

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 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 3. BOLL WEEVIL ERADICATION PROGRAM

SUBCHAPTER K. MAINTENANCE PROGRAM

4 TAC §3.704

The Texas Department of Agriculture (the Department) adopts amendments to §3.704, concerning the West Texas Maintenance Area - Collection of Maintenance Fees, without changes to the proposed text as published in the December 11, 2015, issue of the *Texas Register* (40 TexReg 8850). The amendments are adopted upon the request and recommendation of the Texas Boll Weevil Eradication Foundation and clarify the process for collection of fees on cotton produced in the West Texas Maintenance area.

No comments were received on the proposal.

The amendments are adopted in accordance with the Texas Agriculture Code, §74.203, which provides the Department with the authority to adopt rules to impose a maintenance fee on all cotton grown or on all cotton acres in a maintenance area.

The code that is affected by the adoption is Texas Agriculture Code, Chapter 74.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Proposal publication date: December 11, 2015

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CHAPTER 30. COMMUNITY DEVELOPMENT SUBCHAPTER A. TEXAS COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM

The Texas Department of Agriculture (Department or TDA) adopts amendments to §§30.1, 30.3, 30.7, 30.21, 30.23, 30.24, 30.26, 30.29, 30.52 - 30.54, 30.58, 30.63, 30.64, 30.81, 30.82, 30.84, 30.101, and 30.102; and new §30.65 and §30.66 without changes to the proposed text as published in the December 11, 2015, issue of the *Texas Register* (40 TexReg 8851). The Department adopts the retitle of Chapter 30, Subchapter A to "Texas Community Development Block Grant Program" to reflect the accurate name of the program. The adopted amendments and new rules are to clarify existing rules, to clarify the Department's legal and regulatory authority to administer the program and to eliminate obsolete requirements to ensure a process that is more amenable for applicants, and to add two additional programs that have not been implemented under the Texas Community Development Block Grant (TxCDBG) Program, as administered by the Department.

TDA received one written comment from Langford Community Management Services. The response suggested a substantive change to §30.82, relating to disqualification of an administrator, which would require additional public comment. TDA intends to consider these suggestions through a rule revision at a future date, and will adopt the rule without changes.

DIVISION 1. GENERAL PROVISIONS

4 TAC §§30.1, 30.3, 30.7

The amendments are adopted under Texas Government Code §487.051, which provides the Department authority to administer the state's community development block grant non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the adoption is Texas Government Code Chapter 487.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 2. APPLICATION INFORMATION

4 TAC §§30.21, 30.23, 30.24, 30.26, 30.29

The amendments are adopted under Texas Government Code §487.051, which provides the Department authority to administer the state's community development block grant non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the adoption is Texas Government Code Chapter 487.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 3. ADMINISTRATION OF PROGRAM FUNDS

4 TAC §§30.52 - 30.54, 30.58, 30.63 - 30.66

The amendments and new sections are adopted under Texas Government Code §487.051, which provides the Department authority to administer the state's community development block grant non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the adoption is Texas Government Code Chapter 487.

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DIVISION 4. AWARDS AND CONTRACT ADMINISTRATION

4 TAC §§30.81, 30.82, 30.84

The amendments are adopted under Texas Government Code §487.051, which provides the Department authority to administer

the state's community development block grant non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the adoption is Texas Government Code Chapter 487.

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DIVISION 5. REALLOCATION OF PROGRAM FUNDS

4 TAC §30.101, §30.102

The amendments are adopted under Texas Government Code §487.051, which provides the Department authority to administer the state's community development block grant non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the adoption is Texas Government Code Chapter 487.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 10. COMMUNITY DEVELOPMENT

PART 5. OFFICE OF THE GOVERNOR, ECONOMIC DEVELOPMENT AND TOURISM OFFICE

CHAPTER 190. GOVERNOR'S UNIVERSITY RESEARCH INITIATIVE GRANT PROGRAM

The Office of the Governor, Economic Development and Tourism Office (OOG) adopts new rules in 10 TAC §§190.1 - 190.8,

190.10 - 190.14, 190.20 - 190.29, 190.30 - 190.38, 190.40 - 190.53 and 190.55 - 190.58, relating to the establishment and administration of the Governor's University Research Initiative (GURI) under Chapter 62 of the Texas Education Code.

Some of the new rules are adopted with changes to the proposed text as published in the November 6, 2015, issue of the *Texas Register* (40 TexReg 7758) and they will be republished. The rules adopted with changes are §§190.1, 190.7, 190.21 and 190.34.

Some of the new rules are adopted without changes to the proposed text as published in the November 6, 2015, issue of the *Texas Register* (40 TexReg 7758) and they will not be republished. The rules adopted without changes are §§190.2 - 190.6, 190.8, 190.10 - 190.14, 190.20, 190.22 - 190.29, 190.30 - 190.33, 190.35 - 190.38, 190.40 - 190.53 and 190.55 - 190.58.

Basis for the Rules

The purpose of the rules as adopted is to implement and administer the GURI grant program as enacted by Senate Bill 632, House Bills 7 and 26 during the 84th Legislature, Regular Session to facilitate the recruitment of distinguished researchers to eligible Texas universities. The rules will implement Subchapter H of Chapter 62, Texas Education Code. The grant program will be administered by the Economic Development and Tourism Office within the Office of the Governor. The basis of the rules is to establish the processes and procedures necessary to govern the grant program and to ensure the state grant funds are spent in an efficient and effective manner.

Comments

The OOG received public comments on the proposed rules from various the system offices of the University of Texas, Texas Tech University, and the University of Houston. Some comments were general in nature, while others addressed concerns or questions about specific rule sections. The general comments are addressed as follows:

Comment: One commenter states that the rules, as a general matter, propose a more bureaucratic and complex regulatory scheme than is necessary given the goal of the GURI program to recruit distinguished researchers to public institutions. The commenter suggests that the application, award process, and reporting requirements should be simplified. The commenter suggests that the sole goal of the GURI grant program is to recruit distinguished researchers and hence milestones or other targets relating to research or other economic elements are not appropriate.

Response: The OOG agrees that the objective of the GURI grant program is to assist eligible institutions in recruiting distinguished researchers, but disagrees with the general comment that the application, award process and reporting requirements are too burdensome or unnecessary. The proposed rules offer additional direction in areas where applicable statute was silent while also holding the grantor and the grantee accountable to ensure that awards of grant funds are transparent and take into consideration the award priorities established by law, and that state funds are spent properly.

Comment: One commenter states that the rules, as a general matter, treat the GURI grant program as "research grants" akin to other economic development grants administered by the OOG and consequently the rules impose too many restrictions on the grant application, award process and reporting requirements. The commenter also suggests that the product of the research to be obtained by the distinguished researcher is irrelevant. The

commenter suggests that the GURI grants should be treated simply as "recruitment grants" and hence the rules should focus solely on whether the researcher was recruited. Another commenter requests clarification of the performance measures to be associated with grant awards.

Response: The OOG agrees that the objective of the GURI grant program is to assist eligible institutions in recruiting distinguished researchers. Section 62.163(a), Education Code (SB 632 and HB 26), and §62.162(b)(HB 7), Education Code specifically state that GURI grants are made for the purpose "to assist eligible institutions in recruiting distinguished researchers." For the purposes of GURI grant awards, the grant "project" is the effort to recruit an identified distinguished researcher. However, the law specifically provides that the OOG "shall" give priority to applications "that demonstrate a reasonable likelihood of contributing substantially to this state's national and global economic competitiveness,"(Section 62.164, Education Code, SB 632 and HB 26), and applications that (1) demonstrate a reasonable probability of enhancing Texas' national and global economic competitiveness; (2) demonstrate a reasonable probability of creating a nationally or internationally recognized locus of research superiority or a unique locus of research; (3) are matched with a significant amount of funding from a federal or private source that may be transferred to the eligible institution; (4) are interdisciplinary and collaborative; or (5) include a strategic plan for intellectual property development and commercialization of technology." §62.164(a)(1)-(5), Education Code (HB 7). Consistent with these statutory provisions, these matters are relevant in the grant evaluation and award process. While the OOG is obligated to consider these priorities in making grant award determinations, these priorities will not be established as project goals or performance measures to be evaluated or monitored throughout the grant term once a grant award has been made.

In addition to these general comments, the responses to comments received on various individual rule sections are addressed as follows:

Comments on Subchapter A, Definitions and General Provisions, 10 TAC §§190.1 - 190.8

Comments on §190.1, Definitions.

Comment: One commenter suggests the OOG should define "equivalent honor" or "equivalent honorific organization," in the broadest possible terms to enable, to the extent possible, the use of GURI to recruit promising, "rising star" researchers who may not have yet attained National Academy or Nobel status but whose abilities and honors can reasonably be considered equivalent. In the absence of a clear definition, applicant institutions may unknowingly submit proposals that do not demonstrate that the researcher meets the eligibility requirements, as required by §190.21(2), or fail to pursue recruitment of a promising researcher whose recruitment would be eligible. Similarly, the commenter suggests that a GURI-funded recruitment package could be structured to provide a bonus if a researcher attains academy membership or Nobel status or to provide an incentive for an up and coming researcher to attain that membership or status.

Response: The OOG, disagrees and declines to further define an "equivalent honor" or "equivalent organization" in the rules. The determination of an "equivalent honor" or "equivalent organization" will be determined on a case-by-case basis, which will allow the OOG the opportunity to consider the facts as then presented with each grant application. The OOG will remain

available to assist eligible institutions during the grant application process and invites institutions to consult with our office prior to submitting a grant application for assistance in determining whether a particular honor will qualify as an eligible "equivalent honor" or "equivalent organization."

Comment: One commenter notes that the proper former name for the National Academy of Medicine is "Institute of Medicine."

Response: The OOG agrees the proper former name for the National Academy of Medicine is the "Institute of Medicine" and will modify the §190.1 accordingly. This change is also consistent with §62.161(1)(B), Education Code (SB 632 and HB 26) or §62.161(2)(B), Education Code (HB 7).

Comments on §190.3, Construction of Rules.

Comment: One commenter suggests that if the OOG Chief of Staff or a designee has the ability to "waive any provision" of the rules based solely on a finding that the waiver serves the public interest, the waiver is ambiguous and gives too much authority in a single individual. The commenter states that any exceptions to the rules should be the subject of a future rulemaking process.

Response: The OOG disagrees. It is not uncommon for an agency to provide for the limited authority to grant a waiver to an administrative rule if doing so will serve the public interest and comply with applicable law.

Comments on §190.6, Funding Levels and Withholding of Funds.

Comment: One commenter suggests that the absence from the rules of a minimum or maximum grant funding level creates ambiguity for the institutions applying, and that even if the grant application specifies a minimum and maximum grant award amount, it is still ambiguous because it may mean that the applicant is to propose a range of funding or it may mean that the OOG will prescribe the minimum and maximum amount for which an institution may apply.

Response: The OOG declines to set a specific minimum or maximum amount of grant award in the administrative rules. The amount of funding available will depend upon the amount of biennial appropriations authorized by the legislature and other available funding as it may become available. The OOG intends that the grant application will clearly state the maximum amount of commitment that an eligible institution may propose for grant match at the time of application, and consequently the applicant will know the available funding before it files an application. The OOG will remain available to assist eligible institutions in answering any further questions regarding funding levels during the grant application process.

Comment: One commenter suggests that the OOG is exceeding its statutory authority in determining funding levels. The commenter cites §62.163(a), Education Code (HB 7) ("the office shall award to the applicant institution a grant amount equal to the amount committed by the institution.") and §62.163(c), Education Code (HB 7) ("After fully funding approved grant applications. . .") for the proposition that the OOG has no discretion to set any limit on the maximum amount of an award.

Response: The OOG disagrees. The OOG will comply with §62.163 of the Education Code by awarding grants to eligible institutions in an amount equal to the grant match amount committed by the institution for the recruitment of a distinguished researcher. The proposed rule complies with this statutory mandate because the OOG has broad authority to adopt adminis-

trative rules necessary to administer the GURI program, and in doing so, the OOG will place a maximum cap on the amount of commitment that an eligible institution may propose for grant match. Placing caps on the amount of grant match commitment is necessary to administer the program because an unlimited commitment amount could allow the GURI fund to be exhausted by a single grant applicant, which would defeat the overall purposes of the program.

Comment: Another commenter encourages the OOG to establish a maximum limit on each award amount that would apply to all institutions, given the limited funds available. Such a limit would allow more institutions to participate in the program. The limit could be adjusted from fiscal year to fiscal year as funds are available, and published on the GURI website.

Response: The OOG agrees that a maximum limit on each award should apply. The OOG agrees that flexibility is needed depending upon available funding and will provide that information in the application. The grant application will state the maximum amount of commitment that an eligible institution may propose for grant match at the time of application.

Comment: One commenter states the authority of the OOG to withhold grant funds for failure to attain program or project goals raises several questions. The commenter suggests that GURI grants are for the single, specific, purpose of recruitment of a distinguished researcher by the applicant institution, and hence any reference to a "program," "project," or "goals" is confusing. The commenter states that the notion of recruitment as the single goal of the program is reinforced by §62.165, Education Code (HB 7), which provides for the confidentiality of information relating to distinguished researchers who are the subject of a GURI grant application.

Response: The OOG agrees that the purpose of the GURI grant program is to recruit distinguished researchers to Texas institutions. Section 62.163(a), Education Code (SB 632 and HB 26) and §62.162(b), Education Code (HB 7) specifically state that GURI grants are made for the purpose "to assist eligible institutions in recruiting distinguished researchers." For the purposes of §190.6, the grant "program" or "project goals" refers to the effort to recruit an identified distinguished researcher. However, GURI grant awards will include controls to ensure that grant funds are expended only for the authorized purposes of the GURI program. For example, failure to achieve the recruitment of a distinguished researcher could result in the withholding or possibly the return of grant funds. Statutory provisions concerning the confidentiality of the identity of a particular distinguished researcher who is the subject of a grant proposal has no correlation to the types of financial controls that may be implemented with respect to the expenditure of grant funds.

Comments on §190.7, Match

Comment: One commenter suggests that if the OOG's determination of the amount of the grant determines the amount of the required match, this methodology is the inverse of the statutory design which provides that the match amount committed by the institution determines the amount of the grant from the OOG.

Response: As stated in the response to comments on §190.6, the OOG will comply with §62.163 of the Education Code by awarding grants to eligible institutions in an amount equal to the grant match amount committed by the institution for the recruitment of a distinguished researcher, however the statute only requires the OOG to award a grant in the amount committed by

the institution if the OOG approves a grant application. The proposed rule complies with this statutory mandate because the OOG has broad authority to adopt administrative rules necessary to administer the GURI program, and in doing so, the OOG will place a maximum cap on the amount of commitment that an eligible institution may propose for grant match. Placing caps on the amount of grant match commitment is necessary to administer the program because an unlimited commitment amount could allow the GURI fund to be exhausted by a single grant applicant, which would defeat the overall purposes of the program.

Comment: With regard to the statutory prohibition against the use of appropriated general revenue as grant match, one commenter encourages the OOG to include examples of other types of funding available to institutions that the OOG will recognize for match purposes, as well as identifying funding sources that the OOG would consider ineligible for use as matching funds. Commenters suggest, in general, that the OOG should expand the list of allowable cost categories for which grant funds may be awarded in order to allow eligible institutions to more easily meet the grant match requirement. In the alternative, these commenters suggest that the OOG should provide a broad list of approved costs that the OOG would consider eligible to meet the match requirement, even if those same cost-types would not be allowed as direct cost categories in the grant award.

Response: The OOG declines to provide an exhaustive list of eligible match funding sources in the rules, as a such list may prove impracticable in administering individual grant awards. However, due to general comments questioning the eligibility of various cost categories to meet the match requirement, the OOG will revise the adopted rule to clarify that cash or in-kind contributions may be acceptable forms of match. In addition, the rule will be clarified to state that GURI grants may not be used as a source of funding to support the match requirement for any other grant obtained by the institution.

Comments on §190.8, Compliance with Other Standards.

Comment: Two commenters suggest that compliance with the Uniform Grant Management Standards (UGMS) and the Texas Contract Management Guide is burdensome. One commenter suggests the relevant standards should be those of major federal research sponsors such as the National Institutes of Health (NIH) or the National Science Foundation (NSF). Two commenters note that institutions of higher education are not governed by the State Contract Management Guide adopted under Chapter 2262, Government Code, but rather are required by §51.9337, Education Code, to adopt a contract management handbook specific to the institution and urge the OOG to not use the State Contract Management Guide for the grant agreements.

Comment: One commenter suggested that the federal rules applicable to NIH or NSF awards would allow eligible institutions to use grant funds for more types of expenses related to recruitment efforts than either the UGMS or the proposed rules currently permit. Another commenter suggested since the UGMS requires matching funds meet the same allowability criteria as grant funds and as salaries are not allowable on GURI grant funds (except for the one-time salary payment), then salaries would also not be allowable on matching funds, the OOG should not use the UGMS.

Response: The UGMS were established to promote the efficient use of public funds by providing awarding agencies and grantees with a standardized set of financial management procedures and definitions, by requiring consistency among grantor agencies in

their dealings with grantees, and by ensuring accountability for the expenditure of public funds. State agencies, including the OOG, are required by Chapter 783 of the Government Code to adhere to these standards when administering grants and other financial assistance agreements. The UGMS states that while the UGMS standards do not specifically apply to colleges and universities, "to further consistency and accountability, some state agencies have applied these standard by rule or contract to all their subrecipients." Since GURI is funded with state funds, the OOG, as a state entity, will comply with the UGMS as well as the State Contract Management Guide and will include those provisions in its grant program.

Comments on Subchapter B, Governor's University Research Initiative Advisory Board, 10 TAC §§190.10 - 190.14

Comments on §190.13, Conflicts of Interest.

Comment: One commenter suggests that prohibition for participation by an advisory board member who "has been employed by" or "has been a party to a contract for any purpose with," or is a "former student of" an applicant is unreasonably restrictive and narrow and recommends that the restriction be limited to current employees, contractors, or students.

Response: The OOG disagrees. The rule as proposed strictly complies with the law. Section 62.166(d), Education Code (HB 7), regarding the Advisory Board, specifically states "A member of the advisory board who is or has been employed by, is or has been a party to a contract for any purpose with, or is a student or former student of an applicant eligible institution may not be involved in the review, evaluation, or recommendation of a grant proposal made by that institution."

Comments on §190.14, Communications between the Advisory Board and Applicants, Distinguished Researchers and Others.

Comment: One commenter suggests restricting communication between an advisory board member and an applicant or distinguished researcher may lead to an unintentional disqualification. The commenter suggests that the rule should include a mens rea element of intentionally or knowingly initiating communication for the purpose of influencing the advisory board member as a standard by which the OOG would determine whether a communication results in a disqualification.

Response: The OOG disagrees and declines to modify the rule restricting communications with advisory board members about a GURI grant application. The purpose of the proposed rule is to promote fairness, transparency, and preserve the integrity of the grant award process. However, the rule does not require the automatic disqualification of a grant application based on communication between an advisory board member and an applicant or distinguished researcher. The OOG will consider the circumstances of the unauthorized contact with advisory board members as well as the effect, if any, of the unauthorized contact, to determine whether the application may be disqualified.

Comments on Subchapter C, Application, Review and Award Process, 10 TAC §§190.20 - 190.29

Comments on §190.20, Application Process.

Comment: One commenter suggests that the OOG should not be permitted to change the terms of the formal application document except through a formal rulemaking process. The comment suggests that any changes in the terms and conditions on which grants are awarded, or in the process governing GURI,

should be proposed as formal rulemaking and published for comment as required by law.

Response: The OOG disagrees that a formal rulemaking process is required to make changes to the application or the grant agreement. A detailed rulemaking establishing all the possible requirements and information to be contained in a grant application document is not a standard practice in grants administration and could unreasonably limit the ability of the OOG to effectively administer the program.

Comment: One commenter notes the timing for recruitments can be unpredictable and a rolling basis would prevent a flood of applications to the board at one time.

Response: The OOG agrees but declines to narrow the rule to provide for accepting applications on a rolling basis only. With the launch of a new and innovative program such as GURI, and depending upon the availability of funds, the OOG will need the flexibility to choose the most efficient approach to processing grant applications.

Comments on §190.21, GURI Eligible Applicants.

Comment: One commenter notes the rules do not define what constitutes a "recruit" for eligibility purposes, nor does the statute define or limit what constitutes a recruit. The commenter, and another commenter, urge that the rules expressly permit applications for a GURI grant that would be used to support or retain a distinguished researcher already under contract with the applicant institution.

Response: The OOG declines to expand the GURI program to include retention of a distinguished researcher. The statute only contemplates that the GURI program is to assist institutions with the recruitment of a distinguished researcher. Section 62.163(a), Education Code (SB 632 and HB 26) and §62.162(b), Education Code (HB 7), specifically state that GURI grants are made for the purpose "to assist eligible institutions in recruiting distinguished researchers."

Comment: One commenter states that to require the applicant to have the support of the "president, governing board, and chair of the governing board, or the chancellor of the University System, if the applicant institution is a component of a University System" is incorrect. The commenter suggests the rule, as written, grammatically requires multiple approvals (the president, governing board, and chair of the governing board) and presents the approval of a single individual--the chancellor--as an alternative to the approval of each of other three individuals or entities and is not consistent with the statute. In addition, the commenter states the provision is redundant of §190.23(b), which correctly reflects the statutory support requirement.

The commenter's preferred reading is that only two approvals are required: (1) approval by the president; and (2) approval by one of three entities presented as a series of alternatives. The applicant must indicate the support of:

- (1) the institution's president; and
- (2) one of the following:
 - (a) the governing board;
 - (b) the chair of the governing board; or
 - (c) the chancellor of the university system, if the institution is a component of a university system.

The commenter states the purpose of indicating support for the application is well served by the preferred reading, and the most logical in that it always requires the support of the institutional president. The commenter recommends eliminating §190.21(4) in favor of §190.23(b), which the OOG should consider presenting in the form described above to clarify the meaning.

Response: The OOG agrees with the interpretation suggested by the commenter, but declines to eliminate §190.21(4) or adopt a different construction of §190.23(b). §190.21(4) will be corrected in the adopted rule so that it is consistent with both §190.23(b) and the statutory provisions of §62.163(c), Education Code (SB 632 and HB 26) and §62.163(b), Education Code (HB 7).

Comments on §190.23, Application Form.

Comment: One commenter notes the grant application form requirement to include a narrative of the grant proposal, including objectives, and timeline to accomplish grant purpose, is confusing and unclear. The commenter suggests that information beyond the name and credentials of the distinguished researcher to be recruited is unnecessary as it may be asking for a description of the research to be conducted.

Response: The OOG disagrees. The narrative requirement is essential to determine the type of research the distinguished researcher to be involved in, how it will benefit the State of Texas, and whether or how the proposal addresses the grant award priorities established by the legislature. The OOG will be available to assist eligible institutions during the grant application process in answering any questions about application's narrative requirements.

Comments on §190.25, Grant Award Recommendations and Decisions.

Comment: Another commenter notes that the National Academies and the Nobel Foundation both grant awards on the basis of new knowledge being created, as opposed to commercialization, and urges the OOG to increase the priority of applications for researchers engaged in basic, translational or applied research or for research that offers the opportunity for interdisciplinary and collaborative research.

Response: The OOG declines to change the priorities as the rules strictly comply with the law. The relevant statutory sections specifically provide that the OOG "shall" give priority some applications while for others the OOG "may" give priority. Section 62.164(a), Education Code (SB 632 and HB 26), and §62.164(a)(1)-(5), Education Code (HB 7) state the priorities that the OOG "shall" consider. Section 62.164(b), Education Code (HB 7), provides further additional factors the OOG "may" consider for funding.

Comments on §190.28, Grant Agreement.

Comment: One commenter suggests the grant agreement should not be for a specific length of time or duration because the GURI grant funds should be allocated without any requirement that they be expended within a particular timeframe.

The commenter suggests that if the duration reference in the grant agreement is relating to the expenditure of grant funds, it may be challenging to judiciously spend the amount of a GURI grant in one or two years as well as meet the matching funds requirement within that same time period. The commenter also notes that the funds, once awarded, need to be guaranteed and insulated from the state budget and the economy, to the full

extent allowed by state law governing appropriations and expenditures. The commenter also suggests that if the duration of the grant agreement is tied to when the recruitment must be achieved, the rule should be clarified accordingly because recruitment is be a one-time event that may take a significant length of time to complete, and all the elements of the recruitment package may take years to implement.

Response: The OOG declines to modify §190.28 to eliminate a duration or term in the GURI grant agreement. Specifying the grant term in the grant agreement is necessary for the proper planning and managing administration of the grant funds and program. The GURI grant program is a state-funded grant program and will be subject to the state laws governing appropriations and expenditures, however, the funding terms can be extended by an amendment to the grant agreement to accomplish the objectives of the grant if continued funding is available.

Comment: One commenter suggests that adding any special conditions to a grant agreement injects uncertainty as to the OOG's expectations, possibly creating a reluctance to apply and the possibility of evolving grant requirements not set by rule.

Response: The OOG needs discretion and the ability to require special grant conditions in certain circumstances to appropriately administer and operate the program in a fiscally responsible manner consistent with the best interests of the State of Texas. Special conditions are common provisions in most grant agreements and, by their nature, are not necessarily the subject of a formal rulemaking.

Comments on Subchapter D, Grant Budget Requirements, 10 TAC §§190.30 - 190.38

Comments on §190.30, General Budget Provisions.

Comment: One commenter urges that the budget categories be broadened to account for such items as relocation costs and transfer fees, as well as to allow the salaries of researcher's team, assistants and other appropriate staff to be counted as an eligible expense. The commenter suggests that the package to recruit a distinguished researcher is likely to be complex and take place over a number of years and institutions should be allowed to use the grant as a method of finance for a budget over a period of time. The commenter suggests that the budget categories as described in the proposed rules reflect a focus on a budget to support the research the recruit will be conducting, rather than the recruitment process.

Response: The OOG declines to broaden the allowable cost categories. The budget categories listed in the GURI rules are the most prudent due to nature of the grant program to support the recruitment of a distinguished researcher and the legislative appropriation constraints for the state-funded GURI grant program. Applicants may elect to propose the payment of direct expenses for relocation costs or transfer fees as part of their overall grant proposal, but the OOG declines to add an additional cost category in the administrative rule specifically for this purpose.

Comment: One commenter suggests the rule regarding reimbursement of expenses unnecessarily creates a bureaucratic burden tied to invoices for purchases by the university. The commenter suggests that not all recruitment expenses can be easily identified for reimbursement, occur at the time the distinguished researcher is hired, or be completed within a limited time period. The commenter also states that proposed rule's reference to the use of an alternative method of payment provides no guidance

on the standards to be used to govern the decision or the alternative method.

Response: Cost reimbursement is the preferred and most common method of grant payment and provides the best protection to the State of Texas to ensure that grant funds are properly allocated and managed. The rule's reference to the possible use of an alternative method of payment is intended to provide for limited program flexibility as may be necessary from time-to-time to support the public purposes of the grant program.

Comments on §190.31, One-Time Salary Supplement.

Comment: One commenter suggests that the payment of salary is one of the key elements to recruiting a distinguished researcher and urges that grant funds be made available for use by grantees in paying salary and benefits generally.

Response: The OOG declines to broaden this allowed cost category beyond use of grant funds for the payment of a one-time salary supplement for recruitment purposes. The GURI grant program is designed to support the recruitment of distinguished researchers. Allowing GURI grant funds to be used for the payment of an eligible institution's ongoing operating expenses, such as salaries and benefits for the distinguished researcher or other personnel, does not further the OOG's intent to administer the grant program in a cost-effective and expeditious manner.

Comments on §190.32, Professional and Consultant.

Comment: One commenter notes that given the prohibition on use of grant funds for indirect costs, the rule creates an anomaly in which the institution may use grant funds to contract with an outside source for services such as information technology, legal, and accounting, but may not use grant funds to reimburse the institution directly for the costs associated with providing those services with existing institutional staff at a lower cost. Therefore, the commenter suggests the rule should expressly allow for the payment for professional and consultant services that are provided by institutional staff.

Response: The OOG declines to change this provision to allow the use of GURI grant funds for the payment of professional or consultant services provided by institutional staff because it would constitute the use of grant funds for an otherwise unallowable indirect cost. Moreover, the purpose of including professional and consultant services as an allowable cost category is to permit institutions to use grant funds to pay for costs associated with the procurement of specialized services that are not routinely supportable with existing institutional staff or resources, but that are reasonable, necessary, and directly attributable to the recruitment effort.

Comments on §190.34, Equipment.

Comment: One commenter suggests the requirement for equipment to be used only for "grant-related purposes" and not for "non-grant related purposes" could mean that an equipment purchase made as part of a recruitment package may be used only by the distinguished researcher or in support of that research. Such an interpretation may result in a very expensive item being underused when the item's use could support a wide variety of research across the campus. In addition, a narrow interpretation would prevent the collaboration with other institutions prioritized by §190.25(d)(4) and (e)(2), and urges that to avoid the waste of resources, the rule should expressly permit equipment purchased with grant funds to be used for any purpose consistent with the teaching and research mission of the institution.

Response: The OOG agrees, that as long as the primary purpose of the equipment purchased with grant funds will be related to the GURI grant program, the rule will be changed to allow other reasonable use by the institution.

Comments on §190.35, Supplies and Direct Operating Expenses.

Comment: One commenter requests including examples of direct operating expenses.

Response: The OOG declines to provide further specific examples in the rule as the Uniform Grants Management Standards already provide grant guidance on direct operating expenses.

Comments on §190.37, Indirect Costs.

Comment: One commenter urges that indirect costs should be allowable to include overhead or institutional expenses that are not readily identified with a particular grant but that are necessary for the operation of the institution. The commenter states that even in recruitment grants, the institution may provide significant institutional support, including facilities, maintenance, safety, professional and administrative staff, and support for grant application, reporting, compliance and monitoring processes. The commenter also urges that if the prohibition on indirect costs remains, the proposed rule should be modified to expressly allow indirect costs and in-kind resources to be accounted for as contributing to the institution's match of the GURI grant.

Response: The OOG declines to include indirect costs as an allowed cost category.

Comments on §190.38, Unallowable Costs.

Comment: One commenter urges that salary and benefits for the members of the research team should be included as allowable cost categories, as these expenses are the largest start-up cost relating to a recruitment effort. The commenter also urges that salaries for personnel to design and build equipment and laboratories for the researchers should also be included as allowable cost categories.

Response: The OOG declines to modify the rule with respect to unallowable costs. The reasons for disallowing the use of grant funds for the general payment of salaries and benefits is further addressed in the agency's response to comments on §190.31.

Comments on Subchapter E, Administering Grants, 10 TAC §§190.40 - 190.53

Comments on §190.42, Financial Reporting.

Comment: One commenter suggests the requirement to obtain written approval from the OOG to move grant funding from one budget category to another is unnecessary bureaucracy. The commenter also requests that the financial reporting rule expressly authorize the use of accrual accounting in contrast to reporting expenditures on a cash only basis.

Response: Obtaining prior written approval from the grantor before reallocating funds from one cost category to another is a common grant management financial control to ensure that grant funds are expended for the purpose for which the grant was awarded. The proposed rules do not address or require the use of a particular accounting methodology and the OOG declines to require a specific accounting method. However the expectation is that institutions will comply with Generally Accepted Accounting Principles (GAAP) with respect to any account methods used for grant funds.

Comments on §190.43, Performance Reporting.

Comment: One commenter states the rule is not clear what performance reporting would be required for a recruitment program grant.

Response: Performance reporting is a common grant administration requirement. The content of performance reports will necessarily depend upon the scope of the grant award, but will generally require grantees to report on the progress towards achieving the recruitment of a distinguished researcher and the related expenditure of funds as proposed by the grantee and approved by the OOG. The OOG does not intend performance reporting to encompass reporting on progress towards any research activities or other objectives that are not related to the recruitment of the distinguished researcher. Furthermore, as indicated by §190.41, the OOG anticipates that there will be regular communication between the grantee's designated point of contact and the OOG so that all information and documentation meets requirements.

Comments on Subchapter F, Program Administration and Audit, 10 TAC §§190.55 - 190.58

Comments on §190.55, Monitoring.

Comment: One commenter is concerned that the language of the rule suggesting that the OOG will monitor grantees to ensure the effective and efficient use of grant funds, while not expressly using the term "milestones," may be used by the OOG to assess performance and compliance. The commenter states that it is not clear what milestones would be relevant to the GURI grant program.

Response: Methods to assess the effective and efficient use of grant funds, including assessing grantee compliance with the grant agreement, will be utilized. For example, grantees must be expected to use funds in accordance with the approved grant proposal, including for the recruitment of the identified distinguished researcher. Grant monitoring will not encompass the monitoring or review of any research activities or other objectives that are not related to the project for the recruitment of the distinguished researcher.

Comments on §190.56, Compliance Review or Audit.

Comment: One commenter states that the various rules have a significant, even burdensome, reporting and compliance regimen, including performance reports (§190.43), programmatic monitoring (§190.55), financial status reports (§190.42), progress reports (§190.6(c)(4)), inventory reports (§190.44), and contract monitoring and financial audits (§190.56), even the possibility that the State Auditor's Office can request information and audit (§190.58). The commenter suggests that the proposed rules focus too much on compliance and too little on the recruitment and the research.

Response: The OOG declines to modify the proposed rule with respect to compliance review or audit requirements. The GURI rules are intended to provide transparency and accountability to ensure the proper expenditure of awarded grant funds. Certain duties and responsibilities will be imposed on the grantee, and the OOG expects that compliance with grant standards will be reported, monitored, and subject to verification.

SUBCHAPTER A. DEFINITIONS AND GENERAL PROVISIONS

10 TAC §§190.1 - 190.8

Statutory Authority

The rules are adopted under §62.162(b), Education Code (as enacted by SB 632 and HB 26, 84th R.S. 2015), and §62.162(c), Education Code (as enacted by HB 7, 84th R.S. 2015), which provide that the Office of the Governor may enact any rules the office considers necessary to administer the Governor's University Research Initiative grant program. It is noted that two versions of Subchapter H, Education Code, governing the GURI grant program were enacted by the 84th Legislature; for purposes of this rule adoption notice, each statutory references will be identified by its enacted legislative bill number(s).

Cross Reference to Statute

Subchapter H of Chapter 62, Education Code, as amended by Senate Bill 632, House Bill 7 and House Bill 26, 84th Legislature, Regular Session.

§190.1. Definitions.

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

(1) "Applicant" is the entity that applies for a grant from the Governor's University Research Initiative program.

(2) "Application" is the information that is required to be completed and submitted by an applicant for a grant from the Governor's University Research Initiative program.

