishing to speak at the hearing may register in advance by notifying Lori Morel, Transportation Planning and Programming Division, at (512) 486-5033 not later than Monday, February 23, 2009, or they may register at the hearing location beginning at 9:00 a.m. on the day of the hearing. Speakers will be taken in the order registered. Any interested person may appear and offer comments or testimony, either orally or in writing; however, questioning of witnesses will be reserved exclusively to the presiding authority as may be necessary to ensure a complete record. While any persons with pertinent comments or testimony will be granted an opportunity to present them during the course of the hearing, the presiding authority reserves the right to restrict testimony in terms of time or repetitive content. Groups, organizations, or associations should be represented by only one speaker. Speakers are requested to refrain from repeating previously presented testimony. Persons with disabilities who have special communication or accommodation needs or who plan to attend the hearing may contact the Government and Public Affairs Division, at 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-9957. Requests should be made no later than three days prior to the hearing. Every reasonable effort will be made to accommodate the needs.

Further information on the FY 2008-2011 STIP may be obtained from Lori Morel, Transportation Planning and Programming Division, 118 East Riverside Drive, Austin, Texas, 78704, (512) 486-5033. Interested parties who are unable to attend the hearing may submit comments to James L. Randall, P.E., Director, Transportation Planning and Programming Division, 118 East Riverside Drive, Austin, Texas, 78704. In order to be considered, all written comments must be received at the Transportation Planning and Programming office by Monday, March 30, 2009 at 4:00 p.m.

TRD-200900439
Leonard Reese
Associate General Counsel
Texas Department of Transportation
Filed: February 4, 2009

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 33 (2008) is cited
as follows: 33 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "33 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 33 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).