(3) "Advisory board" means the Governor's University Research Initiative Advisory Board, the nine member board appointed by the Governor.

(4) "Distinguished researcher" means a researcher who is:

(A) a Nobel laureate or the recipient of an equivalent honor; or

(B) a member of a national honorific society, such as the National Academy of Sciences, the National Academy of Engineering, or the National Academy of Medicine, formerly known as the Institute of Medicine or an equivalent honorific organization.

(5) "Eligible institution" means a general academic teaching institution or medical and dental unit or health-related institution.

(6) "Fund" means the Governor's University Research Initiative fund established under §§62.165 and 62.168 of the Education Code.

(7) "General academic teaching institution" has the meaning assigned by §61.003 of the Education Code.

(8) "Governing Board" has the meaning assigned by §61.003 of the Education Code.

(9) "Grant agreement" means the GURI grant agreement executed by the Office of the Governor and the grantee.

(10) "Grantee" is the entity named as the recipient of the award in the grant agreement.

(11) "GURI" means Governor's University Research Initiative.

(12) "Health-related institution" means a medical and dental unit as defined by §61.003 of the Education Code and any other public health science center, public medical school, or public dental school established by statute or in accordance with Chapter 61 of the Education Code.

(13) "Medical and dental unit" has the meaning assigned by §61.003 of the Education Code.

(14) "OOG" or "Office" means the Texas Economic Development and Tourism Office within the Office of the Governor.

(15) "Private or independent institution of higher education" has the meaning assigned by §61.003 of the Education Code.

§190.7. Match.

(a) The GURI grant program will have a match requirement. An applicant eligible institution may commit for matching purpose any funds of the institution immediately available for that purpose other than appropriated general revenue.

(b) The match requirement must be met by cash or in-kind commitments equal to the amount of the grant award made by OOG.

(c) The GURI grant award may not be used as a source of funding to support a match requirement for any other grant obtained by the institution.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. GOVERNOR'S UNIVERSITY RESEARCH INITIATIVE ADVISORY BOARD

10 TAC §§190.10 - 190.14

Statutory Authority

The rules are adopted under §62.162(b), Education Code (as enacted by SB 632 and HB 26, 84th R.S. 2015), and §62.162(c), Education Code (as enacted by HB 7, 84th R.S. 2015), which provide that the Office of the Governor may enact any rules the office considers necessary to administer the Governor's University Research Initiative grant program. It is noted that two versions of Subchapter H, Education Code, governing the GURI grant program were enacted by the 84th Legislature; for purposes of this rule adoption notice, each statutory references will be identified by its enacted legislative bill number(s).

Cross Reference to Statute

Subchapter H of Chapter 62, Texas Education Code, as amended by Senate Bill 632, House Bill 7 and House Bill 26, 84th Legislature, Regular Session.

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SUBCHAPTER C. APPLICATION, REVIEW AND AWARD PROCESS

10 TAC §§190.20 - 190.29

Statutory Authority

The rules are adopted under §62.162(b), Education Code (as enacted by SB 632 and HB 26, 84th R.S. 2015), and §62.162(c), Education Code (as enacted by HB 7, 84th R.S. 2015), which provide that the Office of the Governor may enact any rules the office considers necessary to administer the Governor's University Research Initiative grant program. It is noted that two versions of Subchapter H, Education Code, governing the GURI grant program were enacted by the 84th Legislature; for purposes of this rule adoption notice, each statutory references will be identified by its enacted legislative bill number(s).

Cross Reference to Statute

Subchapter H of Chapter 62, Texas Education Code, as amended by Senate Bill 632, House Bill 7 and House Bill 26, 84th Legislature, Regular Session.

§190.21. GURI Eligible Applicants.

An applicant interested in applying for an award from the GURI fund must meet all basic qualifying criteria, including but not limited to, the following:

- (1) an applicant must be an eligible institution;
- (2) the researcher proposed for recruitment must meet all the eligibility requirements necessary to qualify as a distinguished researcher;
- (3) the applicant and researcher meet the requirements of the applicable provisions of Chapter 62 of the Education Code; and
- (4) the grant application has the support of the applicant institution's president and of the institution's governing board, the chair of the institution's governing board, or the chancellor of the University System if the applicant institution is a component of a University System.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. GRANT BUDGET REQUIREMENTS

10 TAC §§190.30 - 190.38

Statutory Authority

The rules are adopted under §62.162(b), Education Code (as enacted by SB 632 and HB 26, 84th R.S. 2015), and §62.162(c), Education Code (as enacted by HB 7, 84th R.S. 2015), which provide that the Office of the Governor may enact any rules the office considers necessary to administer the Governor's University Research Initiative grant program. It is noted that two versions of Subchapter H, Education Code, governing the GURI grant program were enacted by the 84th Legislature; for purposes of this rule adoption notice, each statutory references will be identified by its enacted legislative bill number(s).

Cross Reference to Statute

Subchapter H of Chapter 62, Texas Education Code, as amended by Senate Bill 632, House Bill 7 and House Bill 26, 84th Legislature, Regular Session.

§190.34. Equipment.

(a) "Equipment" means tangible, nonexpendable personal property (including information technology systems) having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit.

(b) The grantee may use equipment paid for with OOG funds for any purpose consistent with the teaching and research mission of the institution, as long as the primary use of such equipment remains for grant-related purposes.

(c) The grantee shall not give any security interest, lien or otherwise encumber any item of equipment purchased with grant funds. The grantee shall permanently identify all equipment purchased under the grant by appropriate tags or labels affixed to the equipment. The grantee shall maintain a current inventory of all equipment, which shall be available to the OOG at all times upon request, however, the title for equipment will remain with the grantee.

(d) The grantee will operate, maintain, repair, and protect all equipment purchased in whole or in part with grant funds so as to ensure the full availability and usefulness of such equipment for the purposes of the GURI grant award. In the event the grantee is indemnified, reimbursed, or otherwise compensated for any loss of, destruction of, or damage to the equipment purchased with grant funds, it shall use the proceeds to repair or replace said equipment.

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SUBCHAPTER E. ADMINISTERING GRANTS

10 TAC §§190.40 - 190.53

Statutory Authority

The rules are adopted under §62.162(b), Education Code (as enacted by SB 632 and HB 26, 84th R.S. 2015), and §62.162(c), Education Code (as enacted by HB 7, 84th R.S. 2015), which provide that the Office of the Governor may enact any rules the office considers necessary to administer the Governor's University Research Initiative grant program. It is noted that two versions of Subchapter H, Education Code, governing the GURI grant program were enacted by the 84th Legislature; for purposes of this rule adoption notice, each statutory references will be identified by its enacted legislative bill number(s).

Cross Reference to Statute

Subchapter H of Chapter 62, Texas Education Code, as amended by Senate Bill 632, House Bill 7 and House Bill 26, 84th Legislature, Regular Session.

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SUBCHAPTER F. PROGRAM ADMINISTRATION AND AUDIT

10 TAC §§190.55 - 190.58

Statutory Authority

The rules are adopted under §62.162(b), Education Code (as enacted by SB 632 and HB 26, 84th R.S. 2015), and §62.162(c), Education Code (as enacted by HB 7, 84th R.S. 2015), which provide that the Office of the Governor may enact any rules the office considers necessary to administer the Governor's University Research Initiative grant program. It is noted that two versions of Subchapter H, Education Code, governing the GURI grant program were enacted by the 84th Legislature; for purposes of this rule adoption notice, each statutory references will be identified by its enacted legislative bill number(s).

Cross Reference to Statute

Subchapter H of Chapter 62, Texas Education Code, as amended by Senate Bill 632, House Bill 7 and House Bill 26, 84th Legislature, Regular Session.

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §§3.5, 3.31, 3.38, 3.40, 3.45, 3.51, 3.52, 3.86

The Railroad Commission of Texas (Commission) adopts amendments to §§3.5, 3.31, 3.38, 3.40, 3.45, 3.51, 3.52 and 3.86, relating to Application To Drill, Deepen, Reenter, or Plug Back; Gas Reservoirs and Gas Well Allowable; Well Densities; Assignment of Acreage to Pooled Development and Proration Units; Oil Allowables; Oil Potential Test Forms Required; Oil Well Allowable Production; and Horizontal Drainhole Wells, respectively. Sections 3.5, 3.31, 3.38, 3.40, 3.45, 3.51 and 3.52 are adopted without changes, and §3.86 is adopted with changes from the proposed text as published in the November 6, 2015, issue of the *Texas Register* (40 TexReg 7766).

The Commission adopts the amendments to establish a procedure for designating certain fields as unconventional fracture treated fields ("UFT fields"). A UFT field is a field in which horizontal drilling and hydraulic fracturing must be used in order to recover resources from all or part of the field and which is developed using either vertical or horizontal drilling techniques. This designation includes shale formations, such as the Eagle Ford and Barnett Shale, in which the drainage of a wellbore is based upon the area reached by the hydraulic fracturing treatments rather than conventional flow patterns. The substantive amendments to incorporate this concept are adopted in §3.86(i) - (l), with supporting and conforming amendments proposed in the other sections.

Additionally, the Commission adopts amendments to update various Commission requirements related to the drilling of horizontal drainhole wells as defined in §3.86(a)(5). The Commission adopts these amendments to incorporate common special field rule provisions, which apply on a field-by-field basis, into rules that apply statewide. The amendments will reduce and simplify field rule hearings, resulting in a more efficient regulatory process. The amendments would implement requirements related to the following: (1) take points through which a horizontal drainhole can be produced; (2) notification for off-lease penetra-

tion points when the proposed horizontal drainhole will penetrate the productive formation at a point not on the applicant's lease, pooled unit or developmental tract; (3) the creation and production of a structure known as a "stacked lateral" wellbore (a series of horizontal drainholes producing from the same geographical area at differing depths); and (4) plats for permitting, drilling and completion of horizontal wells.

Further, the Commission adopts non-substantive amendments to clarify, update, and conform the rules to current Commission practice.

The Commission received comments from 47 parties, including six associations, two companies, and 39 individuals.

Comments from Occidental Petroleum Corporation (Occidental) and one individual, and a late-filed comment from Apache Corporation (Apache) stated support for the proposed rule changes and contained no recommended changes. The Commission thanks these commenters for their support.

Four associations (Texas Oil and Gas Association (TXOGA), Texas Independent Producers and Royalty Owners Association (TIPRO), Permian Basin Petroleum Association (PBPA), and Texas Alliance of Energy Producers (the Alliance)) filed comments supporting the proposed amendments and suggesting one change to §3.86(i)(2)(A)(ii) regarding the designated person to bear the burden of proof in the event a hearing is set on the Commission's motion.

The Commission agrees with the suggestion and adopts §3.86(i)(2)(A)(ii) with a change to require the proponent of UFT field designation to bear the burden of proof.

The remaining individuals, most of whom identified themselves as professional land surveyors, and two associations (the Texas Society of Professional Surveyors and the Texas Board of Professional Land Surveying) expressed general support for the proposed rule changes, but objected to the inclusion of professional engineers within proposed §3.86(g)(6) regarding plat requirements.

The Commission disagrees with this objection. Professional engineers are included in §3.86(g)(6) because they are qualified to certify downhole data provided to the Commission. Further, Section 3.86(g)(6) does not alter the scope of authority granted to professional land surveyors or to professional engineers. That scope of authority is established by relevant statutes and rules, and is enforced by the authorities created to regulate those professions. The authority granted to either profession is not affected by the Commission's acceptance of certifications related to work performed pursuant to that authority. Therefore, the Commission makes no change in response to these comments.

A separate comment filed by PBPA supported the proposed amendments and addressed some of the comments from the professional land surveyors regarding §3.86(g)(6). PBPA stated that the proposed amendments did not modify the Commission's standards for plats, boundary surveys, or other products of registered professional land surveyors. The Commission agrees. The amendments do not affect the authority of professional land surveyors and professional engineers, and do not permit acts that are not authorized by either profession's governing statutes or rules.

As adopted, the amendments to §3.5 provide plat standards for the drilling of horizontal wells, and require applicants to provide GPS coordinates in connection with drilling permit applications.

The amendments to §3.31 conform the wording related to allowable assignments for gas wells in UFT fields, and update provisions regarding the correct office in which to file completion reports.

The amendments to §3.38 add a reference to the UFT field procedures found in §3.86(k).

The amendments to §3.40 provide that in UFT fields the assignment of acreage to vertical wells and the assignment of acreage to horizontal wells will be regulated independently of one another. The amendments also clarify requirements and update language regarding the filing of Form P-12, Certificate of Pooling Authority, and the filing of Form P-16, Acreage Designation. Finally, the amendments clarify the right of offset, overlying, or underlying operators and lessors or mineral interest owners to file a complaint in situations where a violation of applicable acreage assignment rules may exist.

The amendments to §3.45 add a reference to the UFT field provisions found in §3.86(d).

The amendments to §3.51 provide that potential tests will be filed by the deadline for completion reports, and that the resulting allowable may be backdated no more than 30 days. These amendments will conform §3.51 to previous amendments to §3.16, related to Log and Completion or Plugging Report, adopted by the Commission effective April 28, 2015.

The amendments to §3.52 provide for administrative cancellation of overproduction following notice to offset operators in the field. This change will provide for cancellation of overproduction without the need for a hearing in situations where there is no protest to the cancellation and where the subject wells are otherwise compliant with Commission rules.

The majority of the adopted substantive amendments are found in §3.86, which is adopted with one change, as previously discussed. Amendments to §3.86(a) define nonperforation zone, record well, stacked lateral well, unconventional fracture treated field, and the different types of take points.

Amendments to §3.86(b) implement take point language and provisions related to nonperforation zones within horizontal drainhole wells. The new language also adds additional requirements related to plats to be filed in connection with such drainholes.

Amendments to §3.86(d) clarify the assignment of production allowables for horizontal drainhole wells in conventional fields and in UFT fields.

Section 3.86(f) implements the use of stacked lateral wells as defined in §3.86(a)(10). Due to the limited area drained by this structure, the amendments treat a stacked lateral well as a single wellbore for purposes of calculating density and assigning allowable.

Section §3.86(g), which was §3.86(f) in the previous version of this rule, implements notice requirements related to drilling permit applications for wellbores in which the entry into the correlative interval occurs on an offsite tract.

Section 3.86(i) establishes criteria for designation of a field as a UFT field. The language establishes criteria which, if met, would allow such designation of a field without the need for a hearing; and further provides for a hearing process if the field does not meet the criteria for administrative processing or if an objection is filed. The language provides that either an operator or Commission staff may initiate the designation process. In all cases,

a UFT field will be designated by Commission order. The Commission adopts a change in subsection (i)(2)(A)(ii) to clarify the burden of proof.

Section 3.86(j) clarifies that if an existing special field rule applies to a field designated as a UFT field, the special field rule prevails over all conflicting provisions in Chapter 3 of this title (relating to Oil and Gas Division). This subsection also provides for certain limited areas in which amendments to special field rules in UFT fields may be made upon notice to all affected parties but without the need for a hearing if there are no objections to the proposed change. Specifically, the language provides that, absent any objection from an affected party, a hearing may not be required to: reduce the standard density to one-half of the existing density, delete a between-well spacing rule, or alter the controlling provision under which the allowable is calculated. Similar provisions have been adopted as special field rules for fields in which horizontal drilling and hydraulic fracturing treatments are common.

Section 3.86(k) establishes an alternate procedure for approval of density exceptions for wells in UFT fields. The alternate procedure includes notice provisions to allow affected parties an opportunity to object to the approval of a density exception. In the absence of any objection, the alternate procedure provides for the administrative approval of such exceptions without the need for a hearing or the submission of supporting data. Similar provisions have been adopted as special field rules for fields in which horizontal drilling and hydraulic fracturing treatments are common.

Section 3.86(l) allows flowing oil wells in UFT fields to be completed without tubing for a six-month period. The provision allows for six-month extensions of the exception in cases where the flowing pressure remains above 300 psig surface wellhead flowing pressure, and requires the submission of a revised completion report once the well has been equipped with the required tubing string. Similar provisions have been adopted as special field rules for fields in which horizontal drilling and hydraulic fracturing treatments are common.

While the form is not included in this proposal, the Commission also adopts amended Form P-16 to make conforming changes related to the amendments to §3.40. More information on the adopted form changes is provided on the Commission's Proposed Forms Amendment web page at <http://www.rrc.texas.gov/about-us/resource-center/forms/proposed-form-changes/>.

The Commission adopts the amendments pursuant to Texas Natural Resources Code §§81.051 and 81.052, which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under Commission jurisdiction; Texas Natural Resources Code §§85.042, 85.202, 86.041 and 86.042, which require the Commission to adopt rules to control waste of oil and gas; and Texas Natural Resources Code §85.053, which authorizes the Commission to adopt rules relating to the allocation of production allowables.

Statutory authority: Texas Natural Resources Code, §§81.051, 81.052, 85.042, 85.202, 86.041, 86.042, and 85.053 are affected by the proposed amendments.

Texas Natural Resources Code §§81.051, 81.052, 85.042, 85.202, 86.041, 86.042, and 85.053.

Cross-reference to statute: Texas Natural Resources Code, Chapters 81, 85, and 86.

Issued in Austin, Texas, on January 12, 2016.

§3.86. *Horizontal Drainhole Wells.*

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

(1) Correlative interval--The depth interval designated by the field rules or by new field designation on Form P-7 (New Field Designation).

(2) First take point--The take point in a horizontal drainhole well nearest to the point where the drainhole penetrates the top of the correlative interval. The first take point may be at a location different from the penetration point.

(3) Horizontal drainhole--That portion of the wellbore drilled in the correlative interval, between the penetration point and the terminus.

(4) Horizontal drainhole displacement--The calculated horizontal displacement of the horizontal drainhole from the first take point to the last take point.

(5) Horizontal drainhole well--Any well that is developed with one or more horizontal drainholes having a horizontal drainhole displacement of at least 100 feet.

(6) Last take point--The take point in a horizontal drainhole well nearest the terminus. The last take point may be at a location different from the terminus.

(7) Nonperforation zone (NPZ)--A portion of a horizontal drainhole well within the field between the first take point and the last take point that the operator has intentionally designated as containing no take points pursuant to the spacing requirements in §3.37 of this title (relating to Statewide Spacing Rule).

(8) Penetration point--The point where the drainhole penetrates the top of the correlative interval.

(9) Record well--The single horizontal drainhole within a stacked lateral well designated by the operator as the record well for reporting purposes.

(10) Stacked lateral well--A horizontal drainhole well in which the following conditions are met:

(A) there are two or more horizontal drainhole wells on the same lease, pooled unit, or unitized tract at different depths within the correlative interval for the field;

(B) the horizontal drainholes are drilled from different surface locations;

(C) all take points of a stacked lateral well's horizontal drainholes are within a rectangular area the width of which is 660 feet, and the length of which is 1.2 times the distance between the first and last take points of the record well;

(D) all horizontal drainholes are tested independently and have the same classification (i.e., gas or oil). Only horizontal drainholes of the same classification are eligible to be designated as a stacked lateral well; and

(E) there is only one operator for the stacked lateral well.

(11) Take point in a horizontal drainhole well--Any point along a horizontal drainhole where oil and/or gas can be produced from the correlative interval.

(12) Terminus--The farthest point required to be surveyed along the horizontal drainhole from the penetration point and within the correlative interval.

(13) Unconventional fracture treated (UFT) field--A field designated by the Commission under subsection (i) of this section for which horizontal well development and hydraulic fracture treatment (as defined in §3.29(a)(15) and (16) of this title (relating to Hydraulic Fracturing Chemical Disclosure Requirements)) must be used in order to recover resources from all or a part of the field and which may include the drilling of vertical wells along with the drilling of horizontal wells.

(b) Drainhole spacing.

(1) No take point on a horizontal drainhole shall be located nearer than 1,200 feet (horizontal displacement), or other between-well spacing requirement under applicable rules for the field, to any take point along any other horizontal drainhole in another well, or to any other well completed or permitted in the same field on the same lease, pooled unit, or unitized tract.

(2) No take point on a horizontal drainhole shall be located nearer than 467 feet, or other lease-line spacing requirement under applicable rules for the field, from any property line, lease line, or subdivision line.

(3) All wells developed with horizontal drainholes shall otherwise comply with §3.37 of this title (relating to Statewide Spacing Rule), or other applicable spacing rules.

(4) If the drilling permit application indicates that there will be one or more NPZs, then the as-drilled plat filed after completion of the well shall be certified by a person with knowledge of the facts pertinent to the application that the plat is accurately drawn to scale and correctly reflects all pertinent and required data. In addition to the information required under subsection (f) of this section, the certified as-drilled plat shall include:

(A) the as-drilled track of the wellbore;

(B) the location of each take point on the wellbore;

(C) the boundaries of any wholly or partially unleased tracts within the distance permitted under §3.37 of this title or applicable special field rules of the wellbore; and

(D) notations of the shortest distance from each wholly or partially unleased tract within the distance permitted under §3.37 of this title or applicable special field rules of the wellbore to the nearest take point on the wellbore.

(5) To comply with the spacing requirements set forth in paragraph (3) of this subsection, the take-points along the as-drilled location of a properly permitted horizontal drainhole shall fall within a rectangle established as follows:

(A) two sides of the rectangle are parallel to the permitted drainhole and 50 feet or 10% of the minimum distance to any property line, lease line or subdivision line, whichever is greater, on either side of the drainhole; and

(B) the other two sides of the rectangle are perpendicular to the sides described in subparagraph (A) of this paragraph, with one of those sides passing through the permitted first take point and the other side passing through the permitted last take point.

(6) Prior to perforating the wellbore within an approved NPZ, the operator must amend the permit to authorize perforations within the originally-approved NPZ.

(c) Well densities. All wells developed with horizontal drainholes shall comply with §3.38 of this title (relating to Well Densities) or other applicable density rules.

(d) Proration and drilling units.

(1) Acreage may be assigned to each horizontal drainhole well for the purpose of allocating allowable oil or gas production up to the amount specified by applicable rules for a proration unit for a vertical well plus the additional acreage assignment as provided in this paragraph.

Figure: 16 TAC §3.86(d)(1) (No change.)

(2) Assignment of acreage to proration and drilling units for horizontal drainhole wells shall comply with §3.40 of this title (relating to Assignment of Acreage to Pooled Development and Proration Units).

(3) All proration and drilling units shall consist of continuous and contiguous acreage and proration units shall consist of acreage that can be reasonably considered to be productive of oil or gas.

(4) The maximum daily allowable assigned to a horizontal well shall comply with the table in subsection (d)(1) of this section and the maximum daily allowable specified by paragraph (5) of this subsection, unless special field rules specify different requirements for acreage or maximum daily allowable.

(5) The maximum daily allowable for a horizontal drainhole well in a designated UFT field shall be 100 barrels of oil for each acre that is assigned to an oil well for allowable purposes, or 600 Mcf of gas for each acre that is assigned to a gas well for allowable purposes. This paragraph does not affect suspension of the allocation formula under §3.31(j) of this title (relating to Gas Reservoirs and Gas Well Allowable). The maximum daily allowable for a horizontal drainhole well in a field that has not been designated as a UFT field shall be determined by multiplying the applicable allowable for a vertical well in the field with a proration unit containing the maximum acreage authorized by the applicable rules for the field, exclusive of tolerance acreage, by a fraction:

(A) the numerator of which is the acreage assigned to the horizontal drainhole well for proration purposes; and

(B) the denominator of which is the maximum acreage authorized by the applicable field rules for proration purposes, exclusive of tolerance acreage. The daily oil allowable shall be adjusted in accordance with §3.49(a) of this title (relating to Gas-Oil Ratio), when applicable.

(6) All points on the horizontal drainhole from the first take point to the terminus shall be within the proration and drilling unit. If the penetration point is located on an offsite tract, the conditions prescribed in subsection (g) of this section shall be met before the drilling permit application is submitted to the Commission.

(e) Multiple drainholes allowed.

(1) A single well may be developed with more than one horizontal drainhole originating from a single vertical wellbore.

(2) A horizontal drainhole well developed with more than one horizontal drainhole shall be treated as a single well.

(3) The horizontal drainhole displacement used for calculating additional acreage assignment for a well completed with multiple horizontal drainholes shall be the horizontal drainhole displacement of

the longest horizontal drainhole plus the projection of any other horizontal drainhole on a line that extends in a 180 degree direction from the longest horizontal drainhole.

(f) Stacked lateral wells.

(1) For oil and gas wells, stacked lateral wells within the correlative interval for the field may be considered a single well for density and allowable purposes, at an operator's discretion. If an operator chooses to designate horizontal drainholes as a stacked lateral well, the operator shall designate:

(A) one horizontal drainhole within the stacked lateral well as the record well. An operator may change the record well designation to another wellbore by filing amended drilling permit applications and completion reports for the previous and the new record well; and

(B) all points, from the first take point to the last take point, of the record well for a stacked lateral well are within the proration and drilling unit designated for that well. Notwithstanding paragraph (4) of this subsection, all points from the first take point to the last take point of any other horizontal drainhole comprising the stacked lateral well are not required to be within the proration and drilling unit designated for the record well so long as they otherwise comply with the requirements of this section and any applicable lease line spacing rules.

(2) For the purpose of assigning additional acreage to the stacked lateral well, the horizontal drainhole displacement shall be calculated based on the distance from the first take point to the last take point in the horizontal drainhole for the record well, regardless of the horizontal drainhole displacement of other horizontal drainholes of the stacked lateral well.

(3) Each surface location of a stacked lateral well shall be permitted separately and assigned an API number. When applying for a drilling permit for a stacked lateral well, the operator shall:

(A) identify each surface location of such well as a stacked lateral well on the Form W-1 drilling permit application;

(B) identify on the plat any other existing, or applied for, horizontal drainholes comprising the stacked lateral well being permitted; and

(C) depict on the plat a rectangle described in subsection (a)(10)(C) of this section indicating the lateral boundaries of the stacked lateral well.

(4) Each horizontal drainhole of a stacked lateral well shall comply with: the applicable minimum spacing distance under §3.37 of this title or any applicable special field rules for any lease, pooled unit or property line; and the applicable minimum between well spacing distance under §3.37 of this title or any applicable special field rules for any different well, including all horizontal drainholes of any other stacked lateral well, on the same lease or pooled unit in the field. An operator may seek an exception to §3.37 or §3.38 of this title for stacked lateral wells in accordance with the Commission's rules in this chapter or any applicable special field rule. There are no maximum or minimum distance limitations between horizontal drainholes of a stacked lateral well in a vertical direction.

(5) An operator shall file separate completion forms for each surface location of the stacked lateral well. An operator shall also file a certified plat showing the as-drilled location for each surface location of a stacked lateral well. The certified as-drilled plat shall:

(A) show each horizontal drainhole from each surface location; and

(B) depict on the plat a rectangle described in subsection (a)(10)(C) of this section indicating the lateral boundaries of the stacked lateral well.

(6) In addition to the record well, each surface location of a stacked lateral well shall be listed on the proration schedule, but no allowable shall be assigned for an individual surface location. Each surface location of a stacked lateral well shall be required to have a separate well status report (Form G-10 or Form W-10, as applicable) and the sum of all horizontal drainhole test rates shall be reported as the test rate for the record well.

(7) An operator shall report all production from horizontal drainholes included as a stacked lateral well on the production report that includes the record well. Production reported for a record well shall equal the total production from all of the horizontal drainholes comprising the stacked lateral well. An operator shall measure the production from each surface location of a stacked lateral well. An operator shall measure the full well stream with the measurement adjusted for the allocation of condensate based on the gas to liquid ratio established by the most recent Form G-10 test rate for that surface location. The gas and condensate production shall be identified by individual API number, and recorded and reported on the "Supplementary Attachment to Form PR".

(8) If the field is designated as absolute open flow (AOF) pursuant to §3.31(j) of this title and that designation is removed, the Commission shall assign a single gas allowable to each record well classified as a gas well. The assigned allowable may be produced from any one, all, or a combination of the horizontal drainholes that constitute the stacked lateral well.

(9) An operator shall file Form W-3A, Notice of Intention to Plug and Abandon, and Form W-3, Well Plugging Report, for each horizontal drainhole within the stacked lateral well as required by §3.14 of this title (relating to Plugging).

(10) In order to maintain a single operator of record for a stacked lateral well, a certificate of compliance changing the designation of an operator for a horizontal drainhole in a stacked lateral well pursuant to §3.58 of this title (relating to Certificate of Compliance and Transportation Authority; Operator Reports) may only be approved if certificates of compliance designating the same operator have been filed for all horizontal drainholes within the stacked lateral well.

(11) An operator may remove a horizontal drainhole from a designated stacked lateral well by filing an amended drilling permit application and a completion report. If the horizontal drainhole being removed is the record well for the stacked lateral and there are still multiple horizontal drainholes remaining within the designated stacked lateral well, then the operator shall designate a new record well for the stacked lateral well prior to removing the existing record well from the designated stacked lateral well.

(g) Drilling applications and required reports.

(1) Application. Any intent to develop a new or existing well with horizontal drainholes must be indicated on the application to drill. An application for a permit to drill a horizontal drainhole shall include the fees required by §3.78 of this title (relating to Fees and Financial Security Requirements), and shall be certified by a person acquainted with the facts, stating that all information in the application is true and complete to the best of that person's knowledge. If the penetration point on the proposed horizontal drainhole is located on an offsite tract, the following conditions shall be met prior to submission of the application to drill:

(A) The applicant shall give written notice by certified mail, return receipt requested, to all mineral owners of any offsite tracts

through which the proposed wellbore path traverses from the point of penetration. The notice shall identify the proposed well, include a plat clearly depicting the projected path of the entire wellbore, and allow the party notified not less than 21 days to object to the proposed offsite tract penetration. Notice of offsite tract penetration is not required if:

(i) written waivers of objection are received by the applicant from all mineral owners of any offsite tracts and the waivers are attached to the drilling permit application; or

(ii) the applicant is the only mineral owner of any offsite tracts.

(B) For purposes of this subsection, the mineral owners of any offsite tracts through which the proposed wellbore path traverses from the point of penetration include:

(i) the designated operator;

(ii) all lessees of record for any offsite tracts which have no designated operator; and

(iii) all owners of unleased mineral interests where there is no designated operator or lessee.

(C) In the event the applicant is unable after due diligence to locate the whereabouts of any person to whom notice is required by this subsection, the applicant shall publish notice of this application pursuant to Chapter 1 of this title (relating to Practice and Procedure).

(D) If any mineral owner of an offsite tract objects to the location of the penetration point, the applicant may request a hearing to demonstrate the necessity of the location of the penetration point of the well to prevent waste or to protect correlative rights.

(E) If any person specified in subparagraph (B) of this paragraph did not receive notice as required in subparagraph (A) of this paragraph, that person may request a hearing. If the Commission determines at a hearing that the applicant did not provide the notice as required by subparagraph (A) of this paragraph, the Commission may cancel the permit.

(F) To mitigate the potential for wellbore collisions, the applicant shall provide copies of any directional surveys to the parties entitled to notice under this section, upon request, within 15 days of the applicant's receipt of a request.

(2) Drilling unit plat. The application to drill a horizontal drainhole shall be accompanied by a plat as required by §3.5(h) of this title (relating to Application to Drill, Deepen, Reenter, or Plug Back).

(A) For fields that require a proration unit plat, in addition to the plat requirements provided for in §3.5(h) of this title, the plat shall include the lease, pooled unit or unitized tract, showing the acreage assigned to the drilling unit for the proposed well and the acreage assigned to the drilling units for all current applied for, permitted, or completed oil, gas, or oil and gas wells on the lease, pooled unit, or unitized tract.

(B) An amended drilling permit application and plat shall be filed after completion of the horizontal drainhole well if the Commission determines that the drainhole as drilled is not reasonable with respect to the drainhole represented on the plat filed with the drilling permit application. A horizontal drainhole, as drilled, shall be considered reasonable with respect to the drainhole represented on the plat filed with the drilling permit application if the take points on the as-drilled plat comply with subsection (b)(4) and (5) of this section and with any applicable lease line spacing rules.

(3) Directional survey. A directional survey from the surface to the farthest point drilled on the horizontal drainhole shall be required for all horizontal drainholes. The directional survey and accompanying reports shall be conducted and filed in accordance with §3.11 and §3.12 of this title (relating to Inclination and Directional Surveys Required, and Directional Survey Company Report, respectively). No allowable shall be assigned to any horizontal drainhole well until an acceptable directional survey and survey plat has been filed with the Commission.

(4) Proration unit plat. The required proration unit plat must depict the lease, pooled unit, or unitized tract, showing the acreage assigned to the proration unit for the horizontal drainhole well, the acreage assigned to the proration units for all wells on the lease, pooled unit, or unitized tract, and the path, penetration point, take points, and terminus of all drainholes. No allowable shall be assigned to any horizontal drainhole well until an acceptable proration unit plat has been filed with the Commission. Proration unit plats are not required for wells in a designated UFT field. However, an operator of a well in a designated UFT field may file a proration unit plat along with Form P-16. Designated UFT fields have no maximum diagonal limit.

(5) As-drilled plat. An as-drilled plat is required for each horizontal drainhole well. The as-drilled plat for each horizontal drainhole well shall show the surface location, actual wellbore path, penetration point, terminus, and first and last take points of the horizontal drainhole. If the drilling permit for the horizontal drainhole well is approved with one or more NPZs, the as-drilled plat shall show the nearest take point on either side of each NPZ.

(6) Plat requirements. All plats required by this section shall be prepared using blue or black ink and shall include a certification by a professional land surveyor registered in accordance with Texas Occupations Code, Chapter 1071, relating to Land Surveyors, or by a registered professional engineer registered in accordance with Texas Occupations Code, Chapter 1001, relating to Professional Engineers.

(h) Exceptions and procedure for obtaining exceptions.

(1) The Commission may grant exceptions to this section in order to prevent waste, prevent confiscation, or to protect correlative rights.

(2) If a permit to drill a horizontal drainhole requires an exception to this section, the notice and opportunity for hearing procedures for obtaining exceptions to the density provisions prescribed in §3.38 of this title shall be followed as set forth in §3.38(h) of this title.

(3) For notice purposes, the Commission presumes that for each adjacent tract and each tract nearer to any point along the proposed or existing horizontal drainhole than the prescribed minimum lease-line spacing distance, affected persons include:

(A) the designated operator;

(B) all lessees of record for tracts that have no designated operator; and

(C) all owners of record of unleased mineral interests.

(i) UFT field designation criteria, application and approval procedures.

(1) Criteria for UFT field designation.

(A) Administrative UFT field designation. To be designated administratively as a UFT field, a field shall have the following characteristics:

(i) the *in situ* permeability of at least one distinct producible interval within the field is 0.1 millidarcies or less prior to hydraulic fracture treatment, as determined by core data or other supporting data and analysis; and

(ii) as to producing wells for which the Commission issued the initial drilling permit on or after February 1, 2012, that have been completed in the field, either:

(I) there are at least five such wells of which at least 65% were drilled horizontally and completed using hydraulic fracture treatment; or

(II) there are at least twenty-five such wells drilled horizontally and completed using hydraulic fracture treatment.

(B) Alternative UFT field designation obtained through evidentiary hearing. If an applicant demonstrates in a hearing that reservoir characteristics exist other than the characteristics specified in subparagraph (A) of this paragraph such that horizontal drilling and hydraulic fracture treatment must be used in order to recover the resources from all or a part of the field and that UFT field designation will promote orderly development of the field, the hearings examiner may recommend to the Commission that the field be designated as a UFT field.

(2) Procedures for UFT field designation.

(A) Commission motion to designate a UFT field. The Commission may on its own motion propose that a field be designated as a UFT field upon written notice of the motion to all operators in the field.

(i) If no written objection is filed within 21 days after the date the notice is issued, Commission staff may present a recommendation to the Commission regarding designation of the field as a UFT field.

(ii) If the Commission receives a timely filed written objection, the Commission shall notify the operators in the field that an objection was received and allow any operator in the field 21 days to request a hearing. Pursuant to paragraph (1)(B) of this subsection, the operator requesting the hearing shall bear the burden of proof at the hearing. If no request to set the matter for hearing is received from an operator in the field, the Commission may either dismiss the matter or set the matter for hearing on its own motion. If the matter is set for hearing on the Commission's motion, the proponents of UFT field designation shall bear the burden of proof.

(B) Operator application for UFT designation.

(i) An operator may propose that a field be designated as a UFT field by submitting an application to the Commission that includes an affirmative statement that the field qualifies for designation as a UFT field and providing core data or other supporting data and analysis in support of that affirmative statement.

(ii) If, on review of the completed application, Commission staff determines that the field meets the criteria in paragraph (1)(A) of this subsection, Commission staff shall notify all operators in the field that a UFT field designation order may be presented to the Commission for approval not less than 21 days after the date the notice is issued unless the Commission receives a written objection. If the applicant provides written waivers of objection from all operators in the field, then notice to the operators in the field shall not be required.

(iii) If the Commission receives a timely filed written objection to the notice of the proposal to designate the field as a UFT field, or if Commission staff determines that the field does not

qualify for designation as a UFT field, then the applicant for UFT field designation may request that the application be set for hearing.

(iv) If the applicant requests a hearing, the Commission shall send a notice of hearing to all operators in the field proposed for designation as a UFT field at least 15 days in advance of the hearing.

(v) Following a hearing on the request, the hearings examiner may present a recommendation to the Commission regarding the request to designate the field as a UFT field.

(j) Effect of special field rules for UFT fields.

(1) Special field rules for a UFT field shall prevail over all conflicting provisions of this chapter.

(2) The Commission may on its own motion or on the motion of an operator in a field call a hearing to review the current special field rules applicable in a field that is designated or proposed to be designated as a UFT field and request amendment or rescission of any portion of the current field rules, in conjunction with such designation, so that the field is regulated with the appropriate combination of special field rules and the rules in this chapter to effectively and efficiently protect correlative rights and/or prevent waste.

(3) The following provisions shall apply with respect to specific amendments to the special field rules for a UFT field.

(A) A special field rule amendment hearing is not required for the following amendments:

(i) reduction of the standard and/or optional density to one-half of the existing standard and/or optional density;

(ii) deletion of the between-well spacing rule; or

(iii) replacement of the allowable provided by special field rules with the allowable provided by §3.31 of this title, §3.45 of this title (relating to Oil Allowables), and subsection (d)(4) and (5) of this section.

(B) To request one or more of the amendments listed in subparagraph (A) of this paragraph, the operator shall submit to the Commission a request for amendment and engineering and/or geological data to support the requested amendments. For each exhibit submitted, the operator shall include a written explanation showing that the requested amendment will result in the protection of correlative rights and/or the prevention of waste.

(C) Upon receipt of a request for amendment, the Commission shall provide notice of the request to all operators in the field. If no written objection is filed within 21 days after the date the notice is issued, Commission staff may present a recommendation to the Commission regarding the requested amendment. If the Commission receives a timely filed written objection, the applicant may request a hearing to establish through the submission of competent evidence that the requested amendment is necessary for continued development of a designated UFT field, and will result in the protection of correlative rights and/or prevention of waste.

(k) Exceptions to §3.38 for a well in a UFT field. To request an exception to §3.38 of this title for a well in a UFT field:

(1) The operator shall submit to the Commission a written request for an exception to §3.38 of this title. The operator shall clearly state on the drilling permit application whether the density exception is sought under this subsection or through the provisions of §3.38 of this title.

(2) The Commission shall send written notice of the request for an exception to §3.38 of this title filed under this subsection

to any designated operators, lessees of record for tracts that have no designated operator, and all owners of unleased mineral interests:

(A) within 600 feet from the location of a vertical well completed within the UFT field; or

(B) within 600 feet from any take point on a horizontal well within the UFT field correlative interval.

(3) Persons who have received notice pursuant to paragraph (2) of this subsection shall have 21 days from the date of issuance of the notice to file a written objection with the Commission.

(4) If no timely filed written objection is received by the Commission, the applicant provides written waivers from all persons entitled to notice under paragraph (2) of this subsection, or there are no persons entitled to notice, then the application may be approved administratively without the requirement of filing supporting data.

(5) If a timely filed written objection is received by the Commission, the applicant may request a hearing, at which the applicant shall show that the proposed exception to §3.38 of this title is necessary to effectively drain an area of the UFT field that will not be effectively drained by existing wells or to prevent waste or confiscation. Notice of a hearing for a protested exception application under §3.38 of this title for a well in a UFT field will be provided to those persons entitled to notice of such an application as specified in paragraph (2) of this subsection.

(6) Permits granted pursuant to paragraphs (1) - (5) of this subsection shall be issued as exceptions to §3.38 of this title.

(7) Nothing in this subsection prevents an operator from electing to apply for and obtain a density exception under the provisions of §3.38 of this title rather than the provisions of paragraphs (1) - (6) of this subsection.

(l) Tubing requirements for completions in UFT fields. An operator of a flowing oil well in a UFT field may obtain a six-month exception to the requirement in §3.13(b)(4)(A) of this title (relating to Casing, Cementing, Drilling, Well Control, and Completion Requirements) that flowing oil wells shall be produced through tubing. The exception may be granted administratively. A revised completion report shall be filed once the oil well has been equipped with the required tubing string to reflect the actual completion configuration.

(1) For good cause shown, including a showing that the well is flowing at a pressure in excess of 300 psig surface wellhead flowing pressure, an operator may obtain from the District Director one or more extensions to the six month exception. Each extension shall be no more than six months in duration. If the request for an extension is denied, the operator may request a hearing. If a hearing is requested, the exception shall remain in effect pending final Commission action on the request for an extension.

(2) This subsection applies to new drills, reworks, recompletions, or new fracture stimulation treatments for any flowing oil well in the field.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Railroad Commission of Texas

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



16 TAC §3.78

The Railroad Commission of Texas (Commission) adopts amendments to §3.78, relating to Fees and Financial Security Requirements, without changes to the proposed text as published in the October 2, 2015, issue of the *Texas Register* (40 TexReg 6815). The Commission adopts the amendments to implement a fee for groundwater protection determination letters as provided in Texas Natural Resources Code, §91.0115(b), and to correct a form reference.

House Bill 2694 (HB 2694), enacted by the 82nd Texas Legislature (Regular Session, 2011) amended Texas Natural Resources Code, Chapter 91, and Texas Water Code, Chapter 27, to transfer the Surface Casing Unit from the Texas Commission on Environmental Quality to the Railroad Commission of Texas. HB 2694 added §91.0115, Texas Natural Resources Code, relating to Casing; Letter of Determination, which transferred to the Railroad Commission the responsibility for issuing a letter of determination stating the total depth of surface casing required for an oil or gas well by §91.011. Section 91.0115(b) authorized the Railroad Commission to charge a fee in an amount to be determined by the Railroad Commission for a letter of determination and to charge an additional fee not to exceed \$75 for processing a request to expedite a letter of determination. These adopted amendments to §3.78 implement the Commission's authority to charge a fee for each request for a determination letter. The Commission will continue to charge an additional fee for a request to expedite a determination letter.

The Commission received three comments on the proposal, one from a state representative and two from individuals. The Commission appreciates these comments.

The Honorable Abel Herrero, State Representative for District 34, commented that oil and gas operators in his area have expressed concern that the fee will exacerbate an already difficult economic situation, where recent falling oil prices have threatened jobs in the Coastal Bend as producers rethink the viability of drilling new wells. Representative Herrero asked the Commission to reconsider or indefinitely suspend the proposed fee. Additionally, one individual stated that small operators are being "taxed" unfairly when oil prices have fallen below \$50 a barrel, and asked the Commission not to incorporate these additional fees and to continue to provide free "water board" letters.

The Commission disagrees with these comments and will implement the fee as proposed. The fee will ensure that the Commission recovers funds necessary for Commission staff to prepare groundwater protection determination letters, including the study and evaluation of electronic access to geologic data and surface casing depths necessary to protect usable groundwater in this state. As noted in the proposal preamble, the Commission receives at least 18,000 requests for groundwater protection determination letters each year. The proposal preamble also noted that the new fee will impose a small cost compared to the overall cost of drilling a well. For example, the average cost to drill a 400-foot wildcat well (one of the shallowest wells permitted by

the Commission) is estimated to be approximately \$229,600 (using an average cost of \$574 per foot). The groundwater determination letter fee plus the 150% surcharge, at a total of \$250, is only 0.109% of \$229,600. For deeper wells, the fee will be an even smaller percentage of the overall cost. Finally, the Commission anticipates the amendments will have a lower cost impact on small or micro businesses than on large businesses. This is because the number of wells an entity drills or plugs, and the corresponding number of requests for groundwater determination letters, should be proportionate to the size of the entity.

Another individual commented that a surcharge should not be applied to a nonrefundable fee or added to the expedite fee, given the price of oil and company cut-backs, and stated that it is not a good time for the Commission to impose even more fees and surcharges. The Commission disagrees with this comment. Texas Natural Resources Code §81.070 requires the Commission to impose surcharges on fees required to be deposited into the Oil and Gas Regulation and Cleanup Fund (the Fund), and groundwater determination letter fees are required to be deposited in the Fund pursuant to Texas Natural Resources Code §81.067. For these reasons, the Commission makes no change to the rule as proposed.

The Commission adopts new subsection (a)(14) to add a definition for "Groundwater protection determination letter" to mean "a letter of determination stating the total depth of surface casing required for a well in accordance with Texas Natural Resources Code, §91.011."

The Commission adopts §3.78(b)(14)(A) to require a nonrefundable fee of \$100 with each individual request for a groundwater protection determination letter. The Commission redesignates the existing language of §3.78(b)(14) concerning the fee for each individual application for an expedited letter of determination as §3.78(b)(14)(B). Pursuant to §3.78(n), for which no amendments were proposed, a 150% surcharge would apply to the \$100 fee, for a total cost of \$250 for each request for a groundwater protection determination letter. If an expedited letter is requested, the expedite fee and its surcharge will be charged in addition to the regular fee.

The Commission also amends §3.78(b)(13)(A) to correct a reference to Form W-3X.

The Commission adopts the amendments to §3.78 pursuant to Texas Natural Resources Code, §81.051 and §81.052, which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under Commission jurisdiction; Texas Natural Resources Code, §81.067 and §81.068, relating to the Oil and Gas Regulation and Cleanup Fund; Texas Natural Resource Code, §81.070, which authorizes the Commission to impose surcharges on fees; Texas Natural Resources Code, §91.101, which authorizes the Commission to prevent pollution of surface water or subsurface water from oil and gas operations; Texas Natural Resources Code, §91.011, which authorizes the Commission to adopt rules concerning the depth of well casing; Texas Natural Resources Code, §91.0115, which requires the Commission to issue groundwater protection determination letters and authorizes the Commission to charge an application fee and an expedite application fee; and Texas Water Code, §27.033, which requires a person applying for a permit under Chapter 27 to submit with the application a letter of determination from the Commission stating that drilling and using the disposal well and injecting oil and gas waste into the subsurface

stratum will not endanger the freshwater strata in that area and that the formation or stratum to be used for the disposal is not freshwater sand.

Statutory authority: Texas Natural Resources Code, §§81.051, 81.052, 81.067,81.068, 81.070, 91.101, 91.011, and 91.0115, and Texas Water Code, §27.033 are affected by the adopted amendments.

Texas Natural Resources Code §§81.051, 81.052, 81.067,81.068, 81.070, 91.101, 91.011, and 91.0115, and Texas Water Code, §27.033.

Cross-reference to statute: Texas Natural Resources Code, Chapters 81 and 91, and Texas Water Code, Chapter 27.

Issued in Austin, Texas, on January 12, 2016.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Haley Cochran

Rules Attorney, Office of General Counsel

Railroad Commission of Texas

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Proposal publication date: October 2, 2015

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



PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 60. PROCEDURAL RULES OF THE COMMISSION AND THE DEPARTMENT

The Texas Department of Licensing and Regulation (Department) adopts amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 60, Subchapter G, §60.102, and Subchapter I, §§60.300, 60.302, 60.304 - 60.308, 60.310, and 60.311; and adopts the repeal of Subchapter I, §§60.301, 60.303, and 60.309, without changes to the proposed text as published in the October 23, 2015, issue of the *Texas Register* (40 TexReg 7331). The rules will not be republished.

The adopted amendments and repeals are necessary to implement the changes made by Senate Bill 1267, House Bill 2154 and House Bill 763, 84th Legislature, Regular Session (2015).

The Department would like to clarify the sections being repealed are §§60.301, 60.303 and 60.309, but were published in the October 23, 2015, issue of the *Texas Register* (40 TexReg 7331) as §§65.301, 65.303 and 65.309.

The adopted amendments to §60.102 update terminology and require the Department to respond to a request for rulemaking in accordance with the Texas Administrative Procedure Act (APA), §2001.021.

The adopted amendments to §60.300 clarify that unless otherwise provided by statute, by the APA, by the rules of the State Office of Administrative Hearings (SOAH), or by the 16 TAC Chap-

ter 60 rules, Subchapter I governs contested cases under the APA.

The repeal of §60.301 is adopted because the requirements are found in other law.

The adopted amendments to §60.302 remove most of the provisions relating to Notices of Alleged Violation because those requirements are found in the department's enabling statute, specifically, Occupations Code Chapter 51, Subchapter F.

The repeal of §60.303 is adopted because the requirements are found in other law.

The adopted amendments to §60.304 make editorial corrections only.

The adopted amendments to §60.305 make an editorial correction and correct a rule reference only.

The adopted amendments to §60.306 remove procedural requirements found in other law, including the APA and the Occupations Code, Chapter 51.

The adopted amendments to §60.307 make editorial corrections, correct rule references and remove a requirement found in other law.

The adopted amendment to §60.308 makes an editorial correction only.

The repeal of §60.309 is adopted because the requirements are found in other law.

The adopted amendments to §60.310 remove requirements related to decisions, orders, motions for rehearing, and appeals that are found in other law, including the APA and the Occupations Code, Chapter 51.

The adopted amendments to §60.311 make editorial corrections only.

The Texas Department of Licensing and Regulation (Department) drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the October 23, 2015, issue of the *Texas Register* (40 TexReg 7331). The deadline for public comments was November 23, 2015. The Department did not receive any comments on the proposed rules during the 30-day public comment period.

SUBCHAPTER G. RULEMAKING

16 TAC §60.102

The amendments are adopted under Texas Occupations Code, Chapter 51, which authorizes the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adopted amendments are those set forth in Texas Occupations Code, Chapter 51, the Commission's and the Department's enabling statute. In addition, the following statutes that establish occupational licensing requirements under the Commission's and Department's jurisdiction may be affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Education Code, Chapter 1001 (Driver Education and Safety); Texas Health and Safety Code, Chapters 754 (Elevators, Escalators, and Related Equipment) and 755 (Boilers); Texas Government Code, Chapter 469 (Elimination of Architectural Barriers); Texas Labor Code, Chapters 91 (Professional Employer Organizations) and 92 (Temporary Common Worker

Employers); and Texas Occupations Code Chapters 802 (Dog or Cat Breeders), 953 (For-Profit Legal Service Contract Companies), 1151 (Property Tax Professionals), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetologists), 1603 (Regulation of Barbering and Cosmetology), 1703 (Polygraph Examiners), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Vehicle Towing and Booting), and 2309 (Used Automotive Parts Recyclers).

In addition, the following statutes, which were amended effective September 1, 2015, and will be under the Commission's and Department's jurisdiction when the program transfers are complete pursuant to S.B. 202, 84th Legislature, Regular Session, 2015, may be affected: Texas Occupations Code, Chapters 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Licensed Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 605 (Orthotists and Prosthetists); and 701 (Dietitians). No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

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Proposal publication date: October 23, 2015

For further information, please call: (512) 463-8179



SUBCHAPTER I. CONTESTED CASES

16 TAC §§60.300, 60.302, 60.304 - 60.308, 60.310, 60.311

The amendments are adopted under Texas Occupations Code, Chapter 51, which authorizes the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adopted amendments are those set forth in Texas Occupations Code, Chapter 51, the Commission's and the Department's enabling statute. In addition, the following statutes that establish occupational licensing requirements under the Commission's and Department's jurisdiction may be affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Education Code, Chapter 1001 (Driver Education and Safety); Texas Health and Safety Code, Chapters 754 (Elevators, Escalators, and Related Equipment) and 755 (Boilers); Texas Government Code, Chapter 469 (Elimination of Architectural Barriers); Texas Labor Code, Chapters 91 (Professional Employer Organizations) and 92 (Temporary Common Worker

Employers); and Texas Occupations Code Chapters 802 (Dog or Cat Breeders), 953 (For-Profit Legal Service Contract Companies), 1151 (Property Tax Professionals), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetologists), 1603 (Regulation of Barbering and Cosmetology), 1703 (Polygraph Examiners), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Vehicle Towing and Booting), and 2309 (Used Automotive Parts Recyclers).

In addition, the following statutes, which were amended effective September 1, 2015, and will be under the Commission's and Department's jurisdiction when the program transfers are complete pursuant to S.B. 202, 84th Legislature, Regular Session, 2015, may be affected: Texas Occupations Code, Chapters 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Licensed Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 605 (Orthotists and Prosthetists); and 701 (Dietitians). No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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16 TAC §§60.301, 60.303, 60.309

The repeals are adopted under Texas Occupations Code, Chapter 51, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adopted repeals are those set forth in Texas Occupations Code, Chapter 51, the Commission's and the Department's enabling statute. In addition, the following statutes that establish occupational licensing requirements under the Commission's and Department's jurisdiction may be affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Education Code, Chapter 1001 (Driver Education and Safety); Texas Health and Safety Code, Chapters 754 (Elevators, Escalators, and Related Equipment) and 755 (Boilers); Texas Government Code, Chapter 469 (Elimination of Architectural Barriers); Texas Labor Code, Chapters 91 (Professional Employer Organizations) and 92 (Temporary Common Worker Employers); and Texas Occupations Code Chapters 802 (Dog or Cat Breeders), 953 (For-Profit Legal Service Contract Companies), 1151 (Property Tax Professionals), 1152 (Property Tax Consultants),

1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetologists), 1603 (Regulation of Barbering and Cosmetology), 1703 (Polygraph Examiners), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Vehicle Towing and Booting), and 2309 (Used Automotive Parts Recyclers).

In addition, the following statutes, which were amended effective September 1, 2015, and will be under the Commission's and Department's jurisdiction when the program transfers are complete pursuant to S.B. 202, 84th Legislature, Regular Session, 2015, may be affected: Texas Occupations Code, Chapters 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Licensed Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 605 (Orthotists and Prosthetists); and 701 (Dietitians). No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Executive Director
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CHAPTER 65. BOILERS

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 65, Subchapter A, §65.2, Subchapter C, §65.13, Subchapter I, §65.62, Subchapter J, §65.72, Subchapter N, §65.203 and §65.210, Subchapter O, §65.300, Subchapter P, §65.401, and Subchapter R, §§65.605, 65.608 - 65.611, and 65.613; adopts new rules in Subchapter B, §§65.6 - 65.8, and Subchapter K, §65.86; and adopts the repeal of Subchapter B, §65.10 and §65.11, without changes to the proposed text as published in the October 23, 2015, issue of the *Texas Register* (40 TexReg 7335). The rules and repeals will not be republished.

The amendments to §65.612 are adopted with changes to the proposed text as published in the October 23, 2015, issue of the *Texas Register* (40 TexReg 7335). The rule will be republished.

The adopted amendments, new rules and repeals are necessary to implement the changes made by House Bill 3091; address safety concerns; make technical and editorial corrections; and add a temporary operating permit fee.

The adopted amendments to §65.2 provide clarity and editorial corrections to certain definitions.

The adopted new §65.8 establishes the registration requirements for Authorized Inspection Agency without NB-360 accreditation.

The adopted repeal of §65.10 is primarily to renumber it as §65.6 and distinguish this section as registration requirements for agencies with national board accreditation.

The adopted repeal of §65.11 is primarily to renumber it as §65.7 and distinguish this section as registration renewal requirements for agencies with national board accreditation.

The adopted amendments to §65.13 establish the terms of a temporary operating permit.

The adopted amendments to §§65.62, 65.203, 65.401 and 65.613 change the language of "hydrostatic test" to "liquid pressure test" to conform to industry terminology and practice.

The adopted amendment to §65.72 adds the Executive Director of the Department to the authorized personnel who may declare a boiler unsafe.

The adopted new §65.86 establishes reporting requirements for Authorized Inspection Agencies.

The adopted amendments to §65.210 remove "preparation" from the title and make technical corrections.

The adopted amendment to §65.300 adds a fee for a temporary operating permit.

The adopted amendments to §65.605 require a screen guard to be placed around high voltage circuits and electric boilers be internally examined.

The adopted amendments to §65.608 and §65.609 correct cross references.

The adopted amendment to §65.610 allows the Department instead of just the Chief Boiler Inspector to review and maintain inspection summary reports.

The adopted amendments to §65.611 make editorial changes.

The adopted amendments to §65.612 allow plugging boiler tubes as a type of repair or alteration and make an editorial change.

The Texas Department of Licensing and Regulation (Department) drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the October 23, 2015, issue of the *Texas Register* (40 TexReg 7335). The deadline for public comments was November 23, 2015. The Department did not receive any comments on the proposed rules during the 30-day public comment period.

The Board of Boiler Rules (Board) met on December 16, 2015, to discuss the proposed rules and recommended that the Commission adopt the proposed rules as published in the *Texas Register* with minor changes to §65.612. At its meeting on January 6, 2016, the Commission adopted the proposed rules with changes as recommended by the Board.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §65.2

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

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For further information, please call: (512) 463-8179

SUBCHAPTER B. REGISTRATION-- AUTHORIZED INSPECTION AGENCY

16 TAC §§65.6 - 65.8

The new rules are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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16 TAC §65.10, §65.11

The repeals are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. BOILER REGISTRATION AND CERTIFICATE OF OPERATION-- REQUIREMENTS

16 TAC §65.13

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

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SUBCHAPTER I. INSPECTION OF BOILERS

16 TAC §65.62

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER J. TEXAS BOILER NUMBERS

16 TAC §65.72

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER K. REPORTING REQUIREMENTS

16 TAC §65.86

The new rule is adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER N. RESPONSIBILITIES OF THE OWNER AND OPERATOR

16 TAC §65.203, §65.210

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER O. FEES

16 TAC §65.300

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Executive Director

Texas Department of Licensing and Regulation

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SUBCHAPTER P. ADMINISTRATIVE PENALTIES AND SANCTIONS

16 TAC §65.401

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

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SUBCHAPTER R. TECHNICAL REQUIREMENTS

16 TAC §§65.605, 65.608 - 65.613

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

§65.612. *Repair and Alterations.*

(a) Repairs and alterations shall conform to the current edition of the National Board Inspection Code (NBIC) and shall be acceptable to the inspector, except that repairs and alterations may be performed by the following, provided the intended work is within the scope of the issued certificate of authorization:

(1) holders of a certificate of authorization from the National Board of Boiler and Pressure Vessel Inspectors for use of the R repair symbol stamp; or

(2) owner/operators of boilers who have been issued a certificate of authorization by the department.

(A) Issuance of the certificate of authorization will be made upon submission of an application, on forms provided by the department.

(B) Review of the applicant's program and facilities initially and at subsequent three-year intervals will be done.

(i) The review will determine the applicant has a documented program to control repairs and/or alterations conforming to minimum requirements established by the department.

(ii) The review will require demonstration of the applicant's ability to perform repairs and/or alterations by implementing on representative work the requirements of the written program.

(iii) The guidelines of the NBIC for the quality control system are a minimum, except that an Authorized Inspection Agency is not required and the Repair and Alteration forms are issued by the department. The National Board's forms shall not be used by these certificate holders.

(b) Derating a boiler's MAWP and/or allowable temperature (in accordance with the NBIC), shall be approved by the department prior to commencement of the alteration. If the derating is approved, the MAWP and/or allowable temperature shall not be increased without prior approval from the department.

(c) Non-welded repairs.

(1) Replacement parts made of plate material used for pressure retaining shall require material test reports (MTR). Traceability to the MTR must be maintained at all times.

(2) Replacement parts fabricated by welding shall be certified, stamped with the appropriate ASME Code symbol and inspected by an authorized inspector as required by the ASME Code.

(3) When a non-welded repair involves the replacement of cast or forged parts that are identified with the ASME Code symbol at the time of casting or forging, these parts shall be replaced with cast or forged parts that are identified with the ASME Code symbol or so certified by the manufacturer to be in accordance with the original code of construction.

(4) All other materials shall not require MTR's, provided the material is identified with the material specification, grade, lot and rating as required by the material or product specification and the ASME Code.

(5) When used parts are utilized for non-welded repairs, it is the repair organization's responsibility to ensure the parts are identified as required above.

(6) Boiler tubes shall be replaced with tubes of the allowed material and in accordance with the original code of construction.

(d) Lap seam cracks. The shell or drum of a boiler in which a typical lap seam crack is discovered along a longitudinal riveted lap-type joint shall be immediately and permanently discontinued for use

under pressure. A lap seam crack is the typical crack frequently found in lap seams, which extends parallel to the longitudinal joint and is located either between or adjacent to rivet holes.

(e) Plugging of boiler tubes (excluding tubes in headers of economizers, evaporators, superheaters, or reheaters).

(1) Tube plugs shall be made of a material which is compatible with the material of the boiler tube being plugged and shall be welded into place, or manufactured to be expanded into the tube sheet or drum.

(2) Plugging boiler tubes on Fire Tube Boilers fabricated in accordance with ASME Section I or IV.

(A) Best practice is not to plug a boiler tube in a Fire Tube Boiler. If a Fire Tube Boiler tube is plugged, the following criteria shall apply.

(B) Plugging boiler tubes that are adjacent to another plugged boiler tube is prohibited.

(C) No more than 10% of the total number of boiler tubes shall be plugged.

(D) All non-expanded boiler tube plugs shall be welded into place.

(E) All plugged boiler tubes shall be replaced prior to the next required Certificate Inspection.

(3) Plugging boiler tubes on Water Tube Boilers, Unfired Boilers, or Process Steam Generators.

(A) No more than 10% of the boiler generating tubes may be plugged. Additional tubes may be plugged after approval is obtained from the Original Equipment Manufacturer or an Engineer experienced in boiler design. The scope of the approval is limited to the plugging of the tubes and shall consider the operational effect on the water side pressure boundary or membrane and the effect on the combustion process throughout the boiler.

(B) No Water Wall tubes may be plugged, where the tube forms a separation wall between products of combustion and the outside atmosphere or a separation of the gas passes in a multiple (gas) pass boiler.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

Effective date: February 15, 2016

Proposal publication date: October 23, 2015

For further information, please call: (512) 463-8179



CHAPTER 67. AUCTIONEERS

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 67, §§67.20, 67.25, 67.65 and 67.80; new rule §67.21; and repeal of current §67.70 without changes to the proposed text as published in the October 30, 2015, issue

of the *Texas Register* (40 TexReg 7553). The rules will not be republished.

The amendments to §67.30 and new rules §§67.70, 67.71 and 67.72 are adopted with changes to the proposed text as published in the October 30, 2015, issue of the *Texas Register* (40 TexReg 7553). The rules will be republished.

The adopted amendments, new rules and repeal are necessary to implement the changes made by House Bill 2481, which authorized the Commission to establish an associate auctioneer license; exempted certain auctions of property through the internet from Texas Occupations Code, Chapter 1802; and added several exemptions for auctioneers to conduct auctions of certain motor vehicles.

The adopted amendments to §67.20 make editorial corrections and add an alternative path to obtaining an auctioneer license, via experience gained through licensure as an associate auctioneer.

The adopted new §67.21 establishes the requirements for an associate auctioneer.

The adopted amendments to §67.25 add "associate auctioneer" to the continuing education requirements and makes an editorial change.

The adopted amendments to §67.30 provide clarity for exemptions regarding internet based auctions.

The adopted amendment to the title of §67.65 removes "Education" from the name of the advisory board to bring about consistency in the names of the Department's boards.

The adopted repeal of current §67.70 and new §67.70 will reorganize the current standards and add certain standards of practice for auctioneers into a more logical format by separating the duties relating to advertising, auctioneering and recordkeeping.

The adopted new §67.71 creates duties and responsibilities for the sponsoring auctioneer.

The adopted new §67.72 creates duties and responsibilities for associate auctioneers.

The adopted amendments to §67.80 create an application fee and renewal fee for the associate auctioneer license.

The Texas Department of Licensing and Regulation (Department) drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the October 30, 2015, issue of the *Texas Register* (40 TexReg 7553). The deadline for public comments was November 30, 2015. The Department received comments from three interested parties on the proposed rules during the 30-day public comment period.

Comment--One commenter did not agree with the reinstatement of the associate auctioneer.

Department Response--The reinstatement of the associate auctioneer was made by statute, so this program cannot be abolished by rule. The Department did not make any changes to the proposed rule based on this comment.

Comment--One commenter needed assistance locating the license and wanted help getting his license back.

Department Response--The Department provided the commenter the link for the proposed rules as well as the contact

information to the customer service division to discuss his license.

Comment--One commenter recommended that car auctioneers should not have to hold an auctioneer license and explained that he only performs bid calling and contracts with auto dealers to provide this service. The commenter provided a letter from the Texas Comptroller waiving the requirement to provide clerking, money collection or acceptance of consignment merchandise.

Department Response--A person needs a Texas auctioneer license to sell certain motor vehicles. Pursuant to House Bill 2481, a person does not need an auctioneer license to sell motor vehicles at auction if the person has a general distinguishing number issued by the Department of Motor Vehicles, or is licensed under Texas Occupations Code, Chapters 2301 or 2302. The Department responded directly to the commenter.

The Auctioneer Advisory Board (Board) met on December 14, 2015, to discuss the proposed rules and the public comments received. The Board recommended that the Commission adopt the proposed rules as published in the *Texas Register* with minor changes to §§67.30, 67.70, 67.71 and 67.72. At its meeting on January 6, 2016, the Commission adopted the proposed rules with the changes recommended by the Board.

16 TAC §§67.20, 67.21, 67.25, 67.30, 67.65, 67.70 - 67.72, 67.80

The amendments and new rules are adopted under Texas Occupations Code, Chapters 51 and 1802, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 1802. No other statutes, articles, or codes are affected by the adoption.

§67.30. Exemptions.

(a) An auction of property by live bid call, if the property is solely bid upon through the internet, is not subject to this chapter or Texas Occupations Code, Chapter 1802 and is exempt under §1802.002(4).

(b) For purposes of this chapter and Texas Occupations Code, Chapter 1802, the sale of real or personal property is not considered to be a competitive bid subject to this chapter if all of the material terms of the transaction other than price are not the same.

(c) This chapter does not apply to a person providing an online platform to facilitate an auction.

§67.70. Auctioneer Standards of Practice.

(a) Advertising

(1) All advertisements designed to solicit auction business, including the advertisement of an auction, shall include the auctioneer's name as it appears on the license and the license number.

(2) If an auctioneer advertises an auction as "absolute" or "without reserve", no lots included may have a minimum bid. Advertising may include the wording "many lots are without reserve"; however, the auction may not be titled, headed or called an "absolute" or "without reserve" auction unless all lots meet the criteria.

(3) An auctioneer who intends to charge a buyer's premium at an auction must state this condition and the amount of the buyer's premium in all advertising for the auction.

(4) An auctioneer may not make a false or misleading statement in an advertisement.

(b) Recordkeeping

(1) An auctioneer must furnish to the department the name, including assumed names, addresses, website, or social media pages, and telephone numbers of all auction companies that the auctioneer owns or operates.

(2) An auctioneer must report any change of address to the department in writing within thirty (30) days of the change.

(3) Each licensed auctioneer shall keep records relative to all auctions for a minimum of two (2) years from the date of the sale.

(4) The records for each auction must state the name(s) and address of the owners of the property auctioned, the date of the sale, the name of the auctioneer and clerk of the sale, the gross proceeds, the location and account number of the auctioneer's trust or escrow account, an itemized list of all expenses charged to the consignor or seller, a list of all purchasers at the auction and a description and selling price for each item sold.

(5) The auctioneer shall keep, as part of the records for each auction, all documents relating to the auction. These documents shall include, but are not limited to, settlement sheets, written contracts, copies of advertising and clerk sheets.

(6) These documents include records and documents online.

(7) Each licensed auctioneer must:

(A) Maintain a separate trust or escrow account in a federally insured bank or savings and loan association, in which shall be deposited all funds belonging to others which come into the auctioneer's possession and control.

(B) Deposit all proceeds from an auction into the trust or escrow account within seventy two (72) hours of the auction unless the owner or consignor of the property auctioned is paid immediately after the sale or the written contract stipulates other terms, such as sight drafts.

(C) Pay any public monies, including, but not limited to state sales tax, received into the State Treasury at the times and as per the regulations prescribed by law; and

(D) Pay all amounts due the seller or consignor within fifteen (15) banking days of the auction unless otherwise required by statute or a written contract between license holder and seller.

(8) A licensed auctioneer shall cooperate with the department in the performance of an investigation. This includes, but is not limited to responding to requests from the department, including producing requested documents or other information, within thirty (30) days of request.

(9) The failure of a licensed auctioneer to timely pay a consignor may subject the licensed auctioneer to a claim under the Auctioneer Education and Recovery Fund.

(c) At auction

(1) Before beginning an auction, a licensee must ensure the announcement of, give notice, display notice or disclose:

(A) that the auctioneer conducting the sale is licensed by the department;

(B) the terms and conditions of the sale including whether a buyer's premium will be assessed; and

(C) if the owner, consignor, or agent thereof has reserved the right to bid.

(2) A licensee may not allow any person who is not either a Texas licensed auctioneer or associate auctioneer who is directly supervised by a licensed auctioneer, to call bids at a sale.

(3) A licensee may not knowingly use or permit the use of false bidders at any auction.

(4) All licensed auctioneers shall notify consumers and service recipients of the department's name, mailing address, telephone number and website "www.tdlr.texas.gov" for purposes of directing complaints to the department. The notification shall be included on any auction listing contract and on at least one of the following:

(A) A sign prominently displayed at the place of the auction or on any auction website;

(B) Bills of sale or receipt to be given to buyers; or

(C) Bidder cards.

§67.71. *Requirements--Sponsoring Auctioneer.*

(a) There must be a legitimate employee-employer relationship between an associate auctioneer and the sponsoring auctioneer or between the associate and an auction company operated by a licensed auctioneer that employs the sponsoring auctioneer.

(b) A sponsoring auctioneer must be on the premises and directly supervising an associate auctioneer when the associate is bid calling.

(c) A sponsoring auctioneer is responsible for supervision of an associate auctioneer as the associate performs the items listed in §67.72(c).

(d) An auctioneer who terminates the sponsorship of an associate auctioneer must:

(1) within thirty (30) days notify the department in writing; and

(2) provide signed documentation to the associate auctioneer showing:

(A) the beginning and ending date of sponsorship;

(B) date and location of up to ten (10) auctions bid called by the associate;

(C) items listed in §67.72(c), that the associate has performed.

§67.72. *Requirements--Associate Auctioneers.*

(a) An associate auctioneer shall provide auction services only when under the supervision of the licensed Texas auctioneer whose name is on file with the department as the associate's sponsoring auctioneer.

(b) When bid calling, an associate auctioneer must be under the direct on-premises supervision of the sponsoring auctioneer.

(c) In order to be eligible for licensure as an auctioneer without taking the examination, an associate auctioneer must participate in all aspects of the auction business involving the laws of this state, in at least ten (10) auctions including but not limited to:

(1) appraising;

(2) inventorying;

(3) advertising;

(4) property make ready;

- (5) site selection and preparation;
- (6) lotting;
- (7) registration;
- (8) clerking;
- (9) cashiering;
- (10) bid-calling;
- (11) ring working;
- (12) property check out;
- (13) security;
- (14) accounting; and
- (15) escrow account procedures.

(d) An associate auctioneer must report any change of address to the department within thirty (30) days.

(e) When a sponsoring auctioneer terminates the sponsorship of an associate auctioneer, the associate may not provide auction services until an agreement with a new sponsoring auctioneer, whose name and signature are on file with the department, has been made.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 14, 2016.

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 William H. Kuntz, Jr.
 Executive Director
 Texas Department of Licensing and Regulation
 Effective date: February 15, 2016
 Proposal publication date: October 30, 2015
 For further information, please call: (512) 463-8179



16 TAC §67.70

The repeal is adopted under Texas Occupations Code, Chapters 51 and 1802, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 1802. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 14, 2016.

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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 §15.30

The General Land Office (GLO) adopts amendments to §15.30 (relating to Certification Status of the City of South Padre Island Dune Protection and Beach Access Plan), without changes to the proposed text as published in the July 31, 2015, issue of the *Texas Register* (40 TexReg 4874). Section 15.30 will not be republished.

BACKGROUND AND JUSTIFICATION

The City of South Padre Island's (City's) Dune Protection and Beach Access Plan (Plan) was first adopted on October 5, 1994 and most recently amended to adopt an Erosion Response Plan, which was certified by the GLO as consistent with state law and became effective April 17, 2013. The City Council amended Section 18-19.4 of its Code of Ordinances and its Plan to adopt a Beach User Fee (BUF) on May 20, 2015, and submitted the amended Plan to the GLO with a request for certification pursuant to Texas Natural Resources Code §61.015(b).

The GLO published the proposed amendments in the July 31, 2015, issue of the *Texas Register* (40 TexReg 4874) for a thirty (30) day comment period that ended on August 31, 2015. The GLO received several public comments during the comment period. In order to evaluate and respond to comments relating to the consistency of the BUF with state law, the GLO requested clarification from the City in a letter dated October 8, 2015. The City responded in a letter dated October 20, 2015, and provided additional information related to payment options, measures to ensure beach user safety, overnight parking restrictions, and enforcement procedures.

The amendment adds a Beach User Fee Plan as Appendix 2 to the Plan and establishes a BUF of up to \$13 dollars a day and an annual fee of up to \$50 for designated parking areas. The BUF will be charged for parking along Gulf Boulevard and at most beach access point cul-de-sacs from March 1st - September 15th from 8:00 a.m. to 8:00 p.m. The BUF will be collected through an internet-based pay system, which will require the patron to use a smart phone, a phone that texts, or any phone. Cash payments will also be collected at City Hall during the week and the Visitors Center and Police Station on the weekends. Signage within the parking areas will provide information on where cash payments can be made. In its October 20, 2015, letter to the GLO, the City clarified that cash payments will also be accepted at a future multi-modal transportation facility currently under construction and additional options such as kiosks and/or

distribution points at local businesses may be provided in the future.

Persons displaying a disabled placard or license plate do not need to pay the BUF. Forty-five free parking spaces will be provided and dedicated at three beach access cul-de-sacs, and additional free parking spaces will be provided at other locations both east and west of Padre Boulevard. Beachgoers will be able to use the City's free "Wave" bus transportation system, which runs on 30-minute intervals 365 days a year, from 7:00 a.m. to 9:00 p.m. to access the beach from more distant or remote parking areas.

In the short term, the BUF revenue will be used to increase parking adjacent to the beach; expand beach cleaning and maintenance by purchase of beach equipment; create a recycling program for the beach; install educational beach maintenance signage; and improve beach access by rehabilitating beach walkovers, constructing new walkovers, and installing rinse stations and drinking water stations.

In the long term, the BUF revenue will be used to procure and construct additional parking lots located east of Padre Island Boulevard; improve existing and future parking areas, beach access points and pedestrian pathways; develop a trolley system to enhance public access to the beach from remote off beach parking areas; and provide public restrooms along the beach or at beach access points.

The BUF Plan includes a variance from 31 Texas Administrative Code (TAC) §15.7(h)(1)(A), which requires parking adjacent to the beach to accommodate one car per 15 linear feet of beach. According to the City, historic, physical, and geographic constraints adjacent to the beach, as well as economic constraints, make it difficult to acquire the rights to the land necessary to provide the required parking. In order to obtain the variance, the City committed to devoting 50% of BUF revenue to increasing public parking adjacent to the beach. The City also committed to increasing free parking areas and purchasing land or obtaining long-term leases for parking east of Padre Boulevard within two to eight years after implementation of the BUF, which will provide up to 180 additional parking spaces. Over the long term, the City also committed to developing a trolley system to enhance public access to the beach. The City's commitment to achieve the presumptive criteria for parking spaces on or adjacent to the beach set forth in 31 TAC §15.7(h)(1)(A), and their commitment and adherence to the items found in the BUF Plan, are essential to the GLO's determination that the Plan preserves and enhances public access to and use of the beach. This determination is based explicitly on the City's assurances and commitments to the outlined short and long-term goals that will provide additional parking and enhance the public's access to and use of the public beach. The GLO will monitor the City's compliance with the Plan and its commitments. If the City fails to comply with its Plan, the GLO can withdraw certification of all or a portion of the Plan under 31 TAC §15.10(f) and (g).

The GLO has reviewed the City's BUF Plan and has determined that the BUF is reasonable. The BUF does not exceed the necessary and actual cost of providing reasonable beach-related facilities and services, does not unfairly limit public use of and access to and from public beaches in any manner, and is consistent with §15.8 of the Beach/Dune Rules and the Open Beaches Act. The BUF will provide the City with necessary resources so it can continue to maintain the public beach and provide beach related services within its jurisdiction. Therefore, the GLO finds that the BUF Plan is consistent with state law.

SUMMARY OF COMMENTS

The GLO received numerous public comments during the thirty (30) day comment period.

Comments were received by residents and visitors of the City of South Padre Island and the surrounding area, local business owners, and an individual representing the Surfrider Foundation South Texas Chapter. These comments generally objected to the implementation of a BUF within City limits based on: safety concerns relating to pedestrians crossing City streets, a lack of existing available parking adjacent to the beach, a lack of cash payment options to pay the BUF, and concerns related to enforcement of the BUF, among other issues.

Four commenters expressed concerns over the safety of pedestrians and families parking at free spaces on the west side of Padre Boulevard (HWY 100) and crossing the street with their beach supplies. Some commenters also indicated concerns over a combination of presumed increased vehicular traffic on Gulf Boulevard due to vehicles driving around to look for a parking spot, and an increased number of pedestrians crossing the street, paying the fee, and loading or unloading beach gear from vehicles. The GLO agrees that providing for the safety of persons using the public beach or its amenities is an important component of local government management of the public beach. Local governments are responsible for exercising authority to use police power and provide for public safety on roads within their jurisdictions. Local governments are responsible for exercising their authority to ensure compliance with 31 TAC §15.7(h), which requires a local government to preserve the public's right to access and use the public beach. The City has represented that it will enhance safety for beachgoers as they attempt to access the public beach. In its letter dated October 20, 2015, the City stated that they are "in the process of issuing a \$3 million dollar bond to finish improving the remaining sections of Gulf Boulevard. These improvements will include formalizing the parallel parking and installation of sidewalks and crosswalks. In addition to this, installation of Padre Boulevard crosswalks and medians will increase the safety for beach users having to cross Padre Boulevard to access the beach." In its Plan (Beach Parking System, Attachment A, Page 2), the City identifies future beach access improvements to include the incorporation of loading/unloading zones for the public to safely transport items to the beach access points. In addition, one of the long-term goals identified on Page 9 of the BUF Plan and to be completed within two to five years, is to "enhance safety along Gulf Boulevard with improved and designated parking along Gulf Boulevard with appropriate signage along with pedestrian pathways." The GLO will monitor compliance with the Plan.

One commenter stated that the City should lower the speed limit on Gulf Boulevard to make it safer for pedestrians. As stated on Page 5 of the BUF Plan, "City officials are working closely with the Texas Department of Transportation to reduce speed limits, construct medians and crosswalks for the entire length of the City." However, as provided in 31 TAC §15.7(h)(3), new or amended vehicular traffic regulations enacted for public safety, such as establishing speed limits and pedestrian rights-of-way, are exempt from this certification procedure but must nevertheless be consistent with the Open Beaches Act and 31 TAC Chapter 15.

Five commenters stated there is limited existing parking on Gulf Boulevard, and expressed concern that the BUF Plan does not create any new parking spaces. The GLO agrees with the com-

menters that there is limited beachfront parking on the Island and believes that the City's commitments in the Plan will result in increased parking adjacent to the beach. The GLO disagrees that the Plan does not identify creation of additional parking spaces adjacent to the beach. On Page 9 of the BUF Plan, the City commits to the purchase or long term leasing of vacant lots adjacent to the public beach in order to provide additional parking areas for the public (up to 180 additional parking spaces). The City identifies the creation of this additional parking as a long-term goal of the Plan; to be completed within two to eight years depending on BUF revenue. In order to accomplish this, the City committed 50% of BUF revenue to either purchase or lease land for beach parking east of Padre Boulevard (HWY 100). The GLO will monitor compliance with the Plan.

Related to the issue of limited available parking on Gulf Boulevard, numerous commenters, including City homeowners and business owners, stated that condominium properties along Gulf Boulevard currently do not provide enough parking spaces for their visitors and residents, which causes an overflow of condo parking on Gulf Boulevard, and on side-streets in front of resident homes, and in beach access cul-de-sacs. Three commenters stated that existing City enforcement of illegal overnight parking in beach access cul-de-sacs is not adequate. The GLO has no authority to require local governments to establish minimum parking requirements for the construction of buildings within the local community. The City is authorized to establish standards for the construction of buildings and associated parking; however, the City must do so in accordance with 31 TAC §15.7(h), which requires a local government to preserve the public's right to access and use the public beach. The GLO has determined that over the long term, the City's Plan will result in an increase in parking adjacent to the public beach and will protect public beach parking.

One commenter suggested that the City prohibit overnight parking on Gulf Boulevard in addition to existing overnight parking restrictions at beach access cul-de-sacs. The GLO disagrees with the commenter since the prohibition of overnight parking along both Gulf Boulevard and beach access cul-de-sacs would effectively eliminate parking for vehicles on all areas adjacent to a public beach that is closed to vehicles, which would result in the restriction of public access to the beach and violate the off-beach parking requirements outlined in Texas Natural Resources Code §61.011(d)(3) of the Open Beaches Act and 31 TAC §15.7(h).

One commenter representing a local business expressed concern that the proposed payment structure of \$13 per day or \$50 for a season pass would encourage early arrival to a parking space and a prolonged stay at the beach in order to get the most benefit out of money spent. The commenter also stated that the BUF would not increase turnover on Gulf Boulevard for this reason. The GLO disagrees with this comment. As identified in the BUF Plan, patrons wishing to pay for a parking space on Gulf Boulevard will have the option to pay \$6.35 for a 6-hour stay, providing a shorter option to stay at the beach than a full day.

Two commenters stated that recent efforts by the City to redevelop portions of Gulf Boulevard have complicated existing parking constraints. Complaints included: the recent installation of parallel parking on Gulf Boulevard has created safety concerns for children; vacant lots previously used for beach parking have been roped off by the City and no longer available for public parking; and an overall reduction of parking spaces along Gulf Boulevard has occurred due to redevelopment projects by the City. The City is responsible for exercising its responsibilities for

public safety and its authority in a way that ensures compliance with 31 TAC §15.7(h), which requires a local government to preserve the public's right to access and use the public beach. The City has identified several long-term goals (page 9 of the BUF Plan) that will use BUF revenue to enhance safety along Gulf Boulevard and increase the number of parking spaces adjacent to the public beach. In order to obtain the variance from 31 TAC §15.7(h)(1)(A), the City committed to devoting 50% of BUF revenue to increasing public parking adjacent to the beach. The City will purchase land or obtain long-term leases for parking areas East of Padre Boulevard within two to eight years after implementation of the BUF. The additional lots will provide up to 180 additional parking spaces.

Relating to the use of a smart phone as the primary method of payment of the BUF, seven commenters stated that many people do not own a smart phone, have internet access, or own a credit card. Commenters also expressed concerns that the fee is not equitable for the economically disadvantaged, since this user group would be unfairly limited in their options to pay the BUF or be unable to pay it at all. One commenter stated that \$13 per day was too expensive for a day permit. For these reasons, several commenters stated that the BUF Plan blocks the public's right to access the beach and violates the Open Beaches Act. The GLO agrees that persons without phones using internet capability and lines of credit must not be unfairly limited from accessing the public beach, as provided for under the OBA and 31 TAC §15.8(c)(2). However, the GLO has determined that the City has provided adequate alternative options for payment with cash at various locations, such as City Hall during the week and the Visitors Center and Police Station on the weekends. Signage will provide information on where cash payments can be made. In its October 20, 2015, letter to the GLO, the City stated that cash payments will also be accepted at a future multi-modal transportation facility and additional options such as kiosks and/or distribution points at local businesses may be provided in the future. For those who may be unable to pay the BUF, as required under 31 TAC §15.8(c) - (h), the City has identified areas where no BUF is charged for parking. As outlined in the City's BUF Plan, forty-five free parking spaces will be provided at three beach access cul-de-sacs and additional free parking spaces will be provided at other locations both east and west of Padre Boulevard. In addition, beachgoers will be able to use the City's free "Wave" bus transportation system, which runs on 30-minute intervals 365 days a year, from 7:00 a.m. to 9:00 p.m. to access the beach from remote parking areas. The GLO disagrees that \$13 is too expensive for a total daily BUF amount. Based on the information provided by the City, the GLO has determined that the fee is reasonable and necessary to fund beach-related services and facilities. The City is allowed by TNRC §61.011(b) of the OBA to charge beach user fees specifically in order to fund beach-related services. For the reasons outlined above, the GLO disagrees that the BUF Plan blocks the public's right to access the beach and violates the OBA.

Relating to alternative payment options for those not using the Passport internet-based system, five commenters representing various interest groups expressed concern over paying for a parking space at an off-site location such as City Hall or the Visitor's Center with no guarantee that the parking space will still be available upon return to Gulf Boulevard. The GLO agrees that the situation presented above may be an issue during peak use times. The City represented to the GLO that it will refund money to anyone who is unable to get a parking space after paying the BUF. The GLO urges the City to develop a protocol for making

refunds to patrons. The City has also identified additional cash payment options closer to the parking areas. Possible options include kiosks located near parking areas and/or at local businesses along Gulf Boulevard.

One commenter asked how a parking pass would be available for purchase on days when City Hall is closed and stated that it was not clear how long one could park for the price of a day pass. As stated in the BUF Plan, cash payments will be accepted at City Hall during the week and the Visitors Center and Police Station on the weekends. In its October 20, 2015, letter to the GLO, the City clarified that cash payments will also be accepted at a future multi-modal transportation facility that is currently under construction and additional options such as kiosks and/or distribution points at local businesses may be provided in the future. The fee established by the City will amount to \$6.35, including convenience fees, to park a vehicle for a 6-hour period. If the beachgoer wishes to extend their time, an additional \$6.35 charge will be required. The BUF will be charged for parking from March 1 - September 15, between the hours of 8:00 a.m. to 8:00 p.m.

One commenter asked why there was no mention of parking meters in the BUF Plan. Parking meters were not included in the BUF Plan submitted to the GLO and are not a requirement under 31 TAC §15.8 or TNRC Chapter 61. The BUF will be collected primarily through an internet-based pay system, which will require the patron to use a smart phone, a phone that texts, or any phone. For those that do not have access to a phone, cash payment options will be available at various locations, as previously stated.

Relating to the satellite location of free parking areas at the Convention Center and on the west side of Padre Boulevard (HWY 100), three commenters stated that one Wave bus to transport beachgoers and their beach gear is not adequate or reasonable for the anticipated demand during peak visitation times. The GLO agrees that additional transportation options may be needed to transport visitors from remote parking locations to public beach accesses during peak use times. In response to GLO concerns, the City has committed BUF revenue to fund several long-term goals that will address this issue. As stated in the BUF Plan, the City will develop a trolley system that will enhance accessibility to the beach through the utilization of remote off-beach parking areas. This will be achieved within five or more years depending on BUF revenue and grant availability. In addition, BUF revenue will be used for the purchase of vacant lots adjacent to the beach, and to fund construction of future parking structures adjacent to the public beach. The GLO has determined that these measures should adequately address the comments above.

Although the topic was not presented in the City's BUF Plan, six commenters expressed concerns over enforcement procedures. Commenters stated that one enforcement officer to serve the entirety of Gulf Boulevard on one ATV would be inadequate for the number of vehicles anticipated during March and summer months. Two commenters expressed concern over a vehicle occupying a paid parking space for 24 hours and asked how an enforcement officer was supposed to ensure that a vehicle is not allowed to occupy a space continually. The previous comments are related to City enforcement of the BUF and are outside the scope of the GLO's jurisdiction. The issue before the GLO is whether the BUF Plan as submitted by the City is consistent with the OBA, the Dune Protection Act, and 31 TAC Chapter 15, which do not outline enforcement procedures for beach user fee

collection. These comments and inquiries are outside the scope of the GLO's jurisdiction and certification authority. Local governments have the expertise and discretion to develop and implement enforcement procedures as appropriate for the needs of their community. The City, however, is responsible for exercising that authority in a way that ensures that there is adequate parking for beachgoers as required under 31 TAC §15.7(h). The GLO expects that the City will enforce the Plan that it has adopted in a way that ensures compliance with the TAC.

One commenter representing a local business stated that without rigid enforcement of the BUF, condominium owners would be able to purchase annual passes for renters who could continually occupy a large number of spaces, which would reduce the number of parking spaces available to the public. The GLO disagrees with the commenter and recognizes that the City has an ordinance in place that prohibits overnight parking in cul-de-sacs on Gulf Boulevard. In its October 20, 2015, letter to the GLO, the City clarified that this ordinance helps to assure the public parking spaces are available each morning and are not overtaken by nearby condo property visitors. The GLO expects that the City will enforce its ordinance in a way that ensures that there is adequate parking for beachgoers as required under 31 TAC §15.7.

Four commenters stated that the City's BUF will not create any "real" revenue for the City. Two commenters specified that they believed the cost of implementation and enforcement of the BUF program will exceed the revenue brought in and will not be able to adequately provide for the cost of amenities. The GLO disagrees with these comments. Section 31 TAC §15.8(c)(2)(A) prohibits local governments from imposing a beach user fee that exceeds the necessary and actual cost of providing reasonable beach-related public facilities and services. The GLO has reviewed the proposed fee and the estimated costs implementing the BUF and determined that the City's BUF Plan complies with this provision. In addition, the City provided clarification and assurance on the costs of implementation and enforcement of the BUF in its October 20, 2015, letter to the GLO. The letter clarifies that reserve officers work for the SPI Police Department on a part-time basis and at a minimum salary, and that an officer can easily write up to six tickets per hour. Each ticket generates a \$50 fee making the use of reservist ticketing officers cost-effective. The GLO has determined that the BUF Plan as submitted by the City is consistent with the OBA, the Dune Protection Act, and 31 TAC Chapter 15 and reasonable assurances have been made that the cost of implementation and enforcement of the BUF will not exceed revenue.

One commenter stated that it was not clear where the money collected from the BUF program would go. The GLO disagrees with the commenter, as a requirement for GLO certification of the BUF Plan is that the fee is reasonable and necessary to fund and provide increased beach-related services and facilities to the public. The City is allowed by TNRC §61.011(b) to charge beach user fees specifically in order to fund beach-related services. On Pages 9 - 10 of the BUF Plan, the City has identified short and long-term goals for beach-related services to be funded by BUF revenue. In the short term, the BUF revenue will be used to increase parking adjacent to the beach; expand beach cleaning and maintenance by purchase of beach equipment; create a recycling program; install educational beach maintenance signage; and improve beach access by rehabilitating beach walkovers, constructing new walkovers, and installing rinse stations and drinking water stations. In the long term, the BUF revenue will be used to procure and construct additional parking east of Padre Island Boulevard; improve existing and

future parking, beach access points and pedestrian pathways; develop a trolley system to enhance public access to the beach from remote off beach parking areas; and provide public restrooms along the beach or at beach access points.

Comments were also made related to a historical trend of proposed public amenities being blocked by beachfront homeowners. One commenter stated that when amenities such as restrooms or shade structures have been proposed at existing beach accesses, beachfront property owners on Gulf Boulevard have historically opposed them on the grounds that increased amenities will serve to attract more people to use the beach accesses. The same commenter also expressed an opinion that the impetus to establish a beach user fee or parking fee along Gulf Boulevard comes from these same property owners who wish to limit access to the public beaches from "day trippers" or visitors from the Rio Grande Valley. The GLO has no opinion on these allegations and believes the comments are outside the scope of the GLO's jurisdiction. The issue before the GLO is whether the BUF Plan as submitted by the City is consistent with the OBA, the Dune Protection Act, and 31 TAC Chapter 15. It is the City's responsibility to propose, negotiate, adopt and implement the types of beach related services and amenities it will provide in accordance with the Plan and the TAC. The OBA and the TAC allow a local government to collect a BUF for the purposes of providing beach related services and amenities. The City must use the BUF for the purposes that it has identified and must do so in a way that ensure compliance with the BUF requirements in 31 TAC §15.8 and ensures public access to the public beach under 31 TAC §15.7.

One commenter stated that the City of South Padre Island, in collaboration with Cameron County and the GLO, should develop a comprehensive and long-term plan to address congestion in the area and one that is compliant with the Open Beaches Act. The GLO can assume that the word "congestion" used by the commenter refers to traffic density in the City. As provided for in 31 TAC §15.7(h)(3), new or amended vehicular traffic regulations are exempt from this certification procedure but must nevertheless be consistent with the Open Beaches Act and 31 TAC Chapter 15. The GLO is in favor of the collaborative development of a long term plan but it is beyond the purpose of the Plan amendment and the scope of this rule making. The issue before the GLO is whether the BUF Plan as submitted by the City is consistent with the OBA, the Dune Protection Act, and 31 TAC Chapter 15.

Two commenters stated that the BUF would hurt businesses on the island, as money spent on the fee would detract from money that may be spent at local businesses. One commenter stated that more than one enforcement officer or police office being hired by the City will serve as an added expense to the City's General Fund, and complained that City police officers are unaware of current parking restrictions on side streets. One individual directed a question at the GLO and asked if it was safe and legal for ATVs to operate on public roads. The previous comments are related to City enforcement of the BUF and are outside the scope of the GLO's jurisdiction. The issue before the GLO is whether the BUF Plan as submitted by the City is consistent with the OBA, the Dune Protection Act, and 31 TAC Chapter 15, which do not outline enforcement procedures for beach user fee collection. These comments and inquiries are outside the scope of the GLO's jurisdiction and certification authority.

CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM

The amendments are subject to the Coastal Management Program as provided for in the Texas Natural Resources Code §33.2053, and 31 TAC §505.11(a)(1)(J) and (c), relating to Actions and Rules Subject to the CMP. GLO has reviewed this proposed action for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations and has determine that the proposed action is consistent with the applicable CMP goals and policies. The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals) and §501.26 (relating to Policies for Construction in the Beach/Dune System).

The amendments are consistent with the CMP goals outlined in 31 TAC §501.12(5). These goals seek to balance the benefits of economic development and multiple human uses, protecting, preserving, restoring, and enhancing CNRAs, and the benefits from public access to and enjoyment of the coastal zone. The amendments are consistent with 31 TAC §501.12(5) as they provide the City with the ability to enhance public access and enjoyment of the coastal zone, protect and preserve and enhance the CNRA, and balance other uses of the coastal zone.

The amended rule is also consistent with CMP policies in §501.26(a)(4) by enhancing and preserving the ability of the public, individually and collectively, to exercise its rights of use of and access to and from public beaches.

No comments were received from the public or the Commissioner regarding the consistency determination. Consequently, the GLO has determined that the adopted rule amendments are consistent with the applicable CMP goals and policies.

STATUTORY AUTHORITY

These amendments are adopted under Texas Natural Resources Code §§61.011, 61.015(b), and 61.022(b) and (c) which provide the GLO with the authority to adopt rules governing the preservation and enhancement of the public's right to access and use public beaches, imposition or increase of beach user fees, and certification of local government beach access and use plans as consistent with state law.

Texas Natural Resources Code §61.011 and §61.015 are affected by the amendments.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 13, 2016.

TRD-201600151

Anne L. Idsal

Chief Clerk, Deputy Land Commissioner

General Land Office

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For further information, please call: (512) 475-1859



PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER A. STATEWIDE HUNTING PROCLAMATION

DIVISION 1. GENERAL PROVISIONS

31 TAC §65.29

The Texas Parks and Wildlife Commission, in a duly noticed meeting on August 20, 2015, adopted new §65.29, concerning Managed Lands Deer Program (MLDP), without changes to the proposed text as published in the July 17, 2015, issue of the *Texas Register* (40 TexReg 4533).

The new section is intended to replace the current Managed Lands Deer Permit and Landowner Assisted Managed Permit System (LAMPS) programs, currently contained in §§65.26, 65.34, and 65.28 of this subchapter, respectively. The current MLDP program has been in effect since 1996 for white-tailed deer and 2005 for mule deer and has been a very successful vehicle for encouraging deer harvest, deer management, and habitat conservation. In 2014, approximately 10,000 properties encompassing 24 million acres were participating in the program. The LAMPS program was created in 1993 to provide flexibility to landowners and land managers with respect to the harvest of antlerless deer, primarily in the eastern third of Texas. Substantial growth in the MLDP program during the last 18 years, the accretion of changes to program rules over time, and requests for modernization by staff and program participants have prompted the department to explore options to simplify both programs and create new administrative efficiencies.

New §65.29(a) sets forth the meanings of various specialized words and terms used throughout the new rule, which is necessary to provide clarity of intent for purposes of compliance and enforcement.

New §65.29(a)(1) defines "landowner" as "any person who has an ownership interest in a tract of land." The definition is necessary because enrollment in the MLDP can only be done by a landowner or a landowner's authorized agent and a legal standard of ownership must be established.

New §65.29(a)(2) defines "MLDP" as "the Managed Lands Deer Program" established by the subchapter as consisting of two enrollment options, the Harvest Option (HO) and the Conservation Option (CO). The definition is necessary to provide acronyms for easy reference.

New §65.29(a)(3) defines "MLDP tag" as "a tag issued by the department to a participant in any option under this section." Under the provisions of the new rule, the department will establish a harvest quota for properties under the HO or the CO and issue tags for the harvest of deer on those properties. The definition is necessary to clearly establish the fact that no tag other than a tag issued under the new section meets the requirements of the new section.

New §65.29(a)(4) defines "program participant" as "a landowner or a landowner's authorized agent who is enrolled in the MLDP." Under the new rule, only a landowner or landowner's authorized agent are eligible for enrollment in the MLDP; the term "program participant" is convenient shorthand that eliminates the need to repeat an unwieldy phrase throughout the rule. In addition, the new rule provides that only a landowner (and not a landowner's agent) is authorized to take certain actions. Therefore, the term "program participant" is also used to distinguish between a landowner's authority and the authority that may be

exercised by a landowner or the landowner's agent (i.e., a "program participant").

New §65.29(a)(5) defines "resource management unit (RMU)" as "an area of the state designated by the department on the basis of shared characteristics such as soil types, vegetation types, precipitation, land use practices, and deer densities." The department collects population and harvest data at the RMU level to assess the effect of harvest regulations. Under the HO, a harvest recommendation will be automatically calculated by the department using RMU data and coarse data provided by the program participant.

New §65.29(a)(6) defines "unbranched antlered deer" as "a buck deer having at least one antler with no more than one antler point." The current MLDP rules allow for a harvest quota of buck deer and/or antlerless deer. The new section makes a distinction between buck deer that have two forked antlers and buck deer that have at least one antler with no forks. Allowing additional harvest opportunity for unbranched antlered deer is intended to help landowners and land managers achieve their harvest management goals without adversely impacting the resource. The definition is necessary to stratify the harvest of buck deer in the HO.

New §65.29(a)(7) defines "Wildlife Management Plan (WMP)" as "a written document on a form furnished or approved by the department that addresses habitat and population and management recommendations, associated data, and data collection methodologies." Under the new rule, participation in the CO is contingent on a department-approved management plan. The definition is necessary to broadly outline the components of a WMP for purposes of program administration and compliance.

New §65.29(a)(8) defines "Wildlife Management Associations and Cooperatives" as "a group of landowners who have mutually agreed in writing to act collectively to improve wildlife habitat and populations on their tracts of land." For many years the department has allowed groups of landowners (who because of small acreage or land use would not qualify for MLDP issuance) to pool their acreage in order to qualify. The new rule also allows this practice, but a definition is necessary to establish a formal requirement that participating landowners agree in writing to membership.

New §65.29(b) sets forth general provisions that are common to both the HO and the CO.

New §65.29(b)(1) establishes the conditions for enrollment in the HO and CO, respectively. The HO is an automated tag delivery system; landowners will access the department's web-based portal, complete an online application, provide requested acreage and other data specific to the property, and the department will then calculate the number of tags to be issued. Therefore, a prospective property and landowner will be considered enrolled at the point the department approves the electronic application. For the CO, the application will also be made online, but a WMP is required. Thus, a prospective property and landowner is considered enrolled when the department has approved the application and the WMP.

New §65.29(b)(2) allows a landowner to appoint a person to act as the landowner's authorized agent for purposes of program participation by completing a department-approved form. Under current rules, the department allows landowners to appoint an authorized agent to act on the landowner's behalf, which allows land managers, ranch employees, and private consultants to make management decisions in a quick and efficient manner.

The new rule continues this practice, but requires the authorization to be documented, which is necessary to ensure that a person purporting to be an authorized agent is actually authorized by the landowner to do so.

New §65.29(b)(3) stipulates that MLDP tags be issued to a program participant, which is necessary to specifically establish that the department does not issue tags directly to hunters.

New §65.29(b)(4) specifies that MLDP tags are valid only on the specific enrolled tract for which they are issued, with the exception of aggregate acreages in the HO. Because the MLDP is a program that furnishes a property-driven harvest quota (as opposed to the essentially open-ended harvest possible under county regulation provided in §65.42 of this title, concerning Deer), it is logical that the use of MLDP tags be restricted to the property for which they were issued. The exception is for aggregate acreages in the HO, where the rules allow multiple acreages to be combined, in effect, into a single tract of land for purposes of tag issuance, provided the tracts are contiguous. The tags could then be utilized on any of the properties.

New §65.29(b)(5) exempts an enrolled tract of land from the applicability of personal bag limits, means and method restrictions for archery-only and muzzleloader-only seasons, and archery stamp requirements. When the current MLDP program was created, the department wanted to offer landowners and land managers the most flexibility possible to achieve the management goals jointly determined by the department and landowner; thus, the current rule exempts MLDP properties from the personal bag limits established for each county under §65.42, the means and methods requirement for the archery-only and muzzleloader-only seasons, and the stamp requirements for the archery-only season. Because the department establishes a harvest quota for the property (versus the county regulation under §65.42, which establishes a personal bag limit but does not limit how many hunters may take deer), it makes no biological difference whether one person or many persons harvest deer, provided the harvest quota is not exceeded. Similarly, the means restriction of the archery-only (only lawful archery equipment may be used to take deer) and muzzleloader-only (only muzzleloading firearms may be used to take deer) seasons, because they do not allow the use of modern firearms (which are much more efficient harvest devices), were eliminated for MLDP properties in order to allow landowners and land managers to reduce habitat impacts by harvesting deer by firearm earlier than allowed under the county regulations. The current rule also exempts MLDP properties from the archery stamp requirement, which is necessary because the archery-only season established by §65.42 is statewide and under Parks and Wildlife Code, §43.201, it is unlawful for any person to hunt deer during a season restricted to the use of archery equipment unless an archery stamp has been purchased or the commission, by rule, has exempted a person from the archery stamp requirement. The new rule retains all of these provisions for the same reasons.

New §65.29(b)(6) sets forth MLDP tag utilization requirements. Because department rules at 31 TAC §65.10(c) exempt deer tagged in accordance with MLDP rules from other tagging requirements, it is necessary to precisely delineate the circumstances and procedures for the use of MLDP tags, which is necessary to prevent confusion as well as the unscrupulous use of MLDP tags. Therefore, the new rule requires harvested deer to be immediately tagged (or taken to a location on the property to be tagged), which is necessary for department law enforcement

personnel to verify that deer have been lawfully harvested and for department biologists to track compliance with harvest quotas. The new paragraph also prohibits the various permutations of inappropriate use of an MLDP tag (e.g., use of a mule deer tag on a white-tailed deer and vice versa, use of an antlerless MLDP tag to a buck deer having more than one point on both antlers, use of an unbranched antlered deer with an antlerless MLDP tag); the use of an MLDP tag or tag number more than once; and the use of an MLDP tag on a tract of land other than the tract for which the MLDP tag was issued. The MLDP program tailors harvest to specific tracts of land. It is axiomatic, then, that the harvest of deer by a program participant should precisely track the recommendations of the department. Therefore, MLDP tags are issued for specific types of deer to be harvested. To allow those tags to be used indiscriminately or interchangeably would defeat the purpose of the harvest recommendation. Similarly, the harvest quota for a property represents the total number of deer the department authorizes to be harvested; allowing additional harvest by re-use of tags or tag numbers, or the use of tags issued for another property, defeats the purpose of the program.

New §65.29(b)(7) sets forth the on-site harvest documentation requirements for program participants. The new rule requires deer harvested on MLDP properties to be tagged with an MLDP tag; however, when deer are taken to a taxidermist or processor, the department must be able, if need be, to verify that the deer was lawfully harvested. To provide that ability, the new rule requires a daily harvest log to be maintained on each MLDP property. The new rule requires the hunter's name and hunting license number (or driver's license number, if the daily harvest log is also being used as a cold storage/processing book) to be entered into the harvest log for each deer harvested, along with the date of kill, type of deer killed, and the number of the MLDP tag affixed to the deer. The new provision allows the department to verify that a MLDP-tagged deer encountered at a location other than where it was killed was in fact lawfully taken on the property for which the tag was issued. The new rule also requires the daily harvest log to be presented to any department employee acting within the scope of official duties.

New §65.29(b)(8) sets forth the annual reporting requirements for program participants. Under current rule, MLDP cooperators report harvest and habitat data as part of the WMP that must be approved prior to tag issuance. Because the new MLDP will be an online system, the new rule requires program participants to report harvest data, and in the case of CO program participants, habitat management practices, as well as any other data deemed important by the department. The new provision is necessary to allow the department to gather useful population and harvest data and to verify that required habitat management practices are being performed.

New §65.29(b)(9) specifies that if an applicant does not wish to engage in program participation, the applicant must affirmatively decline program participation by September 15 via the department's online web application. The new provision also stipulates that failure to timely notify the department will result in the deer harvest on the property continuing to be subject to the MLDP regulations until the last day in February (the last day that MLDP tags are valid). When a property is in the MLDP, deer harvest cannot be conducted under the county regulations established in §65.42 and all deer must be harvested under the provisions of the MLDP regulation. Because department law enforcement personnel must know what regulations are in effect on any given property, it is imperative that a program participant who has had

a change of heart notify the department prior to opening day of the archery season.

New §65.29(b)(10) allows deer to be harvested under the county season and bag limit, provided the department is timely notified as provided by §65.29(b)(10) of the program participant's desire to cease participation in the MLDP.

New §65.29(b)(11) allows a program participant who maintains a cold storage/processing facility to satisfy the recordkeeping requirements of Parks and Wildlife Code, §62.029, by recording the hunting license number as part of the daily harvest log required by the new rule and maintaining the log for a period of one year from the date of the last entry. Under Parks and Wildlife Code, §62.029, the operator of a cold storage or processing facility must maintain a record book at the facility of game accepted by the facility and must keep the record at the facility for a period of at least one year from the last date entered in the record book. The new rule allows program participants to collect and record the information required by Parks and Wildlife Code, §62.029 as part of the daily harvest log required by the new rule and requires the harvest log to be kept at the facility for at least one year following the last date entered in the record book. The department believes it is less burdensome and more efficient to allow program participants to maintain a single system of documentation, rather than two.

New §65.29(c) sets forth the specific provisions applicable to the HO and the CO.

New §65.29(c)(1) sets forth the program provisions for the HO. The HO can be thought of as a conflation of the current LAMPS program and the current Level I and II components of the MLDP programs. Whereas the current LAMPS program is intended to help manage antlerless deer populations in the eastern third of the state and does not require a landowner to have a WMP, the current Level I and II MLDP components are statewide and require a WMP, with the Level I MLDP authorizing an antlerless-only harvest and the Level II authorizing an either-sex harvest with buck harvest by firearm limited to spike bucks during the first 35 days of tag validity. The new HO is statewide, does not require a WMP, may be structured as antlerless only or either-sex, and restricts buck harvest by firearm during the first 35 days of tag validity to bucks having at least one antler with no more than one point (any buck could be taken by lawful archery equipment).

New §65.29(c)(1)(A) establishes an application deadline of September 1 for participation in the HO, which was selected in order to allow the department sufficient time to process applications and issue MLDP tags before the period of validity for the MLDP tags begins. Additionally, there is no paper application process; applications must be made and processed via a web-based application.

New §65.29(c)(1)(B) provides for the enrollment of contiguous tracts of land by multiple landowners for program participation, which is necessary because many areas of the state are characterized by numerous small acreages which by themselves are not large enough to qualify for tag issuance. Many of these areas also experience high hunting pressure and the county bag limits established under §65.42 are therefore quite conservative. Thus, for example, if the biological limit for antlerless harvest in a given RMU is calculated to be one deer per 30 acres, properties of less than 30 acres cannot qualify, leaving the landowner no option but the county regulation established under §65.42, which might allow a minimal antlerless harvest per hunter, if any.

Therefore, the department wishes to provide owners of small tracts a way to bundle aggregate acreage to maximize hunting opportunity. The new provision requires a single program participant to be designated to receive MLDP tags and allows MLDP tags to be used anywhere on the combined acreage. Because the new HO is administered via a database application that relates data unique to specific tracts of land enrolled in the program, aggregate acreages must be treated as a single tract for purpose of tag issuance; therefore, a single program participant must be designated to receive tags and the tags can then be utilized anywhere on the aggregate acreage.

New §65.29(c)(1)(C) broadly delineates the components used by the department to calculate harvest quotas for properties enrolled in the HO. The department manages population and harvest data on deer populations by the RMU concept. Areas of the state that share similar soil types, vegetation types, precipitation, land use practices, and deer densities are treated as discrete units for the purpose of determining and analyzing the effectiveness of harvest regulations. The department uses survey information collected by the department in a given RMU as a baseline and then adjusts the harvest quota as necessary to account for the location of a property, the size of the property, the quality and abundance of habitat on the property, and any other information deemed relevant by the department. The new provision is necessary to create a biologically valid standard for managing the deer harvest on properties enrolled in the HO.

New §65.29(c)(1)(D) sets forth the period of validity for MLDP tags issued under the HO. As noted previously in this preamble, the HO can be thought of as a conflation of the current LAMPS program and the Level I and II components of the current MLDP program. The general period of validity of MLDP tags under the HO remains unchanged from the current MLDP program (Saturday closest to September 30 to the last day in February). Under the Level II component of the current MLDP program, buck harvest by firearm during the first 35 days of tag validity is restricted to spike bucks (any buck could be taken by lawful archery equipment). The new HO retains this basic structure, but alters the buck restriction to encompass buck deer with at least one antler having no more than one point (i.e., at least one antler is a spike), which is called an "unbranched antlered" buck. Allowing additional harvest opportunity for unbranched antlered deer is intended to help landowners and land managers achieve their harvest management goals without adversely impacting the resource.

New (c)(1)(E) provides that if a program participant elects to receive tag issuance for only one type of deer (buck or antlerless), then the provisions of §65.42 govern the harvest of the other type of deer on the enrolled tract of land. Since the new rule allows program participants in the HO to customize their harvest, it is necessary to clarify that the county regulations provided in §65.42 are in effect for all deer harvest not governed by the new rule.

New §65.29(c)(2) sets forth the program provisions for the CO. The CO can be thought of as similar to the current MLDP Level III component. Under the current rule, a landowner with a department-approved WMP who agrees to perform four habitat management practices per year receives a harvest quota of buck and antlerless deer and may take or authorize the take of deer from the Saturday closest to September 30 until the last day of February by any lawful means without respect to the personal bag limits established in the county under §65.42. The new CO is similar.

New §65.29(c)(2)(A) requires a landowner or authorized agent to apply for program acceptance by June 15 of each year. Like the HO, application for enrollment in the CO is electronic, using the department's web-based application. The June 15 deadline was selected because unlike the HO (under which tag issuance is completely automated), the CO requires harvest, population, and habitat management reporting, a WMP, and, if necessary, personal interaction with department personnel; therefore, the application deadline must be set well in advance of the period of validity of the MLDP tags in order to allow staff sufficient time to evaluate applications.

New §65.29(c)(2)(B) sets forth the minimum requirements for the WMP required by the CO, to consist of acreage and habitat information requested by the department, deer population and harvest data for each of the two years immediately preceding the year in which initial program participation is sought, and evidence satisfactory to the department that at least two department-approved habitat management practices have been implemented on the tract of land during each of the two years immediately preceding application. The CO also requires, as part of the WMP, an acknowledgement that site visits by the department to assess habitat management practices on the tract of land may be conducted at the request of any department employee. Under the current MLDP rules, acceptance into the Level III component is automatic upon department approval of the WMP and landowner agreement to perform four habitat management practices per year. Level III is extremely popular, and as a result, department biologists have found it increasingly difficult to keep pace with the demands on time created by the current rule. By offering a completely automated alternative in the form of the HO and requiring evidence of landowner commitment to habitat management (in the form of prior/continuing habitat management activities) as part of the CO, the department hopes to direct much of the current Level III tag issuance to the HO, allowing department biologists more time to work with landowners who desire more intensive management on their properties and are willing to cooperate more closely with the department as a result.

New §65.29(c)(2)(C) stipulates that a WMP is not valid unless it has been signed by a Wildlife Division employee assigned to evaluate wildlife management plans, which is necessary to ensure that all WMPs meet a standard of quality that justifies the allocation of department resources.

New §65.29(c)(2)(D) requires the implementation of at least three habitat management practices specified in the WMP during each year of program participation. The new provision preserves the requirements of the current MLDP Level III in this regard. The department intends for the CO to be a vehicle for landowners who are committed to a high level of habitat management; in exchange for performing at least three habitat management practices annually, the department extends the most flexible tag utilization possible, allowing the harvest of any buck deer by any lawful means from the Saturday closest to September 30 until the last day in February (subject to the number of buck tags issued).

New §65.29(c)(2)(E) prescribes the period of validity for MLDP tags under the CO (the Saturday closest to September 30 until the last day in February) and allows the harvest of any deer during that time, subject to the number of tags issued.

New §65.29(c)(2)(F) allows the department to authorize additional harvest on any tract of land enrolled in the CO, provided the program participant furnishes survey or population data that in the opinion of the department justifies the additional harvest.

The department acknowledges that unforeseen circumstances such as inclement weather might adversely affect a program participant's survey efforts, resulting in undercounting of deer; therefore, it is prudent to allow for additional tag issuance in cases that a program participant presents evidence that additional harvest is either possible or necessary. Similarly, unforeseen circumstances may make harvest and/or habitat management difficult or impossible; therefore, new §65.29(c)(2)(G) allows the department to, on a case-by-case basis, waive or defer the habitat management requirements of the new CO in the event that unforeseeable developments such as floods, droughts, or other natural disasters make the attainment of recommended habitat management practices impractical or impossible.

New §65.29(c)(2)(H) creates special provisions for aggregate acreages. In many parts of Texas, landowners join forces and acreages to manage habitat and wildlife on a landscape scale. A wildlife management association or cooperative are popular examples. The new provisions allow a wildlife management association or cooperative to enroll member properties in the CO under a single WMP. MLDP tags will be issued to the individual participating landowners (or their agents) and the tags will be valid only on the tract of land for which they were issued. Another form of aggregate acreage is the hunting club, in which land that is owned or leased by members is managed for habitat and hunting opportunity. The new provision allows these types of aggregate acreages to be enrolled in the CO provided the enrolled acreages are contiguous, the program participant provides the name, address, and express consent of each landowner, and a single program participant is designated to be the recipient of the tag issuance. Because aggregate acreages such as hunt clubs are highly variable from year to year, the department intends to administer the CO in such cases in much the same fashion as the HO. Because the department's web-based application employs a database application that relates data uniquely to specific tracts of land enrolled in the program, aggregate acreages must be treated as a single tract for purpose of tag issuance; therefore, a single program participant must be designated to receive tags and the tags can then be utilized anywhere on the aggregate acreage.

New §65.29(c)(2)(I) stipulates for clarity's sake that MLDP for white-tailed deer is not available in counties in which there is not an open season for white-tailed deer. The department will not open a season in a county in which the habitat is unsuitable to naturally support a population of white-tailed deer; obviously and for the same reason the department does not believe that MLDP participation should be available in such counties, either.

New §65.29(d) sets forth the provisions of the MLDP governing mule deer. Unlike white-tailed deer, mule deer are a fragile resource that the department manages with an extremely conservative harvest regime. For that reason, the MLDP for mule deer does not include the HO. The new rule's provisions with respect to mule deer are identical to those for CO for white-tailed deer, with the exceptions of the length of tag validity and restrictions on lawful means during the first 35 days of tag validity. As noted, the department utilizes a conservative harvest regime for mule deer; no general season is longer than 17 days and antlerless deer cannot be harvested without a permit except in Brewster, Pecos, and Terrell counties, and then only by lawful archery equipment during the special archery-only open season. The current MLDP rule for mule deer (31 TAC §65.34) sets a period of validity for tags to run from the Saturday closest to September 30 until the last Sunday in January, with harvest during the first 35 days of that period being limited to lawful archery equip-

ment. The new rule retains those provisions. The new MLDP for mule deer allows for program participation on the basis of aggregate acreage. Mule deer are dispersed across their range at very low densities compared to white-tailed deer and properties must be quite large in order to biologically justify tag issuance, unlike the case with white-tailed deer. Therefore, the department wishes to provide owners of small tracts a way to bundle aggregate acreage to maximize hunting opportunity.

New §65.29(e) sets forth the conditions under which the department will consider refusing to allow or continue enrollment in the MLDP.

New §65.29(e)(1) establishes the administrative violations that constitute grounds for refusing to allow or continue enrollment in the MLDP. The department does not desire or intend to micro-manage program participants; however, there are three areas in which the department considers compliance to be critical to the integrity of the program. New paragraph (1)(A) allows the department to refuse to allow or continue enrollment in the MLDP for any applicant who as of a reporting deadline has failed to report to the department any information required to be reported under the provisions of the new section. The integrity of the MLDP is in part a function of receiving harvest, population, and habitat data (as applicable) from program participants with enough time for the department to make harvest recommendations that are biologically sensible and sustainable and issue MLDP tags in a timely fashion. The reporting deadlines established in the new rule are therefore quite important, and the department considers it not unreasonable to expect program participants to comply with them. Similarly, the integrity of the program also rests on compliance with the harvest quotas and habitat management goals established by the department. New paragraphs (1)(B) and (C) allow the department to refuse to allow or continue enrollment in the MLDP for any applicant who has exceeded the total harvest recommendation established for an enrolled tract of land or has failed to implement the three habitat management practices specified in a department-approved WMP during each year of program participation, if the tract of land is enrolled in the CO. A program participant who exceeds the harvest quota is in effect exceeding a bag limit, which, if repeated at a large enough scale, results in negative impacts to the resource and thus is counter to the goals of the program. A program participant who intentionally or without reason fails to perform the habitat management practices called for in the WMP under the CO is not only failing to assist the department in attaining the goal of the MLDP, which is to improve habitat on as much acreage as possible, but is also accepting the benefits of program participation without performing agreed-upon obligations. The department believes that in these types of circumstances it is justifiable to refuse to issue tags or continue program participation if necessary.

New §65.29(e)(2) allows the department to refuse to allow or continue enrollment in the MLDP for any applicant who has a final conviction or has been assessed an administrative penalty for a violation of Parks and Wildlife Code, Chapter 43, Subchapter C, E, L, R, or R-1; a provision of the Parks and Wildlife Code other than Chapter 43, Subchapter C, E, L, R, or R-1 that is a Parks and Wildlife Code Class A or B misdemeanor, state jail felony, or felony; Parks and Wildlife Code, §63.002; or the Lacey Act (16 U.S.C. §§3371-3378). In addition, the new section allows the department to prevent a person from acting on behalf of or as a surrogate for a person prevented from program participation under the new provision.

The department has determined that the decision to allow program participation should take into account an applicant's history of violations involving the capture and possession of live animals, major violations of the Parks and Wildlife Code (Class B misdemeanors, Class A misdemeanors, and felonies), and Lacey Act violations. The department reasons that it is appropriate to deny the privilege of taking or allowing the take of wildlife resources pursuant to MLDP to persons who exhibit a demonstrable disregard for the regulations governing wildlife. Similarly, it is appropriate to deny the privilege of personally benefitting from wildlife to a person who has exhibited demonstrable disregard for wildlife law in general by committing more egregious (Class B misdemeanors, Class A misdemeanors, and felonies) violations of wildlife law.

The Lacey Act (16 U.S.C. §§3371-3378) is a federal law that, among other things, prohibits interstate trade in or movement of wildlife, fish, or plants taken, possessed, transported or sold in violation of state law. Lacey Act prosecutions are normally conducted by the United States Department of Justice in federal courts. Although a Lacey Act conviction or civil penalty is often predicated on a violation of state law, the federal government need only prove that a state law was violated; there is no requirement for there to be a record of conviction in a state jurisdiction. Rather than expending resources and time conducting concurrent state and federal prosecutions, the department believes that it is reasonable to use a Lacey Act conviction or civil penalty as the basis for refusing program participation in the MLDP. Because the elements of the underlying state criminal offense must be proven to establish a conviction or assessment of a civil penalty for a Lacey Act violation, the department reasons that such conviction or assessment constitutes legal proof that a violation of state law occurred and it is therefore redundant and wasteful to pursue a conviction in state jurisdiction to prove something that has already been proven in a federal court.

The denial of program participation as a result of an adjudicative status listed in the new rule is not automatic, but within the discretion of the department. Factors that may be considered by the department in determining whether to refuse tag issuance based on adjudicative status include, but are not limited to: the number of final convictions or administrative violations; the seriousness of the conduct on which the final conviction or administrative violation is based; the existence, number and seriousness of offenses or administrative violations other than offenses or violations that resulted in a final conviction; the length of time between the most recent final conviction or administrative violation and the application for enrollment or renewal; whether the final conviction, administrative violation, or other offenses or violations was the result of negligence or intentional conduct; whether the final conviction or administrative violations resulted from the conduct committed or omitted by the applicant, an agent of the applicant, or both; the accuracy of information provided by the applicant; for renewal, whether the applicant agreed to any special provisions recommended by the department as conditions; and other aggravating or mitigation factors.

New §65.29(f) creates several special provisions. Because the new rule implements an automated, web-based application, reporting, and issuance system, it cannot take effect until the necessary software and hardware platforms have been developed, and they cannot be developed without a standing regulation that establishes the parameters of the MLDP program with certainty. For that reason, the rules take effect on their own terms on September 1, 2017. Because current rules regarding MLDP, LAMPS, bag limits, tagging requirements and license log utiliza-

tion conflicts with the new rule but must remain in effect until the new rule takes effect, the department must create an accommodation for each potential conflict, as well as a general statement to the effect that in the event of additional conflicts, the provisions of the new rule will control. The department will harmonize the various regulatory conflicts at a later date. Finally, the new provision provide for alternative program administration in the case that technical difficulties make the department's web-based application inoperable or unavailable, which is necessary to provide for program continuity.

Summary of Public Comment.

The department received 174 comments opposing adoption of the rule as proposed. Of those comments, 161 offered specific reasons or a rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that rule allows hunting too early and allows it to go on too long. The department disagrees with the comment and responds that season length of the rule as adopted is identical to what has been in effect for 20 years under the current MLDP program and there is no biological evidence to suggest that the season length results in negative population impacts. No changes were made as a result of the comment.

One commenter opposed adoption and stated that restricting the harvest of antlered bucks during October will impair the ability to remove antlered bucks from the population. The department disagrees with the comment and responds under the CO this is not the case, and under the HO, antlered bucks may be taken from the first Saturday in November until the last day of February. The department believes that four full months is sufficient time for all buck harvest objectives to be met in virtually all if not all circumstances. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule will result in inferior animals breeding. The department responds that the term "inferior animals" is not further explained in the comment; the department concludes the comment is intended to allude to antler characteristics of buck deer and therefore disagrees with the comment and responds that the rule allows landowners and land managers to manage deer populations as they see fit, but within harvest quotas established by the department. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the MLD program should be eliminated and the department should let landowners be responsible for what they need to harvest. The department disagrees with the comment and responds that by any objective measure, the MLD program has been an overwhelming success. The department further responds that both the county bag limits and the harvest quotas specified by the department for an individual property represent a biologically defensible harvest limitation that is necessary to protect the resource and/or habitat. No changes were made as a result of the comment.

One commenter opposed adoption and stated that allowing unlimited take of white-tailed deer is a regression, that extending the LAMPS season avoids the major focus of the MLD program (habitat), and that landowners who don't manage habitat can harvest bucks without any control. The department disagrees with the comment and responds that the rule as adopted does not allow unlimited harvest (a cooperators must accept a harvest quota established by the department as a condition of receiving tags), the LAMPS program is being eliminated, and

that landowners who do not participate in MLDP are not allowed to harvest an unlimited number of bucks (harvest is governed by personal bag limits established under biologically defensible county regulations). No changes were made as a result of the comment.

Five commenters opposed adoption and stated that the program should be left alone. The department disagrees with the comment and responds that the current MLD, although tremendously successful, cannot continue in its current form and must be replaced with a more efficient program that allows staff to achieve greater program efficiencies. No changes were made as a result of the comment.

One commenter opposed adoption and stated that more "red tape" is unnecessary. The department agrees with the comment and responds that rule as adopted streamlines and simplifies the application and reporting processes in an effort to reduce "red tape." No changes were made as a result of the comment.

One commenter opposed adoption and stated that if the problem is funding, the department should charge a fee for MLDP participation and retain the current rules. The department disagrees with the comment and responds that although funding is a constant concern, introducing administrative efficiencies through modernization is preferable to imposing fees at this time. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the proposed rule "replaces simple rules with a bureaucratic mess and constitutes overkill and excessive government philosophy and intervention." The department disagrees with the comment and responds that the rule as adopted streamlines and simplifies application and reporting processes, automates tag issuance, and is intended to be less burdensome than the current program. No changes were made as a result of the comment.

One commenter opposed adoption and stated that government agencies should stay out of people's business. The department disagrees that the rules are in intrusive and responds that the department is the state agency charged with protecting and conserving public wildlife and fisheries resources. The department further responds that participation in the MLDP is voluntary. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the period of validity for MLDP tags is too long and will result in negative population impacts by removing pregnant and nursing does. The department disagrees with the comment and responds that under the rules as adopted, a harvest quota is imposed on each program participant. In the case of the HO, a conservative harvest quota is determined by an algorithm that takes into account the location and size of the property, general habitat type for the area, and department survey and population data for the resource management unit in which the property is located. In the case of the CO, a custom harvest quota is determined specifically for the property in question on the basis of habitat information and population and harvest data submitted to the department by the program participant. In neither case will a harvest recommendation be at a level that would result in negative population impacts. No changes were made as a result of the comment.

One commenter opposed adoption and stated that unlike South Texas, October buck harvest in the rest of the state is critical and that rule as proposed is biased in that respect; that the reporting of each deer's age, weight, and gross score is worthless unless cooperators are able to compare that data to other ranches and

from year to year on a specific ranch; that if program expense is an issue, let cooperators print their own tags and report via TWIMS; and that habitat practices should be better defined and should include supplemental feeding. The department disagrees with the comment and responds (respectively) that the rule as adopted does not prohibit harvest of bucks in October (under the HO, harvest of bucks by firearm is limited to unbranched antlered bucks during the archery-only season, although any buck may be harvested by means of lawful archery equipment); that the intent of collecting age, weight, and antler data is to aid in management activities on a specific tract of land (and not to provide a basis of comparison between landowners); that the rules do not enumerate and prescribe specific habitat management practices because there are numerous biologically acceptable options and possibilities and that in any event, the department doesn't believe that they should be described by rule; and that while supplemental feeding may be appropriate in some instances, it is not considered a habitat management practice. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule as adopted will cause problems for former MLD Level III cooperators because they "will now have broken horns in November." The department disagrees with the comment and responds that the proposed new rule provides for exactly the same harvest in the CO as is possible now under Level III, with no additional requirements. No changes were made as a result of the comment.

One commenter opposed adoption and stated that lactating does should not be killed because it stresses fawns. The department disagrees with the comment and responds that under the rule as adopted, the department will establish a harvest quota for antlerless deer. The program participant may harvest antlerless deer at any time during the period of tag validity and because the harvest quota is selected either according to the biological parameters of a specific property (under the CO) or by means of an algorithm designed to make conservative harvest recommendations (the HO), the department will not authorize a harvest quota that will result in negative population impacts. A landowner is free to determine that, for various reasons, a specified animal should not be harvested. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule seems to emphasize the use of department biologists instead of real wildlife management professionals; that there is way too much emphasis on the harvest of spike bucks (which has been scientifically proven to be wrong); that doe harvest in February should be prohibited because it results in the harvest of pregnant females; and that basing HO harvest on RMU data will not result in adequate harvest on well-managed properties. The department disagrees with the comment and responds (respectively) that the rule as adopted requires a department-approved management plan for participation in the CO, but does not require a department-*prepared* management plan, meaning a program participant may accept technical guidance from a department biologist at no charge or engage whomever they like (but the management plan must be biologically credible); that there is no requirement in either the HO or the CO to harvest spike bucks (although a maximum number is established in the harvest quota); that the time of harvest (for does or bucks) is completely up to the program participant (so long as it occurs between the Saturday closest to September 30 and the last day in February) and the harvest quota itself acts as a governor against undesirable population impacts; and that the use of RMU data to assist in establishing harvest quotas for HO

participants is based on scientific data. However, a landowner who is interested in more intense management is more likely seek to participate in the CO program than the HO program. No changes were made as a result of the comment.

One commenter opposed adoption and stated that firearms should be lawful for the take of buck deer in September. The department agrees with the comment and responds that the rule as adopted allows the use of firearms for the take of bucks from the Saturday closest to September 30 until the first Saturday in November on all MLDP properties; however, on HO properties buck harvest is restricted to unbranched antlered bucks only (although any buck may be taken by lawful archery equipment). No changes were made as a result of the comment.

One commenter opposed adoption and stated that because the rule does not allow buck harvest in October on HO properties, it will not achieve the goal of reducing workloads. The department disagrees with the comment and responds that the rule as adopted allows the use of firearms for the take of bucks from the Saturday closest to September 30 until the first Saturday in November on all MLDP properties; however, on HO properties buck harvest is restricted to unbranched antlered bucks only (although any buck may be taken by lawful archery equipment). Because any buck may be harvested by firearm on any MLDP property from the first Saturday in September until the last day in February, the department believes the HO will be attractive to those landowners who seek only to manage harvest. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule prevents a property owners association (POA) from acting as a landowners authorized agent for purposes of participation in the HO. The department disagrees with the comment and responds that under §65.29(c)(1)(B), multiple landowners may combine contiguous tracts of land for participation in the HO, provided a single program participant is designated for tag issuance; therefore, the owners of contiguous tracts of land within a POA may designate a single person (including an officer of the POA) to act as program participant. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule should require the department to conduct browse surveys on CO properties every two years to verify compliance with habitat management requirements; that because the CO is intended to be a habitat program, antler data is irrelevant; that yearling spike bucks will be overharvested on HO properties; and that a fee should be imposed for program participation. The department disagrees with the comment and responds (respectively) that the rule as adopted (§65.29(c)(2)(B)(iv)) requires participants in the CO to agree to allow site visits by department personnel to assess habitat management practices; that the department uses antler trend data as an indirect indicator of habitat quality and age structure; that overharvest of spike bucks is not a concern because the department will not recommend or approve a harvest quota that is not biologically defensible. The department also notes that, it is not currently seeking to charge a fee for participation since a fee could create a disincentive for the department to reach the landowners in need of technical guidance. No changes were made as a result of the comment.

Two commenters opposed adoption and stated opposition based on the perception that the rule as adopted alters the lawful means for the harvest of buck deer from the Saturday closest to September 30 to the first Saturday in November. The department disagrees that the rule as adopted changes the lawful means re-

quirements for buck harvest compared to the current rule. The current rule allows Level III MLDP cooperators to harvest any buck by any lawful means from the Saturday closest to September 30 until the last day in February. The current rule allows the take of buck deer on Level I and Level II properties from the Saturday closest to September 30, but allows firearms to be used only for the take of spike bucks by firearms (although any buck may be taken by lawful archery equipment). Under the new rule as adopted, the CO is analogous to the current Level III MLDP and continues to allow the harvest of any buck by any lawful means from the Saturday closest to September 30 until the last day in February, while the HO allows the take of buck deer allows the take of unbranched antlered bucks (which would include spike bucks) by firearms, but allows the take of any other buck deer during that time to lawful archery equipment only. Thus, the new rule as adopted does not alter the means of take stipulated for MLDP participants under the current rules. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the HO should not be changed and there should "not be an archery season only." The department disagrees with the comment and responds that the rule is adopted without changes to the proposed text (including the provisions applicable to the HO). The department also responds that the archery-only season is very popular with hunters and those landowners are not required to allow hunting during the archery-only open season. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule ruins bow hunting and that the antler restriction rule should be retained. The department disagrees with the comment and responds that the rule as adopted does not affect bow hunting, nor does it eliminate the antler restriction rule. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule was too wordy to benefit wildlife, property managers, or hunters. The department disagrees with the comment and responds that the rule was drafted with the intent of stipulating the requirements for entering and complying with the management goals of the MLDP program and was not intended to contain more words than are necessary to accomplish that goal. No changes were made as a result of the comment.

One commenter opposed adoption and stated "To continue to strangle land owners with more rules and regulations has to stop." The department disagrees that the rule sets forth the requirements for participation in the MLDP program and are not believed to be burdensome, and that participation is not mandatory. No changes were made as a result of the comment.

The department received 130 comments in opposition to adoption that were identical or nearly identical. The comments consisted of a list of proposed provisions being opposed. That list of opposed provisions (verbatim), accompanied by the department's response to each, follows.

- "Harvest Option - original Oct. 1 to Feb. 28 harvest dates by 'any legal means and methods' should not be changed and the proposed 'archery only' requirements should be removed." The department disagrees with the comment and responds that if the comment is intended to address the HO provision that limits the take of bucks by firearm to spikes and unbranched antlered bucks from the Saturday closest to September 30 until the start of the general open season, the purpose of the new MLDP program is to create two management options, one with no habitat man-

agement requirements (the HO, for landowners and land managers who are more interested in managing deer harvest) and the CO (for landowners and land managers who are interested in a more intensive approach involving habitat management), with the goal of automating the HO in order to allow staff resources to be allocated to providing assistance to CO cooperators. The rule allows CO cooperators to harvest any buck deer by firearm from the Saturday closest to September 30 until the last day in February as a way to reward landowners and land managers who utilize recommended habitat management practices. The rule as adopted does not prohibit HO cooperators from taking buck deer other than spikes and unbranched antlered deer from the Saturday closest to September 30 until the opening of the general season, but allows such deer to be harvested only by archery equipment during that time period. Any buck may be taken by firearm on a HO property from the opening day of the general season until the last day in February. No changes were made as a result of the comment.

- Harvest Option - "proposed rules changes do not fairly represent or address the counties that have no doe season or have archery only season." The department disagrees with the comment and responds that county regulations are immaterial to a discussion of the new MLD rule. A landowner or land manager has several management options to choose from: the CO, the HO, or the county regulations. The department has chosen this structure to allow maximum flexibility for landowners and land managers to choose the management option that is best for them. No changes were made as a result of the comment.

- Conservation Option - "use or potential use of a browse survey technique, as it must NOT be used as a mechanism, or 'hammer', to dictate/mandate landowner goals and objectives and/or permit participation, or dictate timing of deer releases." The department disagrees with the comment and responds that under the new rule, a CO program participant is required to perform three habitat management practices of their choice (which must be specified in a department-approved management plan). The rule as adopted does not dictate how the management practices are to be performed; however, the department will not approve practices that are inconsistent with or contrary to sound habitat management. No changes were made as a result of the comment.

- Conservation Option - "approved survey methods shall be used consistently and equitably throughout the state, without local field staff bias." The department disagrees with the comment and responds that the rules do not dictate survey technique methodology, although the department will not accept survey data that is not scientifically valid. No changes were made as a result of the comment.

- Conservation Option - "harvest recommendations shall be tailored to each location rather than eco-region, so as to better serve the landowner, as eco-region is too broad." The department agrees with the comment and responds that the intent of the CO is to allow property-specific management, including harvest recommendations. No changes were made as a result of the comment.

- Conservation Option - "application deadline shall not be moved earlier, but left alone or possibly moved later in order to encourage and accommodate new landowners' participation in the program." The department disagrees with the comment and responds that under the current rules while there is absolute deadline, there is a provision stating that administratively complete applications submitted by August 15 will be approved or denied

by October 1 of the same year. The new rule as adopted establishes a June 15 application deadline for the CO because the department requires harvest, population, and habitat management reporting, a WMP, and, if necessary, personal interaction with department personnel; therefore, the application deadline must be set well in advance of the period of validity of the MLDP tags in order to allow staff sufficient time to evaluate applications. No changes were made as a result of the comment.

• Both Options - "harvest data collection requirements shall be relaxed to provide only the most basic and necessary biological information." The department agrees with the comment and responds that neither the rules nor the department require unnecessary biological information to be collected or reported. No changes were made as a result of the comment.

The department received 296 comments supporting adoption of the proposed new rule.

The Texas Wildlife Association commented in support of adoption of the proposed rule.

The new rule is adopted under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed; §42.0177, which authorizes the commission to modify or eliminate the tagging requirements of §§42.018, 42.0185, or 42.020, or other similar tagging requirements in Chapter 42; and §43.201(c) which authorizes the commission to exempt a person from the archery stamp requirement.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4775



SUBCHAPTER B. DISEASE DETECTION AND RESPONSE

DIVISION 2. CHRONIC WASTING DISEASE - MOVEMENT OF DEER

31 TAC §§65.90 - 65.93

The Texas Parks and Wildlife Commission (Commission) in a duly noticed meeting on November 5, 2015 adopted new §§65.90 - 65.93, concerning Disease Detection and Response,

with changes to the proposed text as published in the October 2, 2015, issue of the *Texas Register* (40 TexReg 6856). The new rules are constituted as new Division 2 within Chapter 65, Subchapter B, entitled Chronic Wasting Disease - Movement of Deer.

The change to §65.90(20) alters the definition of "Status" to clarify that, with regard to breeding facilities, "status" is the level of testing "performed" rather than the level of testing "required." Therefore, the definition was modified to define "status" as "the level of testing performed or required by a deer breeding facility or a release site pursuant to this division."

The change to §65.90(21) alters the definition of "Tier 1 facility" for purposes of clarification. As proposed, the definition stated that a Tier 1 facility is "Any facility registered in TWIMS that has received an exposed deer within the previous five years; or transferred deer to a CWD-positive facility within the five-year period preceding the confirmation of CWD in the CWD-positive facility; and is subject to a TAHC hold order." The department has determined that the structure of the definition in the proposal, as well as the phrase "subject to a TAHC hold order" could be a source of confusion. In the interests of clarity, subparagraphs (A) and (B) have been combined and subparagraph (C) has been redesignated as subparagraph (B) and has been reworded to read "has not been released from a TAHC hold order related to activity described in (A)." Thus, if a facility has transferred deer to or accepted deer from an index facility and has not been released from a TAHC hold order, it is a Tier 1 facility.

The change to §65.91 adds new subsection (j) to provide for the expiration of the effectiveness of the division on August 31, 2016. The Texas Parks and Wildlife (department) intends the rules as adopted to be an interim replacement for the emergency rules adopted on August 18, 2015 (40 TexReg 5566), and extended on December 14, 2015 (41 TexReg 9), hereafter referred to as "emergency CWD breeder rules." Based on additional information from the ongoing epidemiological investigation, disease surveillance data collected from captive and free-ranging deer herds, guidance from the TAHC, and input from stakeholder groups, the department intends to review the interim rules and will make an initial recommendation to the Commission at its March 2016 meeting.

The change to §65.92 alters subsection (a)(1)(C) to clarify the reference to DMP facilities. As noted elsewhere in this preamble, the department adopted emergency rules to address the movement of white-tailed via Deer Management Permit (DMP) (40 TexReg 7305). A DMP is a permit issued by the department under rules adopted pursuant to Parks and Wildlife Code, Chapter 43, Subchapters R and R-1, that allows the temporary possession of free-ranging white-tailed or mule deer for breeding purposes. In addition, interim Deer Management Permit (DMP) rules have been proposed (40 TexReg 9086) and will be considered for adoption by the Commission at its January 21, 2016 meeting. As a result, the DMP regulation would include regulations in addition to those contained in 31 TAC Chapter 65, Subchapter R. Therefore, to avoid confusion, this reference is replaced with a reference to the appropriate provision of the Parks and Wildlife Code and a more generic reference to the "department's DMP regulations."

The change to §65.93 alters subsection (b)(2)(B)(i), (b)(2)(C), and (b)(3)(B)(ii) to replace the reference to the "last day of lawful deer hunting at the site in the previous year" with "August 24, 2015." Operationally, in calculating the number of CWD samples required by this subparagraph for Class II release sites, the

department is basing the percentage on the number of deer released between August 24, 2015 and the last day of lawful hunting at the site in the current year. This change is necessary to ensure clarity.

Under Parks and Wildlife Code, Chapter 43, Subchapter L, the department regulates the possession of captive-raised deer within a facility for breeding purposes and the release of such deer into the wild. A deer breeder permit affords deer breeders certain privileges, such as (among other things) the authority to buy, sell, transfer, and release captive-bred white-tailed and mule deer, subject to the regulations of the Commission and the conditions of the permit. Breeder deer may be purchased, sold, or transferred only for purposes of propagation or liberation. There are currently 1,275 permitted deer breeders operating more than 1,300 deer breeding facilities in Texas.

On June 30, 2015, the department received confirmation that a two-year-old white-tailed deer held in a deer breeding facility in Medina County ("index facility") had tested positive for chronic wasting disease (CWD). Under the provisions of the Agriculture Code, §161.101(a)(6), CWD is a reportable disease. A veterinarian, veterinary diagnostic laboratory, or person having care, custody, or control of an animal is required to report the existence of CWD to TAHC within 24 hours after diagnosis. Subsequent testing confirmed the presence of CWD in additional white-tailed deer at the index facility. The source of the CWD at the index facility is unknown at this time. Within the last five years, the index facility accepted deer from 30 other Texas deer breeders and transferred 835 deer to 147 separate sites, including 96 deer breeding facilities, 46 release sites, and two DMP facilities in Texas, as well as two destinations in Mexico. The department estimates that more than 728 locations in Texas (including 384 deer breeders) either received deer from the index facility or received deer from a deer breeder who had received deer from the index facility. At least one of those locations, a deer breeding facility in Lavaca County, has been confirmed to have CWD positive white-tailed deer acquired from the index facility.

The new rules impose CWD testing requirements and movement restrictions for white-tailed deer and mule deer held under the authority of deer breeder permits issued by the department. The new rules are a result of extensive cooperation between the department and the TAHC to protect susceptible species of exotic and native wildlife from CWD. TAHC is the state agency authorized to manage "any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl, regardless of whether the disease is communicable, even if the agent of transmission is an animal species that is not subject to the jurisdiction" of TAHC. Tex. Agric. Code §161.041(b).

The department and TAHC have been concerned for over a decade about the possible emergence of CWD in free-ranging and captive deer populations in Texas. As a result, the department and TAHC have worked together to develop a Chronic Wasting Disease Management Plan (the Plan) to guide the department and TAHC in addressing risks, developing management strategies, and protecting big game resources from CWD in captive or free-ranging cervid populations. The most recent version of the Plan was finalized in March 2015. Much of the information provided in this preamble is also contained in the Plan.

CWD is a fatal neurodegenerative disorder that affects some cervid species, including white-tailed deer, mule deer, black-tailed deer, elk, red deer, sika, moose, and their hybrids

(susceptible species). It is classified as a TSE (transmissible spongiform encephalopathy), a family of diseases that includes scrapie (found in sheep), bovine spongiform encephalopathy (BSE, found in cattle), and variant Creutzfeldt-Jakob disease (vCJD) (found in humans). Much remains unknown about CWD. The peculiarities of its transmission (how it is passed from animal to animal), infection rate (the frequency of occurrence through time or other comparative standard), incubation period (the time from exposure to clinical manifestation), and potential for transmission to other species are still being investigated. There is no scientific evidence to indicate that CWD is transmissible to humans.

What is known is that it is a progressive, fatal disease with no known immunity or treatment. CWD is known to occur via natural transmission in white-tailed deer, mule deer, black-tailed deer, red deer, sika deer, elk, and moose (Sohn et al. 2011, CWD Alliance 2012, Saunders et al. 2012). There are two primary sources of exposure to CWD for uninfected deer: (1) CWD infected deer, and (2) CWD contaminated environments (Williams et al. 2002, Miller et al. 2004, Mathiason et al. 2009). It is believed that some TSE prions may appear spontaneously and sporadically, but there is no evidence of spontaneous CWD (Chesebro 2004). The presence of infected deer over time increases the number of infectious CWD prions in the environment. As CWD becomes established in an area, environmental contamination may become the primary source of exposure for uninfected deer. Conversely, in areas where CWD is not established, and where the environment is relatively uncontaminated, direct animal contact is considered the most likely source of transmission of CWD to uninfected deer.

In early stages of infection, limiting the growth of environmental contamination through the reduction of infected individuals may offer some control in limiting disease prevalence and distribution (Wasserberg et al. 2009, AlMBERG et al. 2011). However, infected individuals on the landscape serve as a reservoir for prions which will be shed into the environment. Prions are shed from infected animals in saliva, urine, blood, soft-antler material, and feces (Gough et al. 2009, Mathiason et al. 2009, Saunders et al. 2012). There are no known management strategies to mitigate the risk of indirect transmission of CWD once an environment has been contaminated with infectious prions. This makes eradication of CWD very difficult, if not impossible in areas where CWD has been established for a long period before initial detection. Although the incubation period for CWD is not fully understood, a susceptible species infected with CWD is expected to display symptoms within five years after infection.

As CWD is invariably fatal, a high prevalence of the disease in free-ranging populations has been correlated to deer population declines. Human dimensions research suggests that hunters will avoid areas of high CWD prevalence (See, e.g. Duda 2011, Needham et al. 2007, Vaske 2009, Zimmer 2012). The potential implications of CWD for Texas and its annual, multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies could be significant, unless it is contained and controlled.

The number of states and provinces in which CWD has been discovered has steadily increased in the past decade, forcing many state and provincial wildlife agencies, hunters, and stakeholders to confront the myriad of consequences and implications this disease presents. Implications of CWD are often centered on the anticipated, or unknown potential impacts to wild cervid populations, most notably concerns for population declines re-

sulting from infected herds. Disease eradication is expected to become less attainable as CWD becomes more established in a population, emphasizing the criticality of a sound CWD surveillance and response plan. Of course, disease prevention is the best approach to protecting cervid populations and avoiding social and economic repercussions resulting from CWD or other wildlife diseases (Sleeman & Gillin 2012).

Currently, the only test certified by the U.S. Department of Agriculture (USDA) for CWD must be conducted post-mortem by extracting and testing the obex (a structure in the brain) or medial retropharyngeal lymph node. However, the department is actively collaborating with researchers to investigate possible efficacious live-animal tests that can be integrated into the state's overall disease surveillance efforts.

In addressing CWD, the Plan sets forth three major goals: (1) Minimize CWD risks to the free-ranging and captive white-tailed deer, mule deer, and other susceptible species in Texas; (2) Establish and maintain support for prudent CWD management with hunters, landowners, and other stakeholders; and (3) Minimize direct and indirect impacts of CWD to hunting, hunting related economies, and conservation in Texas. The department is guided by these three goals in the development of rules needed to address CWD.

As part of the department's surveillance efforts, prior to July 1, 2015, more than 32,882 "not detected" CWD test results were obtained from free-ranging deer (i.e., not breeder deer) in Texas, and deer breeders had submitted 12,759 "not detected" test results as well. The intent of the new rules is to increase the probability of detecting and containing CWD where it exists.

Previous CWD Rulemaking

The department has engaged in several rulemakings over the years to address the threat posed by CWD. In 2005, the department closed the Texas border to the entry of out-of-state captive white-tailed and mule deer and increased regulatory requirements regarding disease monitoring and record keeping. The closing of the Texas border to entry of out-of-state captive white-tailed and mule deer was updated, effective in January 2010, to address other disease threats to white-tailed and mule deer (35 TexReg 252).

On July 10, 2012, the department confirmed that two free-ranging mule deer sampled in the Texas portion of the Hueco Mountains tested positive for CWD. In response, the department and TAHC convened the CWD Task Force, comprised of wildlife-health professionals and cervid producers, to advise the department on the appropriate measures to be taken to protect white-tailed and mule deer in Texas. Based on recommendations from the CWD Task Force, the department adopted new rules in 2013 (37 TexReg 10231) to implement a CWD containment strategy in far West Texas. Those rules (31 TAC §§65.80 - 65.88), among other things, require deer harvested in a specific geographical area (the Containment Zone), to be presented at check stations to be tested for CWD.

Response to June 2015 CWD Discovery

Upon discovery of CWD in Medina County in June 2015, the department and TAHC convened the CWD Task Force to advise the department on the appropriate measures to be taken in response to the discovery. The CWD Task Force met on July 14, August 6, and September 1, 2015. In addition, on July 8, July 24, August 6, and September 16, 2015, the department and TAHC held stakeholder conference calls, some or all of which were attended by

representatives of impacted groups, including the Texas Deer Association, the Deer Breeders Corporation, the North American Deer Farmers Association, the Exotic Wildlife Association, the Texas Wildlife Association, the Texas and Southwest Cattle Raisers Association, the Texas Chapter of Wildlife Society.

Furthermore, the department convened the CWD Working Group, which is comprised of representatives from the department, TAHC, Texas A&M Veterinary Medical Diagnostic Laboratory (TVMDL), and the United States Department of Agriculture - Animal Plant Health Inspection Service - Veterinary Services (USDA-APHIS-VS). Members of the CWD Working Group with expertise in epidemiology and/or disease management participated in numerous meetings and discussions in developing a CWD management strategy, of which the rules are a part.

Emergency CWD breeder rules were adopted on August 18, 2015 (40 TexReg 5566). The emergency CWD breeder rules were extended on December 14, 2015 (41 TexReg 9). Also as noted previously, the rules adopted in this rulemaking will supersede and replace the emergency CWD breeder rules.

Also, to address other types of deer movement that could result in the transmission of CWD, emergency rules were adopted to address movement of white-tailed or mule deer via a Trap, Transport and Transplant (Triple T) Permit (40 TexReg 7307), and via a DMP (40 TexReg 7305). In addition, as mentioned previously, interim DMP rules have been proposed (40 TexReg 9086) and will be considered for adoption by the Commission at its January 21, 2016 meeting.

In addition to the regulatory response (which includes enhanced CWD testing requirements), the department has undertaken an effort to obtain additional CWD tests from hunter-harvested deer on a voluntary basis. The department established goals for testing of hunter harvested deer for each of the state's 33 Resource Management Units (RMU). (An RMU is an area of the state with similar soils, vegetation types and land use practices.) As of December 20, 2015, department staff have collected >9,000 hunter-harvested samples statewide during the 2015-16 hunting season.

Current CWD Rulemaking

The new rules set forth specific CWD testing requirements for deer breeders, which would have to be satisfied in order to transfer deer to other deer breeders (or other captive-deer facilities), or for purposes of release. The new rules also impose CWD testing requirements on some sites where breeder deer are liberated (release sites). The testing strategy established in the rules is intended to increase surveillance and to prevent the spread of CWD through permitted activities.

One of the most effective approaches to managing infectious diseases and arresting the spread of a disease is to segregate suspicious individuals and populations from unexposed populations. As a matter of epidemiological probability, when animals from a population at higher risk of harboring an infectious disease are introduced to a population of animals at a lower risk of harboring an infectious disease, the confidence that the receiving population will remain disease-free is reduced.

Therefore, in establishing testing and other requirements, the rules classify breeding facilities and release sites based on the epidemiological likelihood that the breeder facility or release site will contain or spread CWD. In other words, the classifications are based on the relative level of risk for CWD associated with

the breeding facility or release site. Breeding facilities are classified as Transfer Category 1 (TC 1), Transfer Category 2 (TC 2), or Transfer Category 3 (TC 3). TC 1 breeding facilities are facilities that have a relatively low risk for CWD and TC 3 breeding facilities are facilities that have a higher risk for CWD. TC 1 breeding facilities are considered the highest status breeding facilities under the new rules. Similarly, release sites are classified as a Class I, Class II, or Class III release site. As with breeding facilities, a Class I release site poses less risk and a Class III site poses more risk. Class I release sites are considered the highest status release sites.

One factor in determining relative risk concerns a breeding facility's participation in TAHC's CWD Herd Certification Program. See, 4 TAC §40.3 (relating to Herd Status Plans for Cervidae). Participation in the TAHC CWD Herd Certification Program requires that breeding facilities comply with more stringent CWD testing, monitoring, and other requirements. Breeding facilities that have complied with the testing, monitoring, and other requirements of this program for five years or more are considered to be at the lowest risk for CWD.

Another factor in evaluating risk is the relationship of a breeding facility or release site to a breeding facility at which CWD has been detected. As described in more detail elsewhere in this preamble, those facilities and sites most closely related to the CWD-positive facility are referred to as "Tier 1" facilities.

Another significant component of the new rules is the requirement that breeder deer may be released (liberated) only on release sites that are surrounded by a fence of at least seven feet in height and that is capable of retaining deer at all times. Because deer held under deer breeder permits are frequently liberated for stocking and/or hunting purposes (27,684 in 2014), the potential for disease transmission from liberated breeder deer to other free-ranging deer is of concern. Although the release of CWD-positive deer will threaten free-ranging deer within a specific release site, the existence of a high fence around this release site will reduce or slow the transmission of the disease across the broader landscape.

The new rules are necessary to protect the state's white-tailed and mule deer populations, as well as the long term viability of associated hunting, wildlife management, and deer breeding industries. To minimize the severity of biological and economic impacts resulting from CWD, the new rules implement a more rigorous testing protocol within certain deer breeding facilities and at certain release sites than was previously required. In an effort to balance the needs of the many and varied landowner, management, and deer hunting interests in the state, the department has attempted to allow all deer breeders other than those with a CWD-positive facility the opportunity (which in some instances may require additional testing or other actions) to continue to move and release breeder deer.

Changes from Emergency CWD Breeder Rules

In addition to the changes from the rule as proposed, the new rules differ from the emergency CWD breeder rules in several ways. Although the following is not an exhaustive or comprehensive comparison, it addresses the major differences between the new rules and the emergency CWD breeder rules.

Substantive Changes from Emergency Rules

There are several other differences between the emergency CWD breeder rules and the current rules:

1. Section 65.91(e) of the emergency CWD breeder rules provides that if a breeding facility or release site accepts breeder deer from a facility of lower status, then the receiving facility assumes that lower status for the purpose of the rules. Although the emergency CWD breeder rules provide a mechanism for Transfer Category (TC) 2 status to be re-established for facilities that have dropped to TC 3 status, the emergency CWD breeder rules do not specify a timeframe for such a transition. Therefore, new §65.91(f) stipulates that a facility that has dropped in status may increase in status, either in two years (TC 3 to TC 2) or in five (TC 2 to TC 1). Following the adoption of the emergency CWD breeder rules, questions arose regarding the length of time for a facility that has dropped in status to obtain the higher status and this provision was intended to address that question. The department understands, however, that these provisions/clarifications may be moot considering the August 31, 2016 expiration of these rules. Nonetheless, the department included these provisions to address apparent ambiguity absent the expiration date.

2. Similarly, the emergency CWD breeder rules do not specifically address the status of new facilities permitted after March 31, 2015. Therefore, new §65.92(a)(4) would contain clarifying language to the effect that facilities permitted after March 31, 2015 would assume the status of the lowest status of deer accepted. In the same vein, the emergency CWD breeder rules do not explicitly state that it is possible for TC 2 facilities to become TC 1 facilities (although it would be automatic if "5th year" or "certified" status under the TAHC Herd Certification Program is attained).

3. Section 65.93(b)(3)(A) of the emergency CWD breeder rules did not note that a release site is a Class III release site if it is a Tier 1 facility. New §65.93(b)(3)(B)(i) remedies that oversight.

Clarifying and Other Changes from Emergency CWD Breeder Rules

1. The CWD emergency breeder rules did not contain a definition of "confirmed" as it relates to CWD testing. Therefore, in an effort to avoid confusion, new §65.90(3) defines the term as "a CWD test result of 'positive' received from the National Veterinary Service Laboratories of the United States Department of Agriculture."

2. The definition of "exposed" contained at §65.90(9) of the emergency CWD breeder rules did not contemplate situations in which the department is able to determine that although a deer might otherwise be considered "exposed" to CWD, the department is able, through an epidemiological investigation, to determine that a deer is, in fact, not exposed. For example, if a deer was transferred out of a breeding facility prior to a CWD-positive deer being transferred into the facility, the department may be able to determine that the deer transferred out of the facility was not exposed to CWD. The ability to determine that a deer is not, in fact, an exposed deer is important because a facility that accepts an exposed deer becomes a "Tier 1" facility, triggering provisions that not only affect that facility, but all the facilities that received deer from the facility. Therefore, the definition of "exposed" in new §65.90(10) has been altered to allow the department to truncate the trace-back of deer movements in a facility in cases where an epidemiological investigation reveals the trace-back is not necessary.

3. The definition of "Tier 1" contained at §65.90(20) of the emergency CWD breeder rules did not contemplate situations in which a facility that received exposed deer might be able to

satisfy testing requirements to become eligible to move deer, but would still be prohibited from doing so by being subject to a TAHC hold order. Therefore, new §65.90(21) stipulates that a Tier 1 facility remains a Tier 1 facility if it is under a TAHC hold order.

4. Section 65.91(i) of the emergency CWD breeder rules provided that a person who is subject to the provisions of the emergency CWD breeder rules is required to comply with the provisions of TAHC regulations at 4 TAC Chapter 40 (relating to Chronic Wasting Disease) that are applicable to white-tailed or mule deer. As worded, the provision inadvertently excludes deer released prior the effective date of the emergency CWD breeder rules, because such deer have been liberated and are not possessed under the provisions of the rules. Therefore, new §65.91(i) has been reworded to apply also to persons who receive deer for liberation.

5. New §65.93(a)(5) provides that if the owner of a release site does not comply with the CWD testing requirements, the release site is ineligible to be a destination for future releases. The emergency CWD breeder rules included a five-year timeframe for ineligibility. The five-year time frame for ineligibility is not included in the new rules.

6. The emergency CWD breeder rules contained specific dates necessary to accommodate the immediate application of the emergency CWD breeder rules. The new rules eliminate those dates where necessary and replace them with generic language.

New §65.90, concerning Definitions, sets forth the meanings of specialized words and terms in order to eliminate ambiguity and enhance compliance and enforcement.

New §65.90(1) defines "accredited testing facility" as "a laboratory approved by the United States Department of Agriculture to test white-tailed deer or mule deer for CWD." The definition is necessary in order to provide a standard for testing facilities.

New §65.90(2) defines "breeder deer" as "a white-tailed deer or mule deer possessed under a permit issued by the department pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter." The definition is necessary to establish a shorthand term for a phrase that is used frequently in the new rules but cumbersome to repeat.

New §65.90(3) defines "confirmed" as "a CWD test result of 'positive' received from the National Veterinary Service Laboratories (NVSL) of the United States Department of Agriculture." The definition is necessary in order to provide a definitive standard for asserting the presence of CWD in a sample. Samples collected from breeder deer are sent initially to an accredited testing facility, such as the Texas Veterinary Medical Diagnostic Laboratory (TVMDL). A test result of "suspect" is returned when CWD is detected, and a tissue sample is forwarded to the NVSL for confirmation.

New §65.90(4) defines "CWD" as "chronic wasting disease." The definition is necessary to provide an acronym for a term that is used repeatedly in the rules.

New §65.90(5) defines "CWD-positive facility" as "a facility where CWD has been confirmed." The definition is necessary because the new rules contain provisions that are predicated on whether or not CWD has been detected and confirmed in a given deer breeding, DMP, nursing, or other facility authorized to possess white-tailed deer or mule deer.

New §65.90(6) defines "deer breeder" as "a person who holds a valid deer breeder's permit issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter." As with several other definitions in the new rules, the definition is necessary to establish a shorthand term for a phrase that is used frequently in the new rules but cumbersome to repeat.

New §65.90(7) defines "deer breeding facility (breeding facility)" as "a facility permitted to hold breeder deer under a permit issued by the department pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter." As with several other definitions in the new rules, the definition is necessary to establish a shorthand term for a phrase that is used frequently in the new rules but cumbersome to repeat.

New §65.90(8) defines "department (department)" as "Texas Parks and Wildlife Department." The definition is necessary to avoid confusion, since the new rules contain references to another state agency.

New §65.90(9) defines "eligible mortality" as "a breeder deer that has died within a deer breeding facility and is 16 months of age or older, or, if the deer breeding facility is enrolled in the TAHC CWD Herd Certification Program, is 12-months of age or older." The definition is necessary, in part, because the rules require CWD testing of eligible mortalities. CWD is difficult to detect in deer younger than 16 months of age, and more difficult in deer younger than 12 months of age. The department's previous CWD testing rules at §65.604(e) of this title provided for testing of mortalities that were 16 months or older. The department is retaining that standard but is also recognizing that the TAHC and USDA use a standard of 12 months in their CWD herd certification program that requires testing 100 percent of eligible mortalities.

New §65.90(10) defines "exposed deer." This definition provides that "unless the department determines through an epidemiological investigation that a specific breeder deer has not been exposed to CWD, an exposed deer is a white-tailed deer or mule deer that is in a CWD-positive facility or was in a CWD-positive facility within the five years preceding the confirmation of CWD in that facility." The definition is necessary to distinguish the circumstances under which certain provisions of the new rules are applicable. The five-year timeframe was selected because a deer infected with CWD could shed prions (the infectious agent believed to cause CWD) and infect other animals during this period before exhibiting clinical symptoms of the disease. However, if an epidemiological investigation concludes that any part of the five-year window is unnecessary, the status of "exposed" could be altered.

New §65.90(11) defines "hunter-harvested deer" as "a deer required to be tagged under the provisions of Subchapter A of this chapter (relating to Statewide Hunting Proclamation)." The definition is necessary because the rules in some instances require deer harvested by hunters (as opposed to other types of mortality) to be tested for CWD.

New §65.90(12) defines "landowner (owner)" as "any person who has an ownership interest in a tract of land, and includes a landowner's authorized agent." The definition is necessary because the new rules set forth testing requirements and other obligations for persons who own land where breeder deer are released from TC 2 and/or TC 3 breeding facilities.

New §65.90(13) defines "landowner's authorized agent" as "a person designated by a landowner to act on the landowner's be-

half." The definition is necessary for the same reason set forth in the discussion of new §65.90(12).

New §65.90(14) defines "NUES tag" as "an ear tag approved by the United States Department of Agriculture for use in the National Uniform Eartagging System (NUES)." The definition is necessary because the new rules require breeder deer released from TC 3 breeding facilities to be tagged with either a RFID or NUES tag.

New §65.90(15) defines "originating facility" as "a facility that is the source facility identified on a transfer permit." The definition is necessary because the new rules allow breeder deer to be transferred between deer breeders and from deer breeders to release sites, making it necessary to distinguish the originating facility from the facility that received the deer.

New §65.90(16) defines "reconciled herd" as "the deer held in a breeding facility for which the department has determined that the deer breeder has accurately reported every birth, mortality, and transfer of deer in the previous reporting year." The definition is necessary because the rules require a deer breeder to have a reconciled herd in order to transfer or release breeder deer.

New §65.90(17) defines "release site" as "a specific tract of land that has been approved by the department for the release of breeder deer under this division." The definition is necessary because the new rules impose CWD testing requirements for tracts of land where breeder deer are liberated if the breeder deer originate from certain types of deer breeding facilities.

New §65.90(18) defines "reporting year" as "the period of time from April 1 of one calendar year to March 31 of the next calendar year." Deer breeders are required to file annual reports with the department. The new rules condition the eligibility of deer breeders to transfer and release deer on the completeness and accuracy of those reports.

New §65.90(19) defines "RFID tag" as "a button-type ear tag conforming to the 840 standards of the United States Department of Agriculture's Animal Identification Number system." The definition is necessary because the new rules require breeder deer released from TC 3 breeding facilities be tagged with either an RFID or NUES tag.

New §65.90(20) defines "status" as "the level of testing performed or required by a deer breeding facility or a release site pursuant to this division." The definition also clarifies that the highest status for a Transfer Category is 1 and the lowest status is Transfer Category 3. Similarly, Class I is the highest status for release sites and Class III is the lowest. As noted previously, the rules categorize breeding facilities and release sites based on relative risk. The definition is necessary because the new rules predicate the eligibility of deer breeding facilities to transfer and receive breeder deer, and the testing requirements of release sites, upon the status of the breeding facility or release site.

New §65.90(21) defines "Tier 1 facility" as "any facility registered in TWIMS that (A) has received an exposed deer within the previous five years or has transferred deer to a CWD-positive facility within the five-year period preceding the confirmation of CWD in the CWD-positive facility; and (B) has not been released from a TAHC hold order related to activity described in subparagraph (A) of this paragraph." The definition is necessary to offer a shorthand reference to those facilities that have a direct connection to a CWD-positive facility.

New §65.90(22) defines "TAHC" as "Texas Animal Health Commission." The Texas Animal Health Commission is the

state agency charged with managing "any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl, regardless of whether the disease is communicable, even if the agent of transmission is an animal species that is not subject to the jurisdiction" of TAHC. Tex. Agric. Code, §161.041(b).

New §65.90(23) defines "TAHC CWD Herd Certification Program" as "the disease-testing and herd management requirements set forth in 4 TAC §40.3 (relating to Herd Status Plans for Cervidae)." The new rules have provisions specific to deer breeders who participated in the TAHC herd certification program. The definition makes it clear that references to herd certification are references to the herd certification program administered by TAHC.

New §65.90(24) defines "TAHC Herd Plan" as "a set of requirements for disease testing and management developed by TAHC for a specific facility." The new rules in some cases make eligibility to transfer or receive breeder deer contingent on compliance with a herd plan developed by TAHC. The definition makes it clear that references to herd plans are references to herd plans developed by TAHC.

New §65.90(25) defines "TWIMS" as "the department's Texas Wildlife Information Management Services (TWIMS) online application." TWIMS is the system that all deer breeders are required to use to file required notifications and reports required by current rule.

New §65.91, concerning General Provisions, sets forth a number of provisions that are applicable to the transfer or release of breeder deer.

New §65.91(a) stipulates that in the event that a provision of the new rules conflicts with any other provision of 31 TAC Chapter 65, the new rules would apply. Because of the need to quickly implement a regulatory response to the emergence of CWD there is insufficient time to harmonize the new rules with the agency's existing rules governing white-tailed deer and mule deer. Therefore, the new rules clarify that the new rules govern in the event of conflict.

New §65.91(b) prohibits the transfer of live breeder deer for any purpose except as provided by the new rules. Because deer breeders frequently transfer deer to and receive deer from other deer breeders, as well as transfer breeder deer for release, it is necessary in light of the emergence of CWD in a Texas deer breeding facility to prohibit the movement of breeder deer except as authorized by the rules. New §65.91(c) prohibits the movement of deer to or from a deer breeding facility where CWD has been detected, beginning with the notification that a "suspect" test result has been received and lasting until the department authorizes resumption of activities. Given that CWD is an infectious disease, it is necessary to prohibit certain activities in order to contain the spread of the disease.

New §65.91(d) prohibits the transfer of exposed breeder deer from a deer breeding facility unless specifically authorized in a TAHC herd plan and then only in accordance with the provisions of the new rules. Under TAHC rules, any deer breeding facility that receives breeder deer from CWD-positive facility is automatically placed under a "hold order," which prohibits the movement of breeder deer out of the facility while TAHC conducts an epidemiological investigation and creates a herd plan for the facility based on that investigation. If the TAHC herd plan provides that movement of exposed deer can resume, then such movement

may result if authorized by and if in compliance with the new rules.

New §65.91(e) stipulates that a breeding facility or release site that receives breeder deer from an originating facility of lower status would automatically assume the status of the originating facility. The new rules create a tiered system of testing performance based on the CWD monitoring and testing performance, and thus, the level of risk of transmission of CWD for each deer breeding facility and release site. The level of risk is also based on whether the facility contains or is connected to exposed animals. Epidemiological science dictates that a population receiving individuals from a higher risk population is itself at greater risk; therefore, the new rules address such transfers from higher risk to lower risk populations by requiring the receiving breeding facility, or release site to assume the lower status.

New §65.91(f) explicitly outlines the timeframes for breeding facilities or release sites to increase status following a loss of status. A discussion of this provision was provided earlier in this preamble.

New §65.91(g) stipulates that a CWD test is not valid unless it is performed by an accredited testing facility. The department's efforts to detect and contain CWD depend on the quality of the testing itself. At the current time, USDA will not certify herd plans for cervidae unless CWD testing is performed by laboratories that have been approved by USDA. The standard for approval is compliance with 9 CFR §55.8, which sets forth the specific tests, methodology, and procedure for conducting CWD tests. Therefore, in order to ensure that CWD tests are performed in accordance with uniform standards, the new rules require all CWD tests to be performed by a laboratory approved by USDA. Additionally, the new subsection specifies which tissues must be submitted and who is authorized to collect those tissues. At the current time, the only CWD testing approved by USDA must be performed on certain tissues from eligible mortalities, such as the obex (a structure in the brain) or certain lymph nodes. The rules authorize laypersons to remove an obex, but require the extraction of appropriate lymph nodes be performed by an experienced veterinarian, technician, or biologist to ensure proper extraction and identification. Therefore, the new subsection stipulates that to be valid, a CWD test must be performed on an obex, which can be collected by anyone, but if a lymph node is to be tested in addition to the obex, it must be a medial retropharyngeal lymph node collected from the eligible mortality by an accredited veterinarian or other person approved by the department.

New §65.91(h) requires all applications and notifications required by the new rules to be submitted to the department electronically via the department's TWIMS application or by another method expressly authorized by the department. Under current rule, deer breeders are required to submit all applications and reports via TWIMS; the new rules make the same requirement, but also allow the department to authorize another method in an effort to account for unexpected situations, such as TWIMS being unavailable.

New §65.91(i) requires compliance with TAHC rules concerning CWD, to the extent that they are applicable to white-tailed deer and mule deer. The department's response to CWD is part of a multi-agency cooperative effort with TAHC. In addition to the department's rules regarding movement of breeder deer, deer breeders must comply with TAHC rules governing herd plans. The department intends to enforce those rules under the authority of Parks and Wildlife Code, Chapter 43, Subchapter L.

New §65.91(j) provides that the division of Chapter 65 containing the new rules will expire August 31, 2016. As explained elsewhere in this preamble and in a number of other contexts, the new rules are intended to be interim rules. The department intends to review the new rules following the current hunting season and present preliminary recommendations to the Commission in March 2016.

New §65.92, concerning Transfer Categories and Requirements, sets forth provisions generally applicable to deer breeding facilities as well as delineating a tiered system of testing options and associated requirements predicated on a given deer breeding facility's exposure to deer from a CWD-positive facility.

New §65.92(a) establishes those provisions generally applicable to the transfer of breeder deer from a deer breeding facility.

New §65.92(a)(1) provides for the transfer of breeder deer pursuant to activation of a valid transfer permit for four purposes: (1) to another deer breeder; (2) to an approved release site; (3) to a DMP facility; or (4) to another person for nursing purposes. Under previous rules at §65.610 (relating to Transfer of Deer), breeder deer may be transferred only after the activation of a transfer permit and only for specific purposes (to another deer breeder; for release to the wild; to a DMP facility; to the holder of an educational display or zoological permit issued by the department; or on a temporary basis to another person for nursing purposes or to receive medical attention). Given the threat of transmission of CWD, the new rules contemplate the qualified transfer of breeder deer in a narrower context. Therefore, the new rules allow the movement of breeder deer for four purposes, contingent on the satisfaction of testing requirements imposed by the new rules. Transfer of breeder deer to the holder of an educational display or zoological permit issued by the department is no longer authorized. The temporary transfer of breeder deer to a veterinarian for medical care is addressed in new §65.92(c).

Notwithstanding the provisions of new §65.92(a)(1), new §65.92(a)(2) prohibits the movement of breeder deer if: (1) the transfer is not authorized under a TAHC herd plan; (2) "not detected" CWD test results have been submitted for less than 20 percent of eligible mortalities at the breeding facility since May 23, 2006; (3) the breeding facility has an unreconciled herd inventory; or (4) the breeding facility is not in compliance with the provisions of §65.608 of this title (relating to Annual Reports and Records). The basis for each of these three prohibitions is explained as follows.

With regard to the first prohibition, since a TAHC herd plan will normally not authorize the movement of breeder deer if the deer breeder does not institute a testing program and/or comply with other requirements, paragraph (2)(A) prohibits movement of breeder deer from a breeding facility that is not authorized to do so under the TAHC herd plan for the facility.

With regard to the second prohibition in paragraph (2)(B), for a number of years, the rules at §65.604 of this title (relating to Disease Monitoring) allowed a deer breeder to move breeder deer if, among other things, CWD test results of "not detected" had been returned from an accredited test facility on a minimum of 20 percent of all eligible breeder deer mortalities occurring within the facility since May 23, 2006. Although this standard provides a very low statistical confidence of detecting CWD if it exists in a facility, the department reasons that any breeding facility not in compliance with this standard should not be allowed to move breeder deer until it has "tested out," or submitted sufficient test

samples of "not detected" to provide a higher level of confidence that CWD will not be transmitted from the facility.

The third and fourth prohibitions in paragraphs (2)(C) and (D) are related to reconciled herds and annual reports. Current department rules at §65.608 of this title (relating to Annual Reports and Records) require deer breeders to submit an annual report. The annual report must include a herd reconciliation that accounts for every breeder deer held, acquired, or transferred by a breeding facility, as well as births and mortalities. A breeding facility that is not in compliance with the reporting requirements or has submitted incomplete or inaccurate records frustrates efforts to determine the source and/or disposition of every deer in the facility, meaning that any number of scenarios could be possible with respect to disease transmission.

New §65.92(a)(3) prohibits the transfer of a breeder deer to a Class III release site unless the deer has been tagged with an approved RFID or NUES ear tag. As has been discussed elsewhere in this preamble, the new rules create a classification system for breeding facilities that is based on the extent to which a facility is believed to have been exposed to CWD and the testing history of the facility. The new rules also create a similar system for classifying release sites. As described in more detail later in this preamble, deer within a Class III release site are at a higher risk for CWD. The department believes that breeder deer released onto a Class III site should be readily identifiable for purposes of CWD testing and reporting. Therefore, the new rules require such deer to be ear-tagged prior to release.

New §65.92(a)(4) stipulates that a deer breeding facility initially permitted after March 31, 2015 will assume the lowest status among all originating facilities from which deer are received. New §65.92(a)(4) also provides that a breeding facility cannot assume TC 1 status unless it meets the criteria established in new §65.92(b)(1), which limits the TC 1 designation to those facilities that are not Tier 1 facilities and have a "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program.

New §65.92(b) enumerates the three categories of breeding facilities and the testing requirements for each.

New §65.92(b)(1) establishes that a breeding facility is a TC 1 facility if it is not a Tier 1 facility and has "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program. Because a TC 1 facility has achieved this status in a disease monitoring protocol and has neither accepted deer from nor transferred deer to a CWD-positive facility, a TC 1 facility is a breeding facility that is least likely to contain CWD-positive breeder deer. Additionally, because a TC 1 facility with "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program is considered to be adequately monitoring for CWD, there are no additional testing requirements imposed by the new rules on TC 1 facilities.

New §65.92(b)(2) establishes that a breeding facility is a TC 2 facility if it is not a Tier 1 facility and it has returned "not detected" CWD test results for either 4.5 percent (or more) of the average number of deer at least 16 months of age (or 12 months of age, if the facility is participating in the TAHC herd certification program) within the facility during the previous two reporting years, or 50 percent of all eligible mortalities during the previous two reporting years, whichever represents the lowest number of deer tested.

From an epidemiological point of view, not being a Tier 1 deer breeding facility is not, in and of itself, sufficient to provide any meaningful level of statistical confidence that CWD is not present within the population at the facility. However, in concert with effective surveillance, increased confidence can be obtained. The

success of control and mitigation of infectious diseases is dependent on how soon the disease is detected after it is introduced, how quickly the source of the outbreak is identified, and how quickly infected animals can be isolated. The most effective first step in managing a disease outbreak in a herd of animals is to isolate those individuals known to have been in contact with infected individuals and then test those animals. Unfortunately, as noted previously, the only CWD tests for deer currently approved by USDA must be performed post-mortem (i.e., there is currently no accepted live-animal test). The department recognizes that deer breeders have a considerable investment in their facilities and permitted herds, and that preserving business continuity is an important consideration within the regulatory context.

The testing requirement to achieve TC 2 status in §65.92(b)(2) is the result of a statistical model developed by the department, in consultation with the TAHC, based on the reported average annual adult-mortality rate for all breeding facilities, which is approximately 4.5 percent. Testing 4.5 percent of the average adult population over two years is equivalent to 2.25 percent per year, which is equivalent to 50 percent of the expected eligible mortalities (since the average adult mortality rate is 4.5 percent per year). Or stated another way, testing 4.5 percent of the adult population on an annual basis is equivalent to testing 100 percent of expected adult mortalities, and testing 4.5 percent of the adult population over two years is equivalent to testing 50 percent of expected eligible mortalities.

As an example, a breeding facility (that is not otherwise prohibited by §65.92(a) from transferring deer) that had an average population of 100 adult deer over the preceding two reporting years, and that had not tested any eligible mortalities during the previous two reporting periods would have the option to submit five (i.e., 4.5 percent of 100, rounded up the next whole number) "not detected" test results, which could include test results obtained by the deer breeder but not submitted to the department during the previous two years. Alternatively, the breeding facility could submit "not detected" test results for 50 percent of eligible mortalities from the preceding two reporting years, provided at least one eligible mortality was tested. This standard is more stringent than the disease-testing requirements prior to the adoption of the emergency CWD breeder rules. The intent of this approach is to provide an enhanced method for detection of CWD early enough to allow for an effective response.

New §65.92(b)(3) establishes that a breeding facility is a TC 3 facility if it is neither a TC 1 nor a TC 2 facility. The new paragraph also stipulates that a TC 3 facility could achieve TC 2 status by submission of "not detected" CWD test results for each breeder deer received by the facility from a CWD-positive site, each exposed deer transferred by the breeding facility to another breeding facility or released, and for 4.5 percent (or more) of the average number of adult deer within the facility during the previous two reporting years. Obviously, a TC 3 facility represents the lowest confidence with respect to the presence of CWD. However, the testing of additional deer as provided in new §65.92(b)(3)(B) sufficiently increases the confidence level to enable a TC 3 facility to increase in status to a TC 2 facility.

New §65.92(b)(3)(C) requires all deer transferred from a TC 3 breeding facility to a DMP facility, including buck deer that are returned from a DMP facility to a breeding facility, to be ear-tagged with an RFID/NUES tag. As has been discussed, the new rules create a classification system for breeding facilities that is based on the extent to which the facility is believed to have been exposed to CWD and the testing history of the facility. A DMP au-

thorizes the temporary detention of free-ranging deer for breeding purposes. A DMP may also authorize the introduction of breeder deer into a DMP facility. In addition, a breeder buck that is introduced into a DMP facility may be returned to a breeding facility. A breeder deer that is introduced to a DMP pen thus comes into contact with free-ranging deer, and when the deer are released, they come into contact with additional free-ranging deer. When a TC 3 breeder deer is transferred to a DMP facility, this scenario is epidemiologically analogous to the release of breeder deer to a Class III release site, for which new §65.92(a)(3) also imposes ear tagging requirements.

New §65.92(c) allows breeder deer to be temporarily transferred to a veterinarian for medical care. The department has determined that the temporary movement of breeder deer to a veterinary medical facility for treatment poses a low risk of transmitting CWD.

New §65.93, concerning Release Sites - Qualifications and Testing Requirements, sets forth provisions generally applicable to locations where breeder deer are released to the wild. As noted previously, the new rules classify release sites based on relative level of risk. More specifically, the classification of a release site is based on the classification of the deer breeding facility from which deer were liberated onto the release site. New §65.93 establishes testing and other requirements associated with release sites generally and with specific classes of release sites.

New §65.93(a) establishes those provisions generally applicable to release sites.

New §65.93(a)(1) stipulates that an approved release site consists solely of the specific tract of land and acreage designated as a release site in TWIMS. This is necessary to ensure clarity and the ability to identify the extent of a specific release site. New §65.93(a)(2) requires all release sites to be surrounded by a fence of at least seven feet in height that is capable of retaining deer at all times, and requires the owner of the release site to be responsible for ensuring that fencing and associated infrastructure retain the deer under ordinary and reasonable circumstances. In order to provide a measure of confidence that CWD is detected and contained, it is necessary to identify the specific location where breeder deer are authorized to be released. Similarly, it is necessary to establish a level of vigilance sufficient to give reasonable assurance that breeder deer are not allowed to leave the specific premise where they were released. Additionally, since some release sites have testing requirements for all or a portion of hunter-harvested deer, as well as harvest documentation for all deer harvested on site, it is necessary to delineate the specific acreage to which these requirements apply.

New §65.93(a)(3) sets forth the on-site harvest documentation requirements for deer harvested on Class II and Class III release sites. The new paragraph requires the owner of a Class II or Class III release site to maintain a daily harvest log at the release site. For each deer harvested from a Class II or Class III release site, the new rules require the hunter's name and hunting license number (or driver's license number, if the daily harvest log is also being used as a cold storage/processing book) to be entered into the harvest log, along with the date of kill, type of deer killed, any alphanumeric identifier tattooed on the deer, the tag number of any RFID or NUES tag affixed to the deer; and any other identifier and identifying number on the deer. The new provision enables the department to identify all deer harvested at a given release site (including deer that were released breeder deer) if an epidemiological investigation becomes necessary. The new paragraph also requires the daily harvest log to be presented to

any department employee acting within the scope of official duties and for the contents of the daily harvest log to be reported to the department via TWIMS by no later March 15 of each year.

New §65.93(a)(4) provides that a release site's status cannot be altered by the sale or subdivision of a property to a related party if the purpose of the sale or subdivision is to avoid the requirements of this division. The department believes that a landowner subject to the provisions of the new rules should not be able to avoid compliance simply by selling, donating, or trading the property to another person if the purpose of the transaction is to avoid the requirements of this division.

New §65.93(a)(5) requires the owner of a release site, as a consequence of consenting to the release of breeder deer on the release site, to submit all required CWD test results to the department as soon as possible but not later than May 1 of each year. The new rules contemplate a disease management strategy predicated on the results of CWD testing. Incomplete, inadequate, or tardy reporting of test results confounds that strategy. For this reason, the new paragraph establishes a date certain for reporting test results to the department. The new paragraph also provides that failure to timely submit test results will result in the release site being declared ineligible to be a destination for future releases. In light of the threat that CWD poses to deer, it is prudent to suspend release site privileges for any landowner who does not comply with the testing requirements for release sites.

New §65.93(a)(6) prohibits any person from intentionally causing or allowing any live deer to leave or escape from a release site. The new provision is necessary to ensure that once a release site has received breeder deer, no deer from the release site (breeder deer or free-ranging deer) are able to come into contact with surrounding populations of free-ranging deer.

New §65.93(b) enumerates the three categories of release sites and the testing requirements for each.

New §65.93(b)(1) establishes that a release site is a Class I release site if it is not a Tier 1 facility and it receives breeder deer only from TC 1 facilities. Because a TC 1 facility has a "fifth-year" or "certified" status in the TAH CWD Herd Certification Program, a TC 1 facility is considered to be at relatively low risk for CWD. As a result, there are no additional testing requirements imposed by the new rules on Class I release sites.

New §65.93(b)(2)(A) establishes that a release site is a Class II release site if it is not a Tier 1 facility, receives any breeder deer from a TC 2 facility, and receives no breeder deer from a TC 3 facility. The Class II designation is an intermediate category intended for release sites that have not received breeder deer from higher risk sources (i.e., Tier 1 and/or TC 3 facilities) but at the same time have not received deer solely from TC 1 facilities. Such release sites are considered to present more risk than Class I but less risk than Class III for harboring CWD.

New §65.93(b)(2)(B) imposes testing requirements for Class II release sites. Specifically, if any deer are harvested by hunters on a Class II release site during an open deer season, the landowner must test either a number of deer equivalent to 50 percent of the number of breeder deer released at the site between August 24, 2015 and the last day of lawful deer hunting on the site in the current year, or 50 percent of all deer harvested by hunters, whichever value is lower. The new paragraph also provides that if any hunter-harvested deer were breeder deer released between August 24, 2015, and the last day of lawful hunting on the site in the current deer season, 50 percent of

those deer must be submitted for CWD testing, which may be counted to satisfy the requirements of §65.93(b)(2)(B).

As mentioned previously in this preamble, from an epidemiological perspective, not being a Tier 1 facility is not, in and of itself, sufficient to provide high statistical confidence that CWD is not present or has not been introduced within the population at the release site. However, in concert with effective surveillance, increased confidence can be obtained. The success of control and mitigation of infectious diseases is dependent on how soon the disease is detected after it is introduced, how quickly the source of the outbreak is identified, and how quickly infected animals can be isolated. Although the most efficacious monitoring regime on a release site would be to require 100 percent of all harvested deer to be submitted for testing, based on feedback from stakeholders, the department is requiring the testing of 50 percent of hunter-harvested deer.

New §65.93(b)(3) establishes that a release site is a Class III release site if it is a Tier 1 facility (i.e., it has received deer from a CWD-positive facility) or it receives deer from an originating facility that is a TC 3 facility. The Tier 1 and TC 3 designations represent those environments that have the highest likelihood of harboring CWD; accordingly, the rule requires the landowner of a Class III release site to test 100 percent of all hunter-harvested deer or one hunter-harvested deer per breeder deer released between August 24, 2015 and the last day of lawful deer hunting on the site in the current year, whichever results in the greatest number of test results. As noted above, Class III release sites pose a higher risk for CWD; therefore, it is appropriate to test deer harvested from Class III release sites at a higher rate.

The department again emphasizes that the new rules are an interim replacement for the current emergency CWD breeder rules adopted on August 18, 2015. As noted previously, based on additional information from the ongoing epidemiological investigation, disease surveillance data collected from captive and free-ranging deer herds, guidance from the TAHC, and input from stakeholder groups, the department intends to review the interim rules following the close of the deer season and present the results of that review to the Commission at the March 2016 Commission meeting for possible modifications.

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The department received 373 comments opposing adoption of the proposed rules. Those comments, accompanied by the de-

partment's response to each, follow. The department notes that because many individual comments contained multiple statements, the number of responses is larger than the total number of comments.

Need for Regulatory Certainty

One hundred and one commenters opposed adoption and stated that the "deer industry in Texas is in dire need of a permitting process that provides regulatory certainty while maintaining a climate conducive to business growth." The department acknowledges the value of regulatory certainty, and as noted above and in the proposal preamble, the department also acknowledges that the deer industry is impacted by the regulations. However, the department disagrees that the rules are an inappropriate response to the discovery of CWD, especially when considered in light of the potential significant impacts of CWD for Texas and its annual, multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies. The department also notes that the rule as adopted includes an August 2016 expiration date. It is the intent of the department to revisit the department's regulatory response to CWD in the spring of 2016 at which point a longer-term strategy will be considered.

Spread of Fear

One hundred and one commenters opposed adoption and stated that the rules have resulted in the spread of fear throughout the outdoor community. The department again disagrees and responds that the knowledge that CWD exists in captive deer populations is, in and of itself, cause for hunters and landowners to have concerns regarding the deer being hunted. As noted elsewhere in this preamble, human dimensions research suggests that hunters will avoid areas of high CWD prevalence. The department also believes that given the fact that CWD is present in at least two deer breeding facilities and the potential for exposure and spread of CWD, it is understandable that some landowners might be reluctant to obtain deer from within this highly interconnected network of deer breeding facilities in which CWD has been discovered. No changes were made as a result of the comment.

Perceived Emergency

One hundred and one commenters opposed adoption and stated that the rules were based on a perceived emergency. The department disagrees with the comment and responds that this comment is apparently intended to address the previously adopted emergency CWD breeder rules. Since the adopted rules were adopted following the Administrative Procedure Act's notice and comment requirements, the issue of whether an emergency exists or existed is not germane to the adopted rules. However, the department also notes that CWD is a communicable, fatal disease that has the potential to profoundly alter the dynamics of deer hunting and deer management. Because there is no question that CWD exists in captive cervid populations in Texas and has been spread by the movement of captive cervids in Texas, there continues to be an immediate danger to Texas deer populations that warrants regulatory action by the department. No changes were made as a result of the comment.

Change in Circumstances Due to Index Herd Findings.

One hundred and one commenters opposed adoption and stated that "the environment upon the issuance of the [emergency] Rules in August was dramatically different than it is today." The comment also states that the test results from the index facility

"validate that there is no statewide emergency to white-tailed deer" and the Commission should not adopt the rules based on the current evidence. The comment goes on to state that the department now has "a wealth of knowledge it did not have previously." The comment further states that because no additional cases of CWD have been discovered in the index facility, that fact "narrows the impact of CWD" and "narrows the scope of the investigation to find the source," that "the abundance of non-detected results significantly changes the dynamics of the rules," and that this proves there is no statewide emergency. While the department acknowledges that it is continuing to gather information, including results from additional testing, the department disagrees that the environment (assumed to mean the general state of affairs with respect to the discovery of CWD and the department's knowledge of CWD) has sufficiently changed to eliminate the need for the rules. Confronted with a transmissible, fatal disease, the department (in collaboration with TAHC and other epidemiological and disease management experts) has pursued a scientifically-based program of isolating the index facility, identifying the source and destination of all deer that entered or left the index facility, and prescribing a testing regime for all deer breeding facilities that either transferred deer to or from the index facility or had not tested for CWD at an intensity that could reasonably exclude those facilities from being potential reservoirs for the disease (via transfer from other deer breeding facilities not immediately connected to the index facility). This situation is still the case and will remain so until a definitive characterization of the epidemiological reality of CWD in captive and free-ranging populations is resolved (i.e., the specificity, temporality, biological gradient, and other factors that become known through time via ongoing epidemiological investigation). The most effective response to a disease outbreak (even when the source is known) is possible only when the nature, magnitude, and scope of the threatening agent and its pathways are known. It follows that when such parameters are unknown, as is the case with CWD at present, there is an increased (not decreased) duty incumbent upon the department and TAHC to investigate, analyze, and respond to the threat. Additionally, it is a well-established tenet of epidemiology that a small factor of association (e.g., five deer out of 100,000 or one breeder facility out of 2,000) does not preclude a causal effect (the spread of CWD to additional breeding facilities and to free-ranging populations). Also, as noted elsewhere in this preamble, CWD has since been discovered at an additional deer breeding facility. The department further responds that, and as noted elsewhere in this preamble, the intensity of testing requirements imposed by the previous CWD rules governing deer breeders provided a very low statistical confidence of detecting CWD if it existed in a facility; therefore, the testing requirements contained in the new rules continue to be necessary.

Scope of Rules

Twelve commenters opposed adoption and stated that the rules were unfair or constituted overregulation, overreach, or persecution. The department disagrees with the comment and responds that the rules represent the minimum measures necessary to discharge the department's statutory duty to protect the state's wildlife resources. The rules' classification of breeding facilities and release sites based on risk of exposure to CWD, with requirements based on a breeding facility's and release site's risk of exposure to CWD, was part of the department's effort to ensure that the rules were not, in fact, broader than necessary. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules are unfair because they affect deer that have not been exposed to CWD. The department disagrees with the comment and responds that deer are affected by the status of the facility within which they are kept or to which they are liberated. Status is a direct indicator of the potential of a facility to contain or spread CWD. A TC 1 breeding facility or Level I release site represents a higher level of certainty that CWD is not present and cannot be spread. At other facilities there is some increased uncertainty, either because deer within the facility have at some previous time come into contact with deer from a CWD-positive facility or there has not been sufficient testing to establish confidence that CWD is not present. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules should apply only to new permittees and not to existing permittees. The department disagrees with the comment and responds that exempting current permittees from compliance would not achieve the objectives of the rules, given that CWD has been discovered and spread from a currently permitted deer breeding facility. Allowing current permittees to move breeder deer without restriction would significantly increase the risk of spreading CWD. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules shouldn't "shut down the whole state." The department disagrees with the comment and responds that the rules do not completely prohibit the movement of breeder deer in the entire state. The rules as adopted impose precautionary restrictions on the movement of breeder deer based on level of risk of exposure to CWD. Only the two deer breeding facilities in which CWD has been detected are prohibited from moving deer regardless of testing history. All other facilities have the opportunity, upon compliance with the rules, to achieve a status in which deer movement is allowed. No changes were made as a result of the comment.

Basis of Rules

Four commenters opposed adoption and stated that the department is not using science. The department disagrees with the comment and responds that, as explained in more detail elsewhere in this preamble, the department enlisted veterinarians, epidemiologists, and wildlife disease specialists, including, but not limited to members of the CWD Task Force and the CWD Working Group, which consisted of scientific experts with the TAHC, TVMDL, and USDA-APHIS-VS, to advise and guide the department in the development of the rules. No changes were made as a result of the comment.

One commenter opposed adoption and stated that no agency has the right to change rules on a whim. Similarly, five commenters opposed adoption and stated that the rules were based on personal opinions and agendas. In addition, one commenter opposed adoption and stated that the rules were politically motivated. The department disagrees with the comments and responds that the rules were developed in carrying out the department's duty to protect the state's wildlife resources. The department was guided by the three goals set out in the Chronic Wasting Disease Management Plan: (1) Minimize CWD risks to the free-ranging and captive white-tailed deer, mule deer, and other susceptible species in Texas; (2) Establish and maintain support for prudent CWD management with hunters, landowners, and other stakeholders; and, (3) Minimize direct and indirect impacts of CWD to hunting, hunting related economies, and conservation

in Texas. Furthermore, as explained elsewhere in this preamble, the rules were developed in consultation and with input and guidance from veterinarians, epidemiologists, and wildlife disease specialists, including, but not limited to members of the CWD Task Force and the CWD Working Group, which consisted of scientific experts with the TAHC, TVMDL, and USDA-APHIS-VS. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules are an attempt by big ranching interests to monopolize deer genetics. The department disagrees with the comment and responds that, as noted elsewhere in this preamble and in response to other comments, the rules were developed in carrying out the department's duty to protect the state's wildlife resources, were guided by the three goals of the Plan, and were developed in collaboration with veterinarians, epidemiologists, and wildlife disease specialists. It should also be noted that the provisions of the rules applicable to landowners (release sites) do not include distinctions based on acreage. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules are intended to generate additional tax revenue for the department. The department disagrees with the comment and responds that the rules as adopted contain no component to generate revenue. No changes were made as a result of the comment.

Department's Authority

One commenter opposed adoption and stated that the department should be relieved of its regulatory authority over breeder deer. The department neither agrees nor disagrees with the comment and responds that under the provisions of the Parks and Wildlife Code, the department is the agency designated by the legislature to regulate deer breeding in Texas. No changes were made as a result of the comment.

Nature of CWD

One commenter opposed adoption and stated that CWD is nothing more than dementia in deer. The department disagrees with the comment and responds that unlike dementia, CWD is a transmissible disease. No changes were made as a result of the comment.

One commenter opposed adoption and stated that CWD is not a disease that is confined to breeder deer. The department agrees with the comment and responds that the rules, as adopted, are intended to address the susceptible species of wildlife over which the department has regulatory authority. No changes were made as a result of the comment.

One commenter opposed adoption and stated that everything has been blown out of proportion. The department disagrees that the regulatory response to the discovery of CWD has been excessive and responds that as explained elsewhere in this preamble, the threat of CWD is real and has the potential to result in population declines and to significantly impact the state's hunting-based economy. As a result, the department's response to that threat is required. No changes were made as a result of the comment.

One commenter opposed adoption and stated that deer and elk herds in other states where CWD has been confirmed are thriving. The department disagrees with the comment and responds that the long-term effects of CWD in free-ranging populations are unknown at this time. While some populations in which CWD exists may appear stable, other populations have experienced significant declines and CWD is considered to be a significant

contributor to at least some of those population declines. The human dimensions research that indicates hunters will avoid areas of high CWD prevalence is cause for concern as well. Therefore, the department believes it is prudent to treat CWD as a serious threat in order to protect Texas deer populations and the economies dependent upon them. No changes were made as a result of the comment.

Fifteen commenters opposed adoption and stated, variously, that CWD is not a risk, not a threat, and not an emergency. The department disagrees with the comments and responds that CWD is a communicable, fatal disease that has the potential to profoundly alter the dynamics of deer hunting and deer management, and because there is no question that it exists in captive cervid populations in Texas and has been spread by the movement of captive cervids in Texas, there is in fact a clear and present danger to Texas deer populations that constitutes an emergency. No changes were made as a result of the comments.

Other Diseases

Three commenters opposed adoption and stated that the department does nothing about epizootic hemorrhagic disease (EHD) or anthrax. One commenter opposed adoption and stated that other diseases pose greater risks to deer populations. The department disagrees that the existence of other diseases should preclude the department from responding to CWD. Unlike EHD or anthrax, CWD is an insidious and persistent disease of long duration that may impact a deer population for many years. While EHD and anthrax can have significant short-term population impacts, the potential for long-term population impacts caused or contributed by CWD cause much more concern. In the absence of prudent disease management, CWD continuously impacts a population and increases in prevalence through time. No changes were made as a result of the comments.

Effectiveness of or Need for Rules

One commenter opposed adoption and stated that the rules would not be effective. In addition, two commenters stated that CWD cannot be stopped, so the rules won't matter anyway. The department disagrees with the comments. The department acknowledges that stopping, containing, or attenuating CWD is very difficult once an environment has been contaminated with infectious prions and where CWD has been established for a long period before initial detection. As a result, for disease eradication, early detection of CWD infected animals is paramount. The time between introduction and detection of the disease is the most critical factor impacting the ability to control and possibly eradicate the disease before it can become established. Therefore, the rules provide for enhanced surveillance in an effort to detect CWD. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department's approach has failed in other states. The department disagrees with the comment and responds that no other state where CWD has been detected has employed the model implemented under the rules as adopted. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that the current rules work just fine. The department disagrees with the comment and responds that the current rules, which require the testing of 20 percent of eligible mortalities as a prerequisite for the movement of breeder deer, are inadequate for establishing confidence

that CWD can be detected within a breeder facility where it exists. No changes were made as a result of the comment.

One commenter opposed adoption and stated that CWD has already been "found and dealt with." The department disagrees with the comment and responds that among the many unknowns surrounding this disease outbreak include how CWD was introduced to the index facility, how many infected animals were dispersed to other locations, whether CWD has subsequently been introduced to free-ranging deer, and how long it will take to determine that CWD has been successfully isolated at the two known infection sites. Therefore, it would be incorrect to say that CWD has been dealt with. No changes were made as a result of the comment.

Intensity of Testing of Free-Ranging Deer

Several commenters opposed adoption based on the intensity of testing required by deer breeders as compared to the intensity of testing in free-ranging deer. The department disagrees with those comments as follows, but as general background on the level of surveillance of free-ranging deer, notes that testing a higher proportion of mortalities within a herd/population does not necessarily equate to more intensive sampling and/or a higher probability of detecting the disease. In calculating appropriate sample sizes, the department relies on probability detection tables constructed from a computation put forward by researchers Cannon and Roe that has been used extensively over many years for sample size detection determinations.

This computation and resulting tables demonstrate that testing all eligible mortalities within a captive herd for CWD in one year will not establish the same level of confidence that will be achieved for a population in which hundreds of deer are sampled in a single year, even though those hundreds of deer may represent a small percentage of all adult mortalities that occurred within that population during the year. Confidence is established by the sheer number of tests, irrespective of the number of mortalities that occurred within that population during some period of time. The larger the population, the smaller the proportion of samples required to establish sufficient confidence. For example, to establish 99 percent confidence that CWD would be detected in a population where it occurred at 1 percent prevalence, 99 samples would be required for a population of 100 deer, whereas only 367 samples would be required for a population of 1,000 deer. The same confidence can be achieved with only 433 samples in a population with an infinite number of deer.

The department has obtained a sufficient number of samples from free-ranging deer in nine of the 10 ecological regions to provide 99 percent confidence that CWD would have been detected if it existed in 0.5 percent of any of those populations when CWD surveillance began in 2002. Because of considerably lower deer densities and lower deer harvest in the High Plains ecoregion, the department has collected enough samples in that ecoregion to achieve 95 percent confidence that CWD would be detected if only 1 out of 100 adult deer was infected when surveillance began. Additionally, the department significantly increased surveillance effort during the 2015-16 hunting season to provide considerable confidence that CWD would be detected in any of 33 Resource Management Units if CWD currently exists in low prevalence within any of those populations. As of December 20, 2015, department staff had collected >9,000 samples statewide during the 2015-16 hunting season alone. No changes were made as a result of the comments.

One commenter opposed adoption and stated that there is no evidence that breeder deer are more likely to carry CWD than free-ranging deer, so there is no reason to test breeder deer at a dramatically higher intensity. The department disagrees with the comment and, in addition to the information above about intensity of testing, responds that the rules as adopted are not predicated on an assumption that breeder deer are more likely to carry CWD than free-ranging deer. For the reasons explained elsewhere in this preamble, because CWD was discovered in captive breeding facilities in Texas and there is a high degree of interconnectivity between deer breeding facilities in Texas, it is appropriate that movement of breeder deer be predicated upon meeting the testing and other requirements provided in the rules. No changes were made as a result of this comment.

One commenter opposed adoption and stated that breeder deer are tested at much higher rates than free-ranging deer and that hunters should be required to test at the same rate that deer breeders are. The department disagrees with the comment and as explained previously, responds that in fact, free-ranging deer populations are tested at levels that provide greater confidence than testing levels in most deer breeding facilities. No changes were made as a result of the comment.

Seven commenters opposed adoption and stated that MLDP cooperators should be required to test harvested deer. MLDP cooperators are landowners who participate in the department's Management Lands Deer Program (MLDP). (See, 31 TAC §65.26.) The MLDP allows landowners involved in a formal management program to have the state's most flexible seasons and bag limits. The program is incentive-based and habitat focused. The MLDP has been a very successful vehicle for encouraging deer harvest, deer management, and habitat conservation. The department disagrees that MLDP cooperators should be required to test at levels other than those as provided in the rules. Properties under MLDP that meet the criteria for a Level II or Level III release site under the rules would be required to test harvested deer as provided in the rules. However, from a disease management perspective, there is no reason to require MLDP cooperators to test harvested deer at a higher level because there is no additional threat of a disease being transmitted from those MLDP sites as a result of engaging in MLDP activities. However, it should also be noted that any landowners participating in MLDP who intend to trap and transport live deer from their properties pursuant to Triple T permit will be required to comply with the CWD testing requirements for Triple T trap sites, which are the most stringent testing requirements of all permit holders authorized to engage in intensive deer management practices in Texas. No changes were made as a result of the comment.

One commenter opposed adoption and stated that if free-ranging deer were tested at the same intensity as breeder deer, CWD would be discovered in the free-ranging population. The department disagrees with the comment and responds that as explained in more detail previously, breeder deer are not tested at a statistically greater intensity than free-ranging deer. Also, due to the number samples collected from free-ranging deer previously and over the 2015-2016 hunting season, the probability of detecting CWD in free-ranging deer populations is actually greater than the probability of detecting CWD in captive deer under current rules. No changes were made as a result of this comment.

Four commenters opposed adoption and stated that the testing intensity should be the same for everyone. The department disagrees with the comment and responds that as explained in

more detail previously, the testing intensities that the rules impose for deer breeders and release sites are predicated on the low occurrence of mortalities within the discrete populations in those facilities, whereas the testing of free-ranging deer over time has created a sample size that allows greater statistical confidence; thus, it is not necessary to mandate CWD testing on free-ranging deer. To the extent the commenters are suggesting that all classes of breeding facilities and release sites should be required to test at the same level, the department disagrees and responds that the levels of testing provided or required are based on the level of risk associated with a specified breeding facility or release site. No changes were made as a result of the comment.

Six commenters opposed adoption and stated that all deer, including hunter-harvested deer, should be required to be tested for CWD. While the department agrees that the testing of hunter harvested deer is an important component of disease management, and notes that the rules, as adopted, address the testing of hunter harvested deer at release sites, the department disagrees that all hunter-harvested deer should be required to be tested for CWD. As explained in more detail in the response to other comments, through voluntary cooperation by hunters, the department has obtained sufficient samples from free-ranging deer to provide an enhanced level of assurance of detection of CWD. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules require 90 percent of deer breeders to test 50 percent of released deer, but free-ranging deer harvested by hunters are not required to be tested. The department agrees that the rules require CWD testing at certain intensities at certain breeding facilities and release sites but do not otherwise mandate CWD testing; however, as explained above, free-ranging deer are already being tested on a voluntary basis to a high degree of statistical confidence, which makes the mandatory testing of free-ranging deer unnecessary. As of December 20, 2015, department staff have collected >9,000 hunter-harvested samples statewide during the 2015-16 hunting season. No changes were made as a result of the comment.

Level of Deer Breeder Testing

One commenter opposed adoption and stated that a TC 2 breeder facility that meets the requirement to test 4.5 percent of the deer within the facility or 50 percent of the eligible mortalities should be allowed to transfer deer to anyone and should not be considered to have "at-risk" deer. The department disagrees with the comment and responds that in order to be deemed a low risk facility (TC 1 status), a deer breeding facility must not have received deer from the index and facility and must have "fifth-year" or "certified" status in the TAHC herd certification program. The reason for this is that a five-year period is believed to be a sufficient period of time for the clinical manifestations of CWD to present in a mature deer; therefore, a five-year testing history of all eligible mortalities, coupled with the TAHC herd certification program requirement that "fifth-year" or "certified" herds cannot receive deer from herds of a lower status, gives reasonable confidence that CWD is not present and will not be spread. The two-year window for the TC 2 testing requirements does not afford equivalent confidence. No changes were made as a result of the comment.

One commenter opposed adoption and stated that TC 1 status should be afforded to every deer breeder who tests 100 percent of mortalities. The department disagrees with the comment and responds that TC 1 status is assigned to facilities for which suffi-

cient confidence that CWD is not present has been established. Such confidence is gained not simply by the percentage of mortalities tested, but continuing to test all eligible mortalities for five consecutive years (and thereafter) while also verifying a reconciled herd inventory during annual inspections. As stated previously, certified herds also maintain a "closed population," as they receive deer only from other certified herds. No changes were made as a result of the comment.

One commenter opposed adoption and stated that a TC 3 breeding facility should be given TC 2 status upon one year of testing 4.5 percent of a population. The department disagrees with the comment and responds that one year of test results is not a sufficient sample size to conclude with confidence that a deer breeding facility does not contain CWD. Also, as noted elsewhere in this preamble, a deer that has been exposed to CWD may not display symptoms for several years. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the testing requirements of the current rules were more than sufficient to stop CWD. The department disagrees with the comment and responds that the efficacy of the previous testing requirements provide an extremely low level of confidence for detecting the disease. No changes were made as a result of the comment.

Testing Responsibility

One commenter opposed adoption and stated that testing should be the responsibility of the deer breeder. The department agrees that deer breeders should undertake testing responsibility as provided in the rules. However, the department disagrees that only deer breeders should be responsible for all testing. The department also disagrees that only deer in breeding facilities should be required to be tested. Given the number of breeder deer that have been liberated onto release sites, samples collected from liberated breeder deer that are ultimately harvested by hunters is necessary to enhance the probability of detecting the disease where it exists. No changes were made as a result of the comment.

Three commenters opposed adoption and stated either that the department should pay for the testing of breeder deer or that it is unfair that deer breeders must bear the cost of testing while deer from free-ranging populations are tested at no cost. The department disagrees with the comment and notes that the required testing of free-ranging hunter-harvested deer on release sites is the responsibility of the landowner. The department acknowledges that department is absorbing the costs for testing hunter-harvested deer voluntarily provided. The risk of exposure to CWD is enhanced by the artificial movement of deer; therefore, it is appropriate for the recipient of a permit or authorization that allows such movement of deer to be responsible for the cost of testing associated with such movement. No changes were made as a result of the comment.

Release Site Testing

One hundred and one commenters opposed adoption and stated that the testing and surveillance standards should be amended. The comment goes on to state specifically that the testing requirements of the rules should be altered to end all mandatory CWD testing at Class II release sites, which "would not impact the functions of the Department in containing the spread of CWD." One commenter opposed adoption and stated that testing should not be required at release sites unless the release site is linked to a positive test result. Three commenters opposed adoption and stated that most Class II release sites

have nothing to do with the index facility. Two commenters opposed adoption and stated that there should be no testing requirements for Class II release sites. The department disagrees with the comments and responds that since a deer infected with CWD may not display symptoms of the disease for several years, the ability of the department to identify facilities directly impacted (i.e., facilities that received deer from the index facility, referred to as "Tier 1 facilities") does not eliminate the need to test deer at release sites that receive deer from TC 2 breeding facilities. A release site is designated as a Class II release site on the basis of increased risk of containing exposed deer. Under the rules, a release site is a Class II release site if deer from a TC 2 breeding facility have been released on it. TC 2 breeding facilities do not have a testing history that provides sufficient confidence that CWD does not exist in those facilities; therefore, testing of hunter harvested deer on Class II release sites is necessary in order to establish additional confidence that CWD was not introduced from the originating breeding facilities. As noted previously, the department estimates that within the last five years at more than 728 locations in Texas (including 384 deer breeders) either received deer from the index facility or received deer from a deer breeder who had received deer from the index facility. As a result, the department cannot assume that a facility is free of CWD simply because it did not receive deer directly from the index facility. The department also disagrees that ending testing requirements for Class II release sites wouldn't impact department efforts to contain CWD. Given the previous CWD testing requirements, CWD could very well exist in additional deer breeding facilities and release sites directly or indirectly linked to CWD-positive facilities. To cease enhanced testing requirements would reduce the department's ability to detect and contain the disease. No changes were made as a result of the comments.

One commenter opposed adoption and stated that released deer should not be tested. Similarly, one commenter opposed adoption and stated that testing should not be required at release sites. The department acknowledges that under the rules as adopted, release sites that receive deer from a TC 2 or TC 3 deer breeding facility are required to test hunter-harvested deer at a level stipulated in the rules. However, the department disagrees with the comments and responds that in light of the discovery of CWD in a breeding facility that transported breeder deer to more than 728 locations in Texas (including 384 deer breeders), including to deer breeders who subsequently transported breeder deer to additional locations, the previous testing history for TC 2 and TC 3 breeding facilities is not sufficient to provide the necessary confidence that CWD does not exist in those facilities. Therefore, since Class II and Class III release sites received breeder deer from TC 2 or TC 3 breeding facilities, the rules as adopted require testing of hunter harvested deer on Class II and Class III release sites in order to establish additional confidence that CWD was not transmitted from the originating breeding facilities. No changes were made as a result of the comments.

One commenter opposed adoption and stated that no other private property owners are required to test for CWD. The department disagrees with the comment and responds that in addition to the testing of deer by release sites, private property owners engaged in Triple T activities have been required to test for CWD for a number of years. In addition, as noted elsewhere in this preamble, emergency rules were adopted to address movement of white-tailed or mule deer via a Trap, Transport and Transplant (Triple T) Permit (40 TexReg 7307) and Deer Management Permit (DMP) (40 TexReg 7305). In addition, interim DMP rules

have been proposed (40 TexReg 9086) and will be considered for adoption by the Commission at its January 21, 2016 meeting. Those rules also involve the testing of deer by private property owners for CWD in order to engage in certain regulated activities. No changes were made as a result of this comment.

Method of Testing

Thirteen commenters opposed adoption and stated in one way or another that the rules should not require breeder deer to be killed. Similarly, one commenter opposed adoption and stated that the department doesn't have the right to decide if deer should live or die. To the extent that the commenters are suggesting that a deer breeder should not be required to test deer for CWD (which, under the rules as adopted, must be conducted post-mortem), the department agrees with the comment and responds that the rules do not require the testing of breeder deer unless the breeder seeks to engage in certain activities related to the transfer of deer. However, to the extent that the commenter is suggesting that deer breeders should not be required to test deer (including natural mortalities and/or deer euthanized for testing) as a prerequisite to engaging in certain activities under the rule, the department disagrees with the commenter and responds that, as explained elsewhere in this preamble, in order to provide a higher level of confidence that CWD will be detected, if it exists, testing of deer is necessary. As noted previously in this preamble, the only test currently certified by the USDA for CWD must be conducted post-mortem by extracting and testing the obex (a structure in the brain) or a medial retropharyngeal lymph node. Although the department is actively collaborating with researchers to investigate possible efficacious live-animal tests that can be integrated into the state's overall disease surveillance efforts, live animal testing standards that provide an equivalent level of predictability of detecting the disease in an infected herd (as compared to approved post-mortem tests) have yet to be developed. No changes were made as a result of the comments.

Seven commenters opposed adoption and stated that the rules should allow live-animal test results to count towards satisfaction of the testing requirements of the rules. The department disagrees with the comments and responds, as noted above, that although the department is collaborating with researchers to investigate possible efficacious live-animal tests, at this point, live animal testing standards that provide an equivalent level of predictability of detecting the disease in an infected herd (as compared to approved post-mortem tests) have yet to be developed. No changes were made as a result of the comments.

Fencing Requirements

One commenter opposed adoption and stated that the rules will impose economic hardship on deer breeders who are restricted to releasing deer only to high-fenced properties. The department disagrees with the comment and responds that department records indicate that the vast majority of breeder deer that are liberated are released on high-fenced properties. In addition, the potential for disease transmission from liberated breeder deer to other free-ranging deer is of concern, given that the source of CWD in the index facility is currently unknown and the large number of deer that have been released to the wild. In addition, in order to provide a measure of confidence that CWD is detected and contained, it is necessary to establish a level of vigilance sufficient to give reasonable assurance that liberated deer are not allowed to leave the specific premise where they were released. No changes were made as a result of this comment.

One commenter opposed adoption and stated that if breeder deer are the property of the people of the state they should be allowed to be released to low-fenced properties. The department disagrees with the comment and responds that white-tailed deer and mule deer are among the wildlife that are the property of the people of the state regardless of whether the deer are located in high-fenced, low-fenced, or unfenced property. However, the department disagrees that this fact should impact the rule's requirement regarding the release of breeder deer only to high-fenced properties. As explained elsewhere in this preamble, in order to provide a measure of confidence that CWD is detected and contained, it is necessary to establish a level of vigilance sufficient to give reasonable assurance that breeder deer are not allowed to leave the specific premise where they were released. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the high-fence requirement for release sites is illegal because the rules must apply to everyone equally. The department disagrees and notes that the high-fence requirement applies equally to all properties on which breeder deer are liberated. No changes were made as a result of the comment.

Genetics

One commenter opposed adoption and stated that prohibiting the release of breeder deer to low-fenced properties would prevent landowners from improving genetics. One commenter opposed adoption and stated that deer breeders keep the state's deer population restocked with good genetics. The department disagrees with the comment and responds that the desire to enhance genetics must be balanced against the need to protect captive and free-ranging deer. A landowner seeking to enhance genetics on the landowner's property will normally seek to contain liberated breeder deer to ensure that the landowner benefits from the genetics of the liberated deer. No changes were made as a result of the comment.

One commenter opposed adoption and stated that breeder deer could be used to breed out susceptibility to CWD and the offspring could be released to inoculate the free-ranging deer. The department disagrees with the comment and responds that very little is known about CWD, including whether or not susceptibility to it can be eliminated via selective breeding or line breeding and subsequently introduced to a wild population with any efficacy. No changes were made as a result of the comment.

Impact of Rules on Deer Breeders

One hundred and one commenters opposed adoption and stated that the deer breeding industry has been profoundly negatively impacted by the emergency CWD breeder rules and that the emergency CWD breeder rules have resulted in tens of millions of dollars of economic loss to deer breeders across the state, severely diminished a once-thriving market, resulting in hundreds of lost jobs, and are significantly injuring the deer breeding industry without due cause. Five commenters opposed adoption and stated that the purpose of the rules is to destroy or hinder deer breeders. Six commenters opposed adoption and stated that the rules will destroy the deer breeding business. Nine commenters opposed adoption and stated that the rules create hardship. One commenter opposed adoption and stated that deer breeders are being penalized for improving the deer herd. Although some of these comment appears to be directed at the emergency CWD breeder rules, since the provisions of the proposed rules and the rules as adopted are very similar to the emergency CWD breeder rules discussed in the comment, and since the comment

was submitted as a comment on the proposed rules, the department will respond to the comment as a comment on the proposed rules. The department disagrees that the rules were intended to place an unwarranted burden on the regulated community. The department does acknowledge, as noted in the proposal preamble, that depending on a breeding facility's classification under the rules and the types of activities that the breeding facility seeks to undertake, there may be costs associated with additional testing. If the comments' reference to "tens of millions of dollars" is referring to marketplace behavior, the proposal preamble also noted that to the extent that any marketplace analysis can be conducted, it is difficult, if not impossible, to accurately separate and distinguish marketplace behavior that is the result of the proposed rules from marketplace behavior that is the result of the discovery of CWD. However, detection and containment of CWD is necessary to protect state's multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the rules are "significant and costly to breeders whose conditions and risk haven't changed." The department understands the intent of the comment to be similar to other comments asserting that breeders who have not received breeder deer directly from the index facility should not be required to test for CWD. The department disagrees with the comment and responds that a direct link to a facility where CWD has been detected is simply the highest, but not the only, level of risk. Facilities that have accepted deer from a TC 2 or TC 3 breeding facility, in the absence of reasonable test results over time, are not statistically excludable from being potential reservoirs for CWD; therefore, the rules require testing for all breeding facilities that do not meet the criteria for TC 1 breeding facility as a prerequisite to engaging in certain activities. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department does not have the right to affect hardworking families. The department assumes that this comment is intended to refer to families involved in deer breeding and families associated with properties on which breeder deer have been liberated. The department disagrees with the comment and responds that, as noted above, while the department recognizes that there could be costs associated with additional testing under the rules, the detection and containment of CWD is necessary to protect the state from the threat of CWD to the state's multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the rules discriminated against deer breeders. Similarly, seven commenters opposed adoption and stated that because the proposed rules affect only deer breeders, the department is guilty of profiling. The department disagrees with the comments and responds that since CWD was discovered in two deer breeding facilities and the degree of interconnectivity of among deer breeders, it is appropriate for the rules to address activities undertaken by deer breeders. However, as noted elsewhere in this preamble, the department has adopted requirements regarding other regulated activities associated with the movement of deer. Furthermore, the provisions of the rules are only a part of the department's overall CWD management strategy. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the department's economic analysis of the proposed rule ignored the fact

that persons will not buy breeder deer for release and breeders will not release to their own land because of the testing requirements. The department disagrees with the comment and responds that the department's economic analysis (including the small and microbusiness impact) noted that new rules would cause an adverse economic impact to deer breeders and release site owners who must undertake disease-testing requirements to continue certain activities. The analysis also noted that because CWD has been proven to be transmissible by direct contact (including through fences) and via environmental contamination, there may be adverse economic impacts unrelated to the proposed new rules in the event that CWD is confirmed in a breeding facility due to the possible reluctance of potential customers to purchase deer from a facility that accepted deer from a CWD-positive facility. Additionally, even in the absence of the rules, if CWD is detected within a breeding facility that accepted deer from a CWD-positive facility, there could be lost revenue to the permittee since potential purchasers who are aware of CWD would likely refrain from purchasing deer from such a facility. Therefore, the proposed new rules, by providing a mechanism to minimize the spread of CWD, could also protect the economic interests of the regulated community. The department also notes that the rules as adopted do not prohibit deer breeders from releasing deer to their own properties, provided the deer breeding facility is not an index facility and the release site is surrounded by a high fence. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules will impose economic hardship on deer breeders who are not connected to the index facility. Similarly, one commenter opposed adoption and stated that the department shouldn't change the rules in the middle of the game to affect deer breeders not connected to the index facility. One commenter opposed adoption and stated that rules penalize innocent deer breeders. One commenter opposed adoption and stated that CWD was found in only five breeder deer but the rules penalize everyone. One commenter opposed adoption and stated that deer breeders are being penalized for not testing. The department agrees that deer breeders who have not tested for CWD at sufficient intensity or who have accepted breeder deer from a TC 2 or TC 3 facility could incur increased operational costs as a result of the testing requirements imposed by the new rules as a prerequisite to the transfer of deer. The department also notes that while TC 1 breeding facilities have tested for CWD at a level that provides a higher level of confidence that the disease is not present and cannot be spread, there is some uncertainty associated with other breeding facilities, either because deer within the facility have at some previous time come into contact with individuals from a suspect facility or there has not been sufficient testing to establish confidence that CWD is not present. The department notes that the emergency CWD breeder rules and the new rules will provide regulatory certainty through the 2015-2016 hunting seasons. The Commission will reassess the new rules in the spring of 2016 to consider a longer-term response. The department also notes that the rules do not prevent a deer breeder from improving movement status by accumulating test results over time. No changes were made as a result of the comment.

Nature of Breeder Deer

One commenter opposed adoption and stated that breeder deer are livestock. The department disagrees with the comment and responds that white-tailed deer and mule deer are indigenous wildlife and therefore the property of the people of the state under

Parks and Wildlife Code, §1.011. See, also, Tex. Agric. Code §1.003(3). No changes were made as a result of the comment.

Role of Deer Breeders

One commenter opposed adoption and stated that deer breeders are necessary because otherwise many people would not be able to hunt. The department disagrees with the comment and responds that while deer breeders are involved in hunting operations, most hunting opportunity does not involve breeder deer. No changes were made as a result of the comment.

Impact on Hunting

One commenter opposed adoption and stated that the rules will cause fear in hunters. Two commenters opposed adoption and stated that rules will be detrimental to hunting for years to come. The department disagrees with the comments and responds that the rules are part of an effort to protect hunting. Given the potential impact of CWD on hunting and hunting-related economies in Texas, for the reasons explained elsewhere in this preamble, regulatory action is necessary to protect hunting and related economies. No changes were made as a result of the comments.

Impact on Land Values

One commenter opposed adoption and stated that the rules will decrease land values because no one will purchase land if there are testing requirements for that land. The department, while agreeing that uncertainty surrounding the potential presence of CWD on a given tract of land could affect the land's value, disagrees that the rules impose testing requirements on anyone who purchases a tract of land; however, new §65.93(a)(4) provides that a release site's status cannot be altered by the sale or subdivision of a property to a related party if the purpose of the sale or subdivision is to avoid the requirements of the rules. No change was made as a result of the comment.

Impact on Rural Economy

Six commenters opposed adoption and stated that the rules will hurt the economy of rural Texas and result in reduced employment. The department disagrees with the comment and responds that the department's response to the discovery of CWD, including the rules, is in recognition that healthy wildlife populations are important to the state's multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies. No changes were made as a result of the comment.

CWD in Mule Deer

One commenter opposed adoption and stated that the department's response to the discovery of CWD in free-ranging mule deer was not as drastic. The department disagrees with the comment and responds that the department's response to the discovery of CWD in free-ranging mule deer populations (codified at 31 TAC §§65.80 - 65.88) was more intensive than the new rules as adopted. The rules at §§65.80 - 65.88 require the mandatory testing of all deer harvested in the containment zone, prohibit the movement of breeder deer into, within, or from the containment zone, and prohibit the movement of breeder deer into, within, or from the high risk zone (unless the movement is from a deer breeder with certified status in the TAHC CWD herd certification program). Those rules also prohibit movement of deer pursuant to Triple T and DMP permitting activities into, within, or from the containment and high risk zones, although those activities are permitted in the buffer zone following the submission of considerably more "not detected" CWD test results than is required any-

where else in Texas. No changes were made as a result of the comment.

Duration of Rules

Five commenters opposed adoption and stated that the department was renegeing on a promise that the emergency CWD breeder rules would not be permanent. The department disagrees with the comment and responds that the rules as adopted contain an expiration date of August 31, 2016. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules do not specify a time limit for movement restrictions on deer breeders. The department agrees with the commenter and responds that because the rules were intended to function on a temporary basis until a long-term strategy is developed, the department did not consider it necessary to address the applicability of the rules beyond the 2015-16 deer season and deer breeder reporting period. However, questions from the regulated community have caused the commission to adopt the rules with changes to clarify that a TC 3 breeding facility can attain TC 2 status by complying with the testing requirements of the rules for two years. No changes were made as a result of the comment.

Texas Wildlife Information Management Service

One hundred and one commenters opposed adoption and stated that the department's online reporting application (Texas Wildlife Information Management Service, or TWIMS) allowed the department to identify, contain, and manage CWD, resulting in the elimination of the emergency. The comment goes on to state that the deer industry "adamantly adheres to the direct traceability of movement through the TWIMS system" and that the facts "do not suggest there is any considerable threat to captive or wild white-tailed herds, based on the ability to transfer animals through the TWIMS system." The comment further states that the department "can immediately identify the facilities directly impacted by the five positives found and any positives found in future herds." Four commenters opposed adoption and stated that because TWIMS functioned perfectly, there is no need for the rules. The department disagrees with these comments. As noted elsewhere in this preamble, the issue of whether an emergency existed is not germane to this rulemaking. The department further notes that TWIMS is a database that functions to automate formerly manual reporting and notification conventions. While the department acknowledges that the TWIMS database is a valuable resource, from a disease management perspective, the availability of information does not obviate the need for an appropriate regulatory response to the discovery of CWD in a deer breeding facility. No changes were made as a result of the comment.

Other Comments

Five commenters opposed adoption and stated that the release of breeder deer should be prohibited. The department disagrees with the comments and responds that releases to high-fenced environments are defensible, since the population is contained and can be tested through time. No changes were made as a result of the comments.

One commenter opposed adoption and stated that testing should be required at Class 1 release sites. The department disagrees with the comments and responds that because a Class 1 release site receives deer only from sources that have been tested to the extent that there is a high statistical confidence that CWD is

not present, there is no reason to require additional testing at the release site. No changes were made as a result of the comment.

One commenter opposed adoption and stated that deer breeding should be abolished. The department disagrees with the comments and responds that Parks and Wildlife Code, §43.352(a), authorizes the department to issue a permit to a qualified person to possess live deer in captivity. No changes were made as a result of the comment.

One commenter opposed adoption and stated that wildlife should not be genetically enhanced or farmed. The department disagrees with the comments and responds that Parks and Wildlife Code, §43.352(a), authorizes the department to issue a permit to a qualified person to possess live deer in captivity. No changes were made as a result of the comment.

One commenter opposed adoption and stated that release sites should be required to maintain fencing of greater than eight feet in height. The department disagrees with the comments and responds that the seven-foot standard established by the rule is sufficient to prevent deer from easily leaving a release site. No changes were made as a result of the comment.

The department received 701 comments supporting adoption of the rules as proposed.

The following groups and associations commented in support of adoption of the rules as proposed: Texas Farm Bureau, King Ranch, Texas and Southwestern Cattle Raisers Association, Ducks Unlimited, Archery Trade Association, Plateau Land and Wildlife Management, Audubon Texas, Pope and Young Club, Austin Woods and Waters Club, Quality Deer Management Association, Bexar Audubon Society, Rocky Mountain Elk Foundation, Boone and Crockett Club, Safari Club International - Houston Chapter, Coastal Bend Bays and Estuaries Program, Sierra Club - Lone Star Chapter, Hill Country Alliance, Texans For Saving Our Hunting Heritage, Hill Country Conservancy, Texas Bighorn Society, Texas Cattle Feeders Association, Lone Star Bow Hunters Association, Texas Chapter of The Wildlife Society, National Wild Turkey Federation, Texas Sportsman's Association, National Wildlife Federation, Texas Wildlife Association, Orion - The Hunters Institute, Wildlife Forever, Texas Conservation Alliance, and East Texas Woods and Waters Club.

The Texas Deer Association and the Deer Breeder Corporation commented against adoption of the rules as proposed.

The new rules are adopted under the authority of Parks and Wildlife Code, Chapter 43, Subchapter L, which authorizes the commission to make regulations governing the possession of breeder deer held under the authority of the subchapter; Subchapter R, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that white-tailed deer may be temporarily detained in an enclosure; Subchapter R-1, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that mule deer may be temporarily detained in an enclosure (although the department has not yet established a DMP program for mule deer authorized by Subchapter R-1); and §61.021, which provides that no person may possess a game animal at any time or in any place except as permitted under a proclamation of the commission.

The new rules affect Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, and R-1.

§65.90. *Definitions.*

The following words and terms shall have the following meanings, except in cases where the context clearly indicates otherwise.

(1) Accredited testing facility--A laboratory approved by the United States Department of Agriculture to test white-tailed deer or mule deer for CWD.

(2) Breeder deer--A white-tailed deer or mule deer possessed under a permit issued by the department pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter.

(3) Confirmed--A CWD test result of "positive" received from the National Veterinary Service Laboratories of the United States Department of Agriculture.

(4) CWD--chronic wasting disease.

(5) CWD-positive facility--A facility registered in TWIMS and in which CWD has been confirmed.

(6) Deer breeder--A person who holds a valid deer breeder's permit issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter.

(7) Deer breeding facility (breeding facility)--A facility permitted to hold breeder deer under a permit issued by the department pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter.

(8) Department (department)--Texas Parks and Wildlife Department.

(9) Eligible mortality--A breeder deer that has died within a deer breeding facility and:

(A) is 16 months of age or older; or

(B) if the deer breeding facility is enrolled in the TAHC CWD Herd Certification Program, is 12-months of age or older.

(10) Exposed deer--Unless the department determines through an epidemiological investigation that a specific breeder deer has not been exposed, an exposed deer is a white-tailed deer or mule deer that:

(A) is in a CWD-positive facility; or

(B) was in a CWD-positive facility within the five years preceding the confirmation of CWD in that facility.

(11) Hunter-harvested deer--A deer required to be tagged under the provisions of Subchapter A of this chapter (relating to Statewide Hunting Proclamation).

(12) Landowner (owner)--Any person who has an ownership interest in a tract of land, and includes a landowner's authorized agent.

(13) Landowner's authorized agent--A person designated by a landowner to act on the landowner's behalf.

(14) NUES tag--An ear tag approved by the United States Department of Agriculture for use in the National Uniform Eartagging System (NUES).

(15) Originating facility--The source facility identified on a transfer permit.

(16) Reconciled herd--The deer held in a breeding facility for which the department has determined that the deer breeder has accurately reported every birth, mortality, and transfer of deer in the previous reporting year.

(17) Release site--A specific tract of land that has been approved by the department for the release of breeder deer under this division.

(18) Reporting year--For a deer breeder, the period of time from April 1 of one calendar year to March 31 of the next calendar year.

(19) RFID tag--A button-type ear tag conforming to the 840 standards of the United States Department of Agriculture's Animal Identification Number system.

(20) Status--The level of testing performed or required by a breeding facility or a release site pursuant to this division. For the transfer categories established in §65.92(b) of this title (relating to Transfer Categories and Requirements), the highest status is Transfer Category 1 (TC 1) and the lowest status is Transfer Category 3 (TC3). For the release site classes established in §65.93(b) of this title (relating to Release Sites - Qualifications and Testing Requirements), Class I is the highest status and Class III is the lowest.

(21) Tier 1 facility--Any facility registered in TWIMS that:

(A) has received an exposed deer within the previous five years or has transferred deer to a CWD-positive facility within the five-year period preceding the confirmation of CWD in the CWD-positive facility; and

(B) has not been released from a TAHC hold order related to activity described in subparagraph (A) of this paragraph.

(22) TAHC--Texas Animal Health Commission.

(23) TAHC CWD Herd Certification Program--The disease-testing and herd management requirements set forth in 4 TAC §40.3 (relating to Herd Status Plans for Cervidae).

(24) TAHC Herd Plan--A set of requirements for disease testing and management developed by TAHC for a specific facility.

(25) TWIMS--The department's Texas Wildlife Information Management Services (TWIMS) online application.

§65.91. General Provisions.

(a) To the extent that any provision of this division conflicts with any other provision of this chapter, this division prevails.

(b) Except as provided in this division, no live breeder deer may be transferred anywhere for any purpose.

(c) Notwithstanding any other provision of this chapter, no person shall introduce into or remove breeder deer from or allow or authorize breeder deer to be introduced into or removed from any deer breeding facility for which a CWD test result of 'suspect' has been obtained from an accredited testing facility. The provisions of this subsection take effect immediately upon the notification of a CWD 'suspect' test result for a deer breeding facility, and continue in effect until the department expressly authorizes the resumption of permitted activities at that facility.

(d) No exposed breeder deer may be transferred from a breeding facility unless expressly authorized in a TAHC herd plan and then only in accordance with the provisions of this division.

(e) A breeding facility (including a facility permitted after the effective date of this subsection) or release site that receives breeder deer from an originating facility of lower status automatically assumes the status associated with the originating facility and becomes subject to the testing and release requirements of this division at that status.

(f) A facility that has dropped in status may increase in status as follows:

(1) from TC 3 to TC 2: by complying with the provisions of §65.92(b)(3)(B) of this title (relating to Transfer Categories and Requirements) for a period of two consecutive years;

(2) from TC 2 to TC 1 status: by attaining "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program.

(g) A CWD test is not valid unless it is performed by an accredited testing facility on the obex of an eligible mortality, which may be collected by anyone. A medial retropharyngeal lymph node collected from the eligible mortality by an accredited veterinarian or other person approved by the department may be submitted to an accredited testing facility for testing in addition to the obex of the eligible mortality.

(h) Unless expressly provided otherwise in this division, all applications and notifications required by this division shall be submitted electronically via TWIMS or by another method expressly authorized by the department.

(i) A person who possesses or receives white-tailed deer or mule deer under the provisions of this division and Subchapter T of this chapter is subject to the provisions of TAHC regulations at 4 TAC Chapter 40 (relating to Chronic Wasting Disease) that are applicable to white-tailed or mule deer.

(j) Unless amended to provide for a longer period of effectiveness, the provisions of this division cease effect on August 31, 2016.

§65.92. *Transfer Categories and Requirements.*

(a) General.

(1) A breeding facility that is a TC 1, TC 2, or TC 3 facility may transfer breeder deer under a valid transfer permit that has been activated and approved by the department as provided in §65.610(e) of this title (relating to Transfer of Deer) to:

(A) another breeding facility;

(B) an approved release site as provided in §65.93 of this division (relating to Release Sites - Qualifications and Testing Requirements);

(C) a DMP facility permitted under Parks and Wildlife Code, Chapter 43, Subchapter R (relating to White-Tailed Deer Management Permits) and department's DMP regulations; or

(D) to another person for nursing purposes.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, a breeding facility is prohibited from transferring breeder deer anywhere for any purpose if:

(A) such a transfer is not authorized pursuant to a TAHC Herd Plan associated with a hold order or quarantine;

(B) "not detected" CWD test results have been submitted for less than 20 percent of eligible mortalities at the breeding facility since May 23, 2006;

(C) the breeding facility has an unreconciled herd inventory; or

(D) the breeding facility is not in compliance with the provisions of §65.608 of this title (relating to Annual Reports and Records).

(3) A deer breeder may not transfer a breeder deer to a Class III release site unless the deer has been tagged by attaching a button-type RFID or NUES tag approved by the department to one ear.

(4) A deer breeding facility that was initially permitted after March 31, 2015 will assume the lowest status among all originating

facilities from which deer are received; provided, however, a breeding facility shall not assume TC 1 status unless it meets the criteria established in subsection (b)(1) of this section.

(b) Types of Facilities.

(1) TC 1. A breeding facility is a TC 1 facility if:

(A) it is not a Tier 1 facility; and

(B) it has "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program.

(2) TC 2. A breeding facility is a TC 2 facility if:

(A) it is not a Tier 1 facility; and

(B) CWD test results of "not detected" have been returned for one of the following values, whichever represents the lowest number of tested breeder deer:

(i) 4.5 percent or more of the breeder deer held within the facility during the immediately preceding two reporting years, based on the average population of deer in the facility that were at least 16 months of age on March 31 of each year (including eligible mortalities for those years); or

(ii) 50 percent of all eligible mortalities from the preceding two reporting years, provided at least one eligible mortality was tested.

(3) TC 3.

(A) A breeding facility is a TC 3 facility if it is neither a TC 1 facility nor a TC 2 facility.

(B) A breeding facility may increase status from TC 3 to TC 2 if CWD test results of "not detected" have been obtained for:

(i) each breeder deer received by the breeding facility from any CWD-positive site;

(ii) each exposed breeder deer that has been transferred by the breeding facility to another breeding facility or released; and

(iii) 4.5 percent or more of the breeder deer held within the breeding facility during the immediately preceding two reporting years, based on the average population of deer in the facility that were at least 16 months of age on March 31 of each year (including eligible mortalities for those years).

(C) All deer transferred from a TC 3 breeding facility to a DMP facility, including buck deer that are returned from a DMP facility to a breeding facility, must be eartagged with an RFID/NUES tag.

(c) Breeder deer may be temporarily transferred to a veterinarian for medical care.

§65.93. *Release Sites - Qualifications and Testing Requirements.*

(a) General.

(1) An approved release site consists solely of the specific tract of land and acreage designated as a release site in TWIMS.

(2) All release sites must be surrounded by a fence of at least seven feet in height that is capable of retaining deer at all times. The owner of the release site is responsible for ensuring that the fence and associated infrastructure retain the deer under ordinary and reasonable circumstances.

(3) The owner of a Class II or Class III release site shall maintain a legible daily harvest log at the release site.

(A) The daily harvest log shall be on a form provided or approved by the department and shall be maintained until the report required by subparagraph (E) of this paragraph has been submitted to and acknowledged by the department.

(B) For each deer harvested on the release site and tagged under the provisions of Subchapter A of this chapter (relating to Statewide Hunting Proclamation), the landowner must, on the same day that the deer is harvested, legibly enter the information required by this subparagraph in the daily harvest log.

(C) The daily harvest log shall contain the following information for each deer harvested on the release site:

(i) the name and hunting license of the person who harvested the deer;

(ii) the date the deer was harvested;

(iii) the species (white-tailed or mule deer) and type of deer harvested (buck or antlerless);

(iv) any alphanumeric identifier tattooed on the deer;

(v) any RFID or NUES tag number of any RFID or NUES tag affixed to the deer; and

(vi) any other identifier and identifying number on the deer.

(D) The daily harvest log shall be made available upon request to any department employee acting in the performance of official duties.

(E) By not later than March 15 of each year, the owner of a release site shall submit the contents of the daily harvest log to the department via TWIMS or other format authorized by the department.

(4) Release site status cannot be altered by the sale or subdivision of a property to a related party if the purpose of the sale or subdivision is to avoid the requirements of this division.

(5) The owner of a release site agrees, by consenting to the release of breeder deer on the release site, to submit all required CWD test results to the department as soon as possible but not later than May 1 of each year. Failure to comply with this paragraph will result in the release site being declared ineligible to be a destination for future releases.

(6) No person may intentionally cause or allow any live deer to leave or escape from a release site.

(b) Types of Release Sites.

(1) Class I.

(A) A release site is a Class I release site if it:

(i) is not a Tier 1 facility; and

(ii) receives breeder deer only from TC 1 facilities.

(B) There are no testing requirements for a Class I release site.

(2) Class II.

(A) A release site is a Class II release site if it:

(i) is not a Tier 1 facility;

(ii) receives any breeder deer from TC 2 facility; and

(iii) receives no deer from a TC 3 facility.

(B) The landowner of a Class II release site must obtain valid CWD test results for one of the following values, whichever represents the lowest number of deer tested:

(i) if deer are hunter-harvested, a number of deer equivalent to 50 percent of the number of breeder deer released at the site between August 24, 2015 and the last day of lawful deer hunting at the site in the current year; or

(ii) 50 percent of all hunter-harvested deer.

(C) If any hunter-harvested deer were breeder deer released between August 24, 2015 and the last day of lawful deer hunting at the site in the current, 50 percent of those hunter-harvested deer must be submitted for CWD testing, which may be counted to satisfy the requirements of subparagraph (B) of this paragraph.

(3) Class III.

(A) A release site is a Class III release site if:

(i) it is a Tier 1 facility; or

(ii) it receives deer from an originating facility that is a TC 3 facility.

(B) The landowner of a Class III release site must obtain valid CWD test results for one of the following values, whichever represents the greatest number of deer tested:

(i) 100 percent of all hunter-harvested deer; or

(ii) one hunter-harvested deer per breeder deer released between August 24, 2015 and the last day of lawful deer hunting at the site in the current year.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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General Counsel

Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4775